NCVO Charity Law Review Advisory Group

Final report and recommendations of NCVO’s independent review of the Charities Act 2006

May 2012
Contents

Acknowledgements ......................................................................................................................................................... 1
Executive Summary ......................................................................................................................................................... 2
NCVO’S CHARITY LAW REVIEW ADVISORY GROUP ......................................................................................... 1
  Background............................................................................................................................................................. 1
  Purpose.................................................................................................................................................................... 2
  Areas of review.......................................................................................................................................................... 2
THE IMPACT OF CHARITY LAW ON TRUSTEES .................................................................................................. 5
  Liability of Trustees.................................................................................................................................................... 5
  Payment of Trustees................................................................................................................................................... 8
  Independence, Transparency and Accountability of Trustees ............................................................................ 11
  Conclusions and recommendations.................................................................................................................. 13
THE FUTURE OF THE CHARITY COMMISSION ................................................................................................. 16
  The Charity Commission’s Independence from Government ........................................................................ 16
  The Charity Commission’s Funding Model .................................................................................................... 17
  The possibility of the Charity Commission charging for services ................................................................ 19
  The Charity Commission’s Powers and Responsibilities ................................................................................. 21
  The Charity Commission’s relationship with other regulators ........................................................................ 22
  Conclusions and Recommendations................................................................................................................. 23
THE LAW ON PUBLIC BENEFIT ............................................................................................................................... 26
  The Charity Commission’s Guidance on Public Benefit ................................................................................. 26
  The Public Benefit Reporting Requirement (PBR) ............................................................................................ 28
  The Definition of Public Benefit .................................................................................................................... 29
  The UK dimension ................................................................................................................................................ 31
  Conclusions and Recommendations................................................................................................................. 33
MEANS OF REDRESS AVAILABLE FOR AND AGAINST CHARITIES .......................................................... 35
  Charity Tribunal .................................................................................................................................................... 35
  The role of the Attorney General .................................................................................................................... 36
  Charities Ombudsman ....................................................................................................................................... 37
  Conclusions and Recommendations................................................................................................................. 38
REGULATION OF FUNDRAISING .......................................................................................................................... 42
  Current levels and trends in giving .................................................................................................................... 42
  Drivers of public trust and confidence ............................................................................................................. 43
  Self-Regulation...................................................................................................................................................... 43
Acknowledgements

Baroness Howe of Idlicote, Chair of the Advisory Group, would personally like to thank all members of the Advisory Group for their time and expertise over the past months to produce this report. Particular recognition goes to the members who further committed to chair the various sub-committees and led the work in the special areas covered.

The Advisory Group would like to offer grateful thanks to the many external contributors who shared their views and submitted evidence on the issues addressed in this report.

It also wishes to express particular thanks and appreciation for the assistance provided by Elizabeth Chamberlain of NCVO, who has acted as secretary, researcher, host and co-ordinator to both the Advisory Group and all the sub-committees, and has helped the work in many other ways.
Executive Summary

The need to maintain and enhance public trust and confidence in charities has always been a central focus of NCVO’s work. In particular, it was one of the key aims of our work on charity law reform which led to the Charities Act 2006. NCVO’s research in this area had revealed a gap between public perceptions of charity and what is charitable in law. The concern was that such confusion would undermine public trust and confidence in the sector, particularly in the context of a decline in trust in social institutions more generally. Having recognised that there was a need to modernise the legal position of charities to reflect changes in society and changing public perceptions of what is charitable and what charities should do, the aim of the Charities Act 2006 was to provide a clear and up-to-date legal framework that would be more easily understood by both charities and the public.

An effective review of the operation of the 2006 Act is equally important to ensure charities continue to enjoy the public’s trust and confidence, and has been at the heart of the work carried out by NCVO’s Charity Law Review Advisory Group.

Although in some ways five years is no time at all for legislation to bed down, there have been some major changes in society that are highly relevant to the role of charities and how they are perceived. In particular, public confidence in key institutions has been severely dented by the systemic failure of the banking sector, by the scandals on MPs expenses and media hacking. People are now more likely to question, and less likely to take on trust, an organisation’s claims for itself. For example, a key public – and media – concern is how much money actually goes to beneficiaries and how much is spent on fundraising and administration costs. At the same time government policy has given charities much greater visibility than before, increasing the extent to which they are subject to public and media scrutiny.

Charities have maintained high levels of public trust over the past decade, but they are aware that there is no room for complacency and they need to continue engaging with the public in ways that maintain and enhance people’s trust and confidence, convincing donors and supporters that their cause is worthy and that they can be trusted to make a difference. In doing so, they need to take account of public concerns about how they operate, and whether the existing legal and regulatory framework is sufficiently robust. The recommendations published in this report seek to achieve this by simplifying the current legal requirements where possible, improving existing regulatory guidance and formulating proposals that promote good practice.

The Advisory Group has focused its attention on the issues that, in its view, are most relevant to ensuring that charities and the people who govern them operate effectively, within a clear and enabling framework, so that in all their activities – including the more controversial ones such as fundraising and campaigning – they engage with the public in a way that ensures trust and confidence. These issues are:

- the impact of charity law on trustees;
- the future of the Charity Commission;
- the law on Public Benefit;
- the means of redress available for and against charities;
- the regulation of fundraising; and
- the law of campaigning and political activities by charities.
Having analysed these in detail, there is general agreement that the Charities Act 2006 has overall proved to be a good piece of legislation. Whilst the law would benefit from some minor modifications, which are outlined in this report, the legal framework remains fit for purpose and doesn’t present significant barriers to charities.

Even subjects that have been under heated debate, such as the payment of trustees or the status of the Charity Commission, upon closer inspection are considered to be dealt with by the law in a satisfactory manner. More often, if a problem has been identified the solution lies in clarifying or improving existing guidance, or producing more detailed guidelines.

Rather it is other factors, such as the economic downturn, the recent budget announcements and the public service contracting environment, that are of far greater concern.
NCVO’S CHARITY LAW REVIEW ADVISORY GROUP

1. Background

Charity law and regulation has always been a key policy area for NCVO: it is the legal and regulatory framework that defines what ‘charity’ is, and assures that special charitable status, and the rewards that it brings, is granted only to organisations that exist to achieve a particular “good cause,” and do so for public benefit, not personal gain.

It important to have a legal and regulatory framework that reflects the needs of charities in a modern world, and matches public perceptions about what is, and should be, charitable. This is because charities rely on public support, shown by people’s willingness to give their time and money to the causes they care about, so they need to understand what charity is for, and why charities are special.

It is with these priorities in mind that NCVO first put itself at the forefront of calls for the law to be reformed, and played a leading role in the campaign that eventually led to the Charities Act 2006. Previous research highlighted a growing gap between public perceptions of what was, or should be, charitable and what was actually charitable in law. There was a real concern that unless it was addressed, this disparity would, in time, undermine public support for and confidence in charity.

The same concern about maintaining public trust and confidence in charities and ensuring the legal framework enables the sector to thrive led to the decision of setting up the Charity Law Review Advisory Group. Members were invited to join the group on the basis of their expertise in charity law and experience working with charities. Details of all members are available in Annex I of this report.

The review of the Act has been expected since the time of implementation, due to the requirement set out in s. 73. This provision was inserted due to a concern that the new Act would create a mass of additional bureaucracy for charities, which would make giving and volunteering more difficult, and therefore building in a review process provided some way of checking the efficacy and efficiency of the Act.

Section 73 sets out the areas that the review must address, which include the effect of the Act on public confidence in charities and the willingness of individuals to volunteer.¹

---

¹ Section 73 of the Charities Act states that:
(1) 'The Minister must, before the end of the period of five years beginning with the day on which this Act is passed, appoint a person to review generally the operation of this Act'.
(2) The review must address, in particular, the following matters –
(a) The effect of the Act on –
(i) excepted charities
(ii) public confidence in charities,
(iii) the level of charitable donations, and
(iv) the willingness of individuals to volunteer,
(b) the status of the Charity Commission as a government department, and
(c) any other matters the Minister considers appropriate.
(3) After the person appointed under subsection (1) has completed his review, he must compile a report of his conclusions.
2. Purpose

The Advisory Group was tasked with the responsibility of carrying out an independent review of charity law, in order to develop proposals for improving the legal and regulatory framework in which charities operate, with reference to the current status of implementation of charity law. In particular, the Advisory Group was referred to enquire and report on the operation of the Charities Act 2006 and its overall effect on public trust and confidence in charities.

In order to achieve this, the Advisory Group agreed to examine a range of issues concerning the regulation of charities and their activities, involving a targeted review of areas of charity law that have been identified as causing uncertainty and carrying disproportionate regulatory or administrative burdens.

The work of the Charity Law Review Advisory Group has shadowed the review undertaken by Lord Hodgson of Astley Abbots, who has been appointed by Government according to s.73 of the Charities Act 2006.

The Charity Law Review Advisory Group’s full terms of reference are in Annex II of this report.

3. Areas of review

The overarching themes of the Advisory Group’s work have been the importance of maintaining public trust and confidence in the charity sector with a general deregulatory thrust. Using these as the guiding concerns, the Advisory Group identified some key issues of principle, which are of interest and relevance to all charities, and where the Advisory Group has targeted its review.

The impact of charity law on trustees

The Charities Act 2006 introduced a number of changes aimed at encouraging the willingness of individuals to volunteer as trustees, for example by allowing trustees to be remunerated in certain situations and relaxing the rules on trustee indemnity insurance. These provisions are highly relevant to ensuring charities continue to operate under effective governance arrangements, and also have important implications for how the sector is perceived by the public.

The Advisory Group therefore agreed that it would examine the impact of charity law on the role of charity trustees, with particular focus on how the changes made by the Charities Act 2006 have operated in practice and whether further changes are necessary.

The Future of the Charity Commission

NCVO has always believed that the existence of a strong and independent regulator is a key element to ensure charities operate within an appropriate legal framework, and therefore maintain the accountability and transparency that ensure public trust and confidence. During the first meeting of the Advisory Group, all members expressed serious concerns about the Charity Commission’s future, especially with regards to its independence in relation to other Government departments.

(4) The Minister must lay before Parliament a copy of the report mentioned in subsection (3).
It was therefore agreed that the Advisory Group’s review should address the Charity Commission’s status and current funding model. This has also included examining the possibility of the Charity Commission charging for some of its services.

Furthermore, in the context of reduced resources and of the Charity Commission’s Strategic Review, there has been concern about the expectation on charities to exercise greater self-reliance and what the implications will be not only for the accountability of the sector but also in the longer term for how it will be perceived by the public. The Advisory Group’s review has therefore also discussed the Charity Commission’s powers and responsibilities; and its relationship with other regulators.

**The Law on Public Benefit**

The provisions about public benefit were the most high profile and hotly debated elements of the Charities Act 2006. The idea of providing a level playing field where all charities must demonstrate public benefit was first put forward in a NCVO consultation document in 2001.\(^2\) The main rationale was to help maintain public trust and confidence in charities: emphasising public benefit as the over-riding consideration would not only remove a layer of complexity in the law by treating all organisations consistently, but would also bring ‘legal’ charity closer to the general public perception of what is charitable.

The controversy surrounding the public benefit requirement and the Charity Commission’s guidance have led to two important Upper Tribunal rulings, the immediate effect of which has been the withdrawal of the Charity Commission’s guidance. However, there is still considerable debate about what this will mean in the longer term, especially at the practical level for charity trustees.

The Advisory Group therefore agreed on the importance of analysing the legal and regulatory framework in which charities operate with reference to the public benefit requirement in the light of the Charities Act 2006 and the recent decisions by the Tribunal. In particular, it would address the question whether the current solution provides sufficient clarity or whether other options need to be explored.

**Means of Redress**

The opportunity to challenge decisions, not only those affecting charities but also those made by charities themselves, is essential to ensure real accountability of the sector, and in turn maintain public trust and confidence in charities. In particular, the perception that a charity is not able to question how the Commission acts, or individuals cannot challenge how they have been treated by a charity, can cause detrimental impact of public trust and confidence.

In light of these considerations, the Advisory Group wanted to examine whether the existing mechanisms for resolving complaints relating to charities and their regulation are sufficiently comprehensive and accessible, and whether they are working effectively. This in particular has included a review of how the Charity Tribunal has functioned so far, and if any changes need to be made in order improve the current system.

---

Regulation of Fundraising

Fundraising is one of the most important public interfaces of charity, and it is therefore essential that it is undertaken responsibly and transparently, in ways that encourage the public to give confidently. It is increasingly clear, however, that a key public – and media – concern is how much money actually goes to beneficiaries and how much is spent on fundraising and administration costs. The media can make good copy if a charity is perceived to be spending a significant amount of its income on raising funds. Even though such stories are often based on unrealistic expectations, they have a negative impact on public trust and confidence in the sector as a whole.

Recent data about public attitudes to charities shows that the most important factor influencing trust is a charity’s compliance with high standards in fundraising. Personal experience of, and familiarity with charities also remain important factors relating to trust. It was therefore agreed it is essential to outline some general criteria that will ensure an effective framework for fundraising where charities can engage with the public in ways that will maintain and enhance people’s trust and confidence, striking the appropriate balance between deregulation and safeguarding minimum standards. In particular, it is important to find a solution that enables charities to fundraise effectively, and therefore have the resources necessary to support their beneficiaries, while avoiding undue inconvenience to members of the public.

The Law on Campaigning and Political Activities by Charities

Political campaigning is now an established part of the charity sector scene as a valid means of engagement. However, how far a charity can go with a political campaign and in particular how much expenditure is acceptable continues to be a matter of debate. The media in particular appears readier to challenge or criticise charities for particular campaigning activities, but questions have also been recently raised within some political circles about charities becoming over-involved with campaigning activities.

The Advisory Group felt that any perceived lack of charities’ legitimacy to campaign should be addressed as a matter of priority, due to the direct link with broader issues about transparency and legitimacy, and ultimately the concern that public misperception can lead to a decline in public trust and support.

Each of these specific parts of legislation was allocated to a specialist sub-committee, chaired by a member of the Advisory Group and tasked with analysing the issues identified within its area of competence. The full composition of each sub-committee and details of how they operated are in Annex III of this report.
THE IMPACT OF CHARITY LAW ON TRUSTEES

The issues relating to trustees that currently have the greatest impact on individuals’ willingness to volunteer, and on public trust and confidence in charities have been identified as:
- liability of trustees;
- payment of trustees.

1. Liability of Trustees

Trustee liability is a broad term covering a range of liabilities arising in a number of different ways. For example it includes:

- for all charities, liability to the charity for acting in breach of trustee duties;
- in the case of charitable companies, liability under the Companies Act 2006 for wrongful or fraudulent trading;
- in the case of unincorporated charities, liability to third parties for the debts of the charity;
- liability under general legislation, e.g. employment law, Health & Safety.

The Charities Act 2006 introduced some protections – by giving the Charity Commission power to relieve a trustee of liability for breach of trustee duties (previously only the High Court had this power), and by giving all charities the power to take out trustee indemnity insurance.

The availability of trustee indemnity insurance has helped allay concerns about liability, particularly for trustees of incorporated charities. However, concerns remain about:

- the broad and complex nature of a trustee’s duties to a charity, and the impact this can have on willingness to volunteer;
- providing protection to trustees of unincorporated charities so that they are not personally liable for debts owed to third parties by the charity.

i) Duties owed by a trustee to the charity

The law in this area is particularly complex – case law has over time developed a number of separate duties. There are several contributing issues here:

- anecdotal evidence shows that many charities start up without those involved having any awareness that those serving as committee members have duties, which if breached, can lead to personal liability;
- where there is some awareness of duties, the language used (which often includes unfamiliar technical legal terms such as “breach of trust”) adds to the difficulties faced by a trustee or potential trustee seeking to understand and assess the risks;
- further anecdotal evidence reveals that, where trustees are aware of their duties, there is a considerable gap between perception and reality, with sometimes too much concern about the impact of potential liabilities. In particular, there is a lack of knowledge/reassurance about how rare it is in practice for a trustee to actually be out of pocket. It would therefore be helpful if research could be published identifying how many trustees over the last few years have found themselves in a position where
personal liability for breach of their duties was threatened or averted, and whether in fact any trustees have had to make payments to the charity. The Charity Commission’s Inquiry Reports and Regulatory Case Reports often cover cases where there have been breaches of trustee duties and it seems situations where repayment is required are rare.\(^3\)

Over the years there have been regular calls for clearer guidance about trustee duties and liability but equally an acknowledgement that simple guidance is difficult to provide.\(^4\)

The core Charity Commission guidance in this area “CC3 – The Essential Trustee: What You Need To Know”\(^5\) does include reassurance in several places (Section D4 and I1). For example, Section D4 states:

“The Charity Commission offers information and advice to charities on both legal requirements and best practice to help them operate as effectively as possible and to prevent problems arising. In the few cases where serious problems have occurred we have wide powers to look into them and put things right. Trustees may also be personally liable for any debts or losses that the charity faces as a result. This will depend on the circumstances and the type of governing document for the charity. However, personal liability of this kind is rare, and trustees who have followed the requirements on this page will generally be protected.”

There is a plethora of other guidance, including “Reducing the Risks: A Guide to Trustee Liabilities”\(^6\) which includes a very helpful early section on “The reality of risk”.

Whilst well-trodden territory, finding a way to educate trustees and potential trustees about their duties continues to be a priority. Clear and consistent information should be easily available on websites and in print. For example, the Charity Commission guidance “The Essential Trustee” should be signposted more frequently on the Commission website. It would also be helpful if the Commission were to publish statistics about the number of individuals who have actually been required to make payments due to breach of trustee duties.

**ii) Additional liability arising for trustees of unincorporated charities**

The Charities Act 2006 did not address this issue head on, but rather dealt with it obliquely by introducing the Charitable Incorporated Organisation (CIO).

Recent years have seen some well publicised cases where individual trustees have been pursued for the debts of an unincorporated charity (or organisation). In some cases, the organisation itself has had the assets to meet the debt but has not paid for one reason or another, and so the debtor has brought an action against a member of the management committee personally, not necessarily intending to force them to pay, but more in the hope of triggering payment of the debt. Examples include:

\(^3\) Although there has been a recent case where the trustee was a local authority and repayment for loss caused by a breach of trust was made: Charity Commission Regulatory Care Report 2012 ‘The Knotty Ash Special School Trust’ (http://www.charitycommission.gov.uk/Our_regulatory_activity/Compliance_reports/RC_reports/rrc_knotty_ash.aspx).


- debts arising under pension schemes;\(^7\) and
- debts for building works carried out for the organisation.\(^8\)

While the difficulty to address this issue is acknowledged, it is now time to grasp the nettle and find a solution. This would bring England and Wales into line with the common situation internationally where all formal not for profit organisations have limitation of liability.

One neat solution would be to give unincorporated charities separate legal personality so that they can enter into contracts and incur liabilities in their own name, thereby sparing the trustees from personal liability. Extensive work was carried out in this area by the Scottish Law Commission in 2008/2009,\(^9\) and it recommended that legal personality could be attributed to unincorporated associations which satisfied certain conditions. These include that:

- the objects of the association do not include making a profit;
- that the association’s constitution contains certain minimum provisions (none of which are onerous);
- the association should have at least two members.

As of April 2012, these proposals for Scotland are being actively progresses with the launch of a final consultation on implementing the recommendations.\(^10\)

Notwithstanding the plans to introduce the Charitable Incorporated Organisation, protection of this kind is still necessary because many fledgling charities begin their existence as an unincorporated group. It would therefore be appropriate for Government to widen the remit of the consultation so that changes can be considered not just for Scotland but for the whole of the UK.

It is therefore recommended that the results of the current consultation on attributing separate legal personality to unincorporated associations should be used to inform work by the Law Commission to introduce similar legislation for the rest of the UK.

**iii) The Charitable Incorporated Organisation ("CIO")**

This new legal form, introduced by the Charities Act 2006 and due to be available in 2012 will provide a solution for some new charities wanting a structure that protects trustees from personal liability for debts of the charity.

It is regrettable that there has been an inordinate delay in implementing the CIO: this has been an enormous source of frustration to trustees of many unincorporated charities. Government is therefore urged to introduce CIOs without further delay.

---

\(^7\) Civil Society, “Court to hear plea against pension scheme deficit payment” (17\(^{th}\) March 2010), [http://www.civilsociety.co.uk/governance/news/content/6277/ymca_pension_scheme_sues_branch_chair_for_1820_deficit](http://www.civilsociety.co.uk/governance/news/content/6277/ymca_pension_scheme_sues_branch_chair_for_1820_deficit).

\(^8\) See Davies v Barnes Webster & Sons Ltd [2011] EWHC 2560 (Ch).


A comparative view of what has happened in Scotland since the introduction of the equivalent Scottish Charitable Incorporated Organisation, shows that between 20% and 30% of new charities are registering with this new form.\(^{11}\)

However, there is reason to believe that this new legal form will not provide an immediate and comprehensive solution because:

- initially the CIO will only be available to new charities, following the Cabinet Office’s statement that existing unincorporated charities wishing to “convert” will have to wait;
- there is no easy conversion process for unincorporated charities (although there is for charitable companies).

Furthermore, concerns have been raised about the approach taken by the Charity Commission, which in public discussions about the CIO to date has apparently suggested that the CIO is not suitable for small charities. This is regrettable and, once the CIO is introduced, the Charity Commission should be urged to dissuade applicants from setting up as unincorporated associations and steer them towards the CIO.

2. Payment of Trustees

Although there has much public debate about the payment of trustees, there is no legal problem that requires immediate solution: charities without the necessary power to pay a trustee can currently make a case to the Charity Commission for an order authorising the payment or seek consent to a change to the charity’s constitution. Evidence from the Commission itself shows payment of trustees in the larger charities is common\(^ {12}\).

However, there is the question of whether the statutory power to pay a trustee (introduced by the 2006 Act and now set out in Section 185 of the Charities Act 2011) should be changed or extended in some way.

There is a broad range of situations where payment of a trustee may be considered, each requiring different considerations and giving rise to different issues. This means that applying a blanket rule to all situations would not be appropriate. Some examples are:

- founder trustee / Chief Executive – for some new charities it can be helpful if the Founder can act as Chief Executive and serve as a trustee, though there are risks that need to be managed and such arrangements should generally be time limited;
- members of staff on the trustee board – this arises in practice for charities at both the larger and smaller end of the scale (though for smaller charities it can be more difficult


to establish the necessary checks and balances that need to be in place if employees are on the board);
- paid Chair (or Treasurer) – particularly for larger charities where the role of Chair involves a significant time commitment; Though there is a contrary argument that for some larger ‘big name’ charities, the prestige of being the Chair /Treasurer is enough reward in itself;
- paid trustee – again, particularly for larger complex charities.

**i) Arguments against paying trustees**

- Voluntary trusteeship has always been a defining feature of a charity and moving away from this to any substantial extent could lead to a decrease in trust and confidence in charities.
- There is a compelling "slippery slope" argument that the more charities that pay their trustees, the harder it will be to recruit trustees for those charities who cannot afford to pay the same or at all.
- More widespread payment of trustees would increase the sector's administrative costs.
- Charities do not have shareholders and issues of accountability would be confused.
- A view that payment of trustees could be a way in which to increase the diversity of people serving on trustee boards does not appear to be borne out by what has happened in the housing sector where housing associations have been allowed to pay board members since 2003.
- There is no evidence that payment of trustees improves the overall effectiveness of the organisation.

**ii) Arguments in favour of paying trustees**

The inability to pay trustees is seen by some as a barrier to recruitment, deterring those who cannot afford to give up their time without payment (such as the self-employed and young people). It has been argued that payment of trustees could lead to more diverse boards.

Similarly, there can be an assumption that paying trustees will lead to better governance. There is a considerable amount of published research which sheds light on whether this is the case:

- Research carried in the US in 2007 concluded, among other things, that there was “no indication that compensating trustees promotes higher levels of board engagement. Boards that compensate were not more or less likely to be actively engaged in financial oversight, setting policy, planning, monitoring programs, or evaluating the CEO/executive director. They were no more or less likely to evaluate whether the organization is achieving its goals at least every two years”. Compensation was “positively associated with attendance at board meetings” but “was not associated with achieving greater racial or ethnic diversity”.

---

Research carried out in the UK in 2009 in relation to the social housing sector\textsuperscript{14} (which has allowed for some payments to board members since 2003) includes a statement that "the general view appears to be that payment has led to improved governance". The report also quotes one organisation's experience of paying Board members: "Initially we had hoped we would be able to attract more members to the board and that board members payment would act as an added incentive. However, we did find that candidates attracted by payment were really only interested in the financial incentives we could offer and were less interested in the work that we do...We are now phasing out payments as and when existing members leave the board. We will continue to monitor the situation and if we felt that payment would be an effective recruitment mechanism in future then we may re-evaluate our decision."

The issue of what benefits paying trustees can bring is an area ripe for further research and it is therefore recommended that future research is undertaken in order to shed more light on whether payment helps with recruitment, diversity and improved governance.

\textbf{iii) Issues arising if trustees are paid}

The issue of whether or not to pay trustees can often overshadow the consequences to consider when the decision to pay is made, such as:

- establishing how long a trustee will serve for and eligibility for re-election;
- recognising that conflicts of interest issues will arise more often and will be more significant, so charities paying their trustees will need to have sophisticated procedures in place to manage such conflicts;
- establishing a remuneration committee to set levels of remuneration for paid trustees, which should include some independent members;
- establishing appraisals for paid trustees;
- ensuring vacancies are properly advertised, as using word of mouth or current networks to recruit to paid positions could lead to inequality.

There is the additional and often unrecognised issue that paid trustees are legally expected to exercise a higher standard of care than unpaid trustees, particularly where their recruitment has been driven by the need to have their particular skills and expertise on the Board. Potential paid trustees should therefore be made aware of this.

\textbf{iv) Alternatives to payment of trustees}

Currently, most charities are able to reimburse trustees for actual expenses but this does not extend to reimbursement for loss of earnings. The Charity Commission guidance 'CC11 – Trustee Expenses and Payments'\textsuperscript{15} explains at Section H that compensation for loss of earnings is treated not as an expense but as a trustee benefit: this means that either the charity's constitution must permit it, or prior Commission consent must be obtained.

\textsuperscript{14} TSRC Working Paper ‘Housing Associations’, Prof. David Mullins (http://www.tsrc.ac.uk/LinkClick.aspx?fileticket=qyS3AvWvt%2bk%3d&tabid=500).

\textsuperscript{15} http://www.charitycommission.gov.uk/publications/cc11.aspx
Following consideration of whether the power to pay trustees, as now set out in the Charities Act 2011, should be extended to allow payment for loss of earnings as a reimbursable expense, the conclusion is that there is no strong argument for introducing a blanket rule of this kind. Currently, the facility exists to approach the Commission for consent and this is sufficient, particularly as the Commission’s guidance sets an encouraging tone for approaches on this basis.

A similar issue is whether charities should be able to compensate an employer if a member of staff has to spend time during working hours on trustee duties. Within the housing sector, the National Housing Federation has included some guidance on this16, highlighting that payment to a third party “will generally be construed as the provision of a service and therefore attract VAT.”

3. Independence, Transparency and Accountability of Trustees

The independence of trustees, and the rules ensuring their transparency and accountability are the other issues identified by the Advisory Group as requiring attention due to their potential implications for public trust and confidence.

i) Independence of Trustees

Independence of trustees can mean several things:

- Whether individual trustees are acting independently
  There can in particular be a problem with so-called ‘representative trustees’ when trustees are appointed by outside bodies or elected by part of the membership and the trustees see their role as representing the interests of the organisation or group which appointed them. This can mean that they fail to exercise independent judgement. There can also be issues with conflicts of interest (i.e. situations where the personal interests of the trustee conflict with the charity’s interests) and conflicts of loyalty (i.e. situations where due to another role carried out by the trustee, there can be a conflict between the trustee’s duties in their other role and their duties as trustee of the charity).

- Whether a board of trustees collectively is acting without the influence of a third party
  Charities needing financial support can become unduly influenced by a third party actual or potential funder (which might be Government, a commercial sponsor or other funders). This can lead to mission drift. There are concerns that public service delivery contracts in particular are skewing independence.

There is a further and separate issue about the independence of the sector as a whole. These issues are currently being looked at by the Panel on the Independence of the Voluntary Sector established in June 2011. The first of the Panel’s annual assessments17 poses the question whether the review of the Charities Act should explore stronger arrangements for protecting independence and suggests lessons could be learned from other countries. In Scotland, for example, the charity legislation specifically provides that an organisation fails the charity test if

---

“its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities”.

However, an analysis of the wording used by the Scottish legislation reveals that its effect is fairly limited: it denies charitable status to any organisation whose constitution builds in rights for a Minister to direct or control it, therefore preventing Ministers from setting up charities that they control. However, it has no impact in situations where control is not written into a constitution but is being exerted on a de facto basis in less direct ways. So for example, the Scottish legislation would have no impact in situations where a local authority exerts pressure to have a representative on the board of a community organisation, or where access to funding has the effect of compromising the independence of a body.

While maintaining the sector’s independence is vital, it is not something that can be legislated for: rather it is something the sector will continue to have to strive to achieve. Therefore support (including financial support) and guidance are more likely to help with that. The guidance issued in Scotland by OSCR\(^\text{19}\) is a good resource, by reviewing different scenarios where issues of control arise and dissecting how trustees should ensure they are acting independently.

### ii) Systems of Transparency and Accountability

**Accountability - Public benefit reporting**

A key change introduced following the Charities Act 2006 is the requirement for trustees to make a statement on public benefit. A Trustees’ Annual Report must now include:

- a report of those activities undertaken by a charity to further its charitable purposes for the public benefit – this requirement is more onerous for larger charities;
- a statement by the charity trustees as to whether they have complied with the duty in section 17 of the Charities Act 2011 to have due regard to public benefit guidance published by the Commission.

Research carried out by a team at Sheffield Hallam University and published in June 2011\(^\text{20}\) showed that levels of compliance were relatively low, particularly within smaller charities.

The public benefit reporting requirement is of course relatively new so it is understandable that progress has been slow. However, charities are encouraged to see this not just as a box ticking exercise to comply with legislation. It is a valuable opportunity to articulate the extent of the public benefit the charity is delivering. Trustees should actively engage in writing this part of the Trustees’ Annual Report and avoid relying on standard, precedent or even last year’s wording. Furthermore, good reporting needs to go wider than just technical public benefit issues to include plans, achievements, quantified benefits to people and communities, lessons learned any other factor that demonstrates the charity’s effectiveness and impact. The responsibility for encouraging these wider improvements should be seen as shared between the Charity Commission (in furtherance of its statutory duty to encourage best use of charity

---

\(^{18}\) Section 7 (4)(b) of the Charities and Trustee Investment (Scotland) Act 2005.
\(^{19}\) ‘Who’s in Charge: Control and Independence in Scottish Charities’, OSCR (http://www.oscr.org.uk/media/2151/Whos%20in%20Charge.pdf).
\(^{20}\) ‘Public benefit reporting by charities’ - Morgan and Fletcher (http://www.charitycommission.gov.uk/RSS/News/pb_reporting.aspx)
resources) and the sector itself (including umbrella bodies), which has its own responsibility to innovate and show leadership.

**Accountability generally**

‘Who owns a charity’ is a big issue for the sector. Trustees who are independent, unpaid and could be held personally liable should be the ones to protect the independence and ensure their charity is accountable. According to the ICSA Charities Handbook:21

“Whilst stakeholders may have access to more and better information, many charities still struggle with the degree to which their stakeholders should be involved in influencing the running of the charity and, in particular, shaping the services that they provide. In addition, the concept of ‘ownership’ and who owns a charity is still a matter of wide discussion and different views….However, given the importance of accountability through all aspects of corporate governance, perhaps one core principle to deal with is to be clear who the charity should be accountable to, and how.”

**iii) Transparency**

In 2009 following media coverage on the expenses of trustees and senior staff in charities, NCVO set up an Independent Expert Group on Expenses which reported in February 2010.22 This made a number of recommendations about the management and disclosure of expenses in the interest of maintaining public trust and confidence and these need to be followed up. Under SORP, charity accounts must disclose the payment of trustee expenses (and if no payments have been paid) and this requirement and the need for an expenses policy as part of wider financial controls needs to be stressed in guidance for trustees.

**iv) Audit and financial reporting regime**

The Charities Act 2006 introduced some changes to the regime for audit of charities, including simplifying and raising some thresholds. Further simplification is unlikely to have any benefits: to reflect the diverse nature of the sector, a relatively sophisticated regime is necessary. And the current system of setting audit levels by reference to thresholds works to ensure a proportionate regime. It would therefore be unadvisable to move to a one size fits all approach.

**Conclusions and recommendations**

**Liability of Trustees**

1. Continued efforts should be made to find an accurate way to explain the duties a trustee owes to a charity, at the same time providing reassurance that instances of individual trustees ending up personally out of pocket are rare. Guidance using everyday language (and statistics evidencing the low risks in practice) would help dispel the myths and help individuals assess the risks associated with becoming a trustee.

---

2. It would be helpful if the Charity Commission could publish information from its records on a yearly basis about how many trustees have found themselves in a position facing personal liability for breach of trustee duties and whether in fact any trustees have had to make payments to the charity.

3. With a view to addressing concerns about the liability of trustees of unincorporated associations and in light of the current consultation to introduce separate legal personality for unincorporated associations in Scotland, the Government should revisit the issue of introducing separate legal personality for unincorporated charities (and possibly other unincorporated bodies) across the UK.

4. The Charity Commission guidance on the choice of legal forms for new charities should include clearer guidance:
   - comparing the different liabilities arising for trustees depending on how the charity is established, emphasising which structures give trustees more protection from liability to third parties when doing so it would be helpful if the information were set out in a table as well as commentary;
   - explaining the specific situations in which setting up a trust or unincorporated association would be more appropriate than setting up as a CIO;
   - actively encouraging all new charities (even small ones) to consider the CIO form – this could be achieved by including a reminder that the CIO offers more protection in the drafting notes of the Commission’s various model constitution for unincorporated charities (for example, the Small Charities Constitution, the model trust deed and model unincorporated association constitution). If it were possible in time to produce either a Small Charities CIO constitution or a plain English CIO constitution that would also be helpful.

5. The CIO should be made available as soon as possible to existing unincorporated charities wishing to convert (with simplified Commission application forms).

6. The Charity Commission should consider using its powers to transfer the assets of an existing unincorporated charity to a CIO by way of Order as it has done in the past in relation to mergers.

7. The Law Commission should be asked to consider introducing an “automatic” transfer process (set out in statute) for unincorporated charities converting to a CIO, similar to the vesting declaration introduced by the Charities Act 2006 for mergers.

Payment of Trustees

8. As the law currently stands, the presumption of unpaid trusteeship should remain and exceptions should continue to be allowed by the Charity Commission on a case by case basis, thereby ensuring the necessary safeguards are built in.

9. The Charity Commission has recently made changes to streamline the process that charities have to follow in order to get permission to pay their trustees. This is a welcome improvement, but it is important that the role of the Commission as the regulatory body overseeing the process should be maintained. If the Commission were to relinquish its role in examining and giving a decision on proposals to pay trustees there would be serious concerns that in the long term the absence of proper checks and balances could have a negative impact on public trust and confidence in the sector.
10. There is no reason to make any amendment to the power to pay trustees set out in the Charities Act 2011 to extend it further, and in particular the power should not be extended to allow for payment for loss of earnings for self-employed trustees.

11. The Charity Commission’s very helpful guidance “CC11 Payment of Charity Trustees” could benefit from the following additions:
   - a section explaining the criteria the Commission applies when considering whether to allow members of staff to serve as trustees; and
   - more detailed guidance on the safeguards that need to be put in place if trustees are paid.

12. Funders with an interest in governance are strongly encouraged to fund further research into whether payment of trustees has an impact on the delivery of effective governance.

**Independence, Transparency and Accountability of Trustees**

13. Although no change to the law is necessary, it would be helpful if the Charity Commission guidance on Independence could be updated and promoted more widely. In particular, it is important to recognise that - although trustees have a certain degree of accountability to their stakeholders, members and users of the charity - no trustee should see their role as representing or championing the rights of one particular organisation or interest group.

14. Trustees should be encouraged to use the Code of Good Governance which looks at ways to strengthen governance to ensure independence.

15. Charities need to actively manage conflicts of interest, and if trustees have been appointed by outside bodies, it is necessary to ensure an objective approach so they don’t risk surrendering their independence to third parties. This is best done by having robust policies and procedures in place to manage both conflicts of interest and conflicts of loyalty.

16. The sector should build on the growing body of good practices in reporting achievements so that charities that don’t follow these standards become the exception.

17. Trustees are strongly encouraged to follow the Code of Good Governance, particularly Principle 6 on Accountability.

18. The move to a one-size fits all approach to financial reporting is not to be recommended, as the current regime structured on thresholds has the benefit of reflecting the diverse nature of the sector.
THE FUTURE OF THE CHARITY COMMISSION

The essence of the Charity Commission's role is to sustain a fundamental part of English law which underpins an essential part of British life by supporting and facilitating the engagement of citizens in activities for the well-being of the community. This goes well beyond the responsibilities and policies of Government and must therefore be safeguarded carefully.

Furthermore, the Commission has always had a function which can be described as that of a "modern regulator": its function of supporting the sector which it "regulates". Although other regulators have also developed an interest in the sector they regulate23, this function has always held a particular importance for the Commission.

The role of the Commission, therefore, is, and always has been, a much more complex one than that of a straightforward "regulator", with its historic function of performing judicial functions alongside the Courts, and its dual role of both encouraging/advising the sector and of acting as its policeman.

On this premise, it is imperative that the Charity Commission is demonstrably independent from both the sector it regulates and Government.

1. The Charity Commission's Independence from Government

No hard evidence has been found from the past five years that there is a problem with the Charity Commission's independence. Indeed, nothing indicates that the Commission acts otherwise than completely independently from Government, setting its own agenda and policies, free from political bias or interference. Only two particular occasions have been cited as situations where the Commission's independence from Government has been questioned, namely:

- during the appointment process of chair and board by the Minister;
- when particular sets of circumstances have coincided, leading to accusations in the media of partisan regulatory practices.

With regard to the first situation, since the time of the current chair's appointment the process for public appointments has been amended, in particular by a stage of pre-appointment scrutiny by the Public Administration Select Committee. This adds transparency to the process and ensures that any potential actual or perceived conflicts of interest are addressed. It is anticipated that the appointment of the next chair will include this new stage and should therefore provide greater public reassurance of independence.

With regard to the portrayal by the media of the current chair, it is generally acknowledged that such portrayals are inherent in any high profile appointment, where the incumbent’s political leanings or previous activities may be juxtaposed with the responsibilities of the current job.

---

23 For example OFSTED and HEFCE have an interest in the health of education; the position is similar for regulators of health professions and providers; legal services regulators profess a responsibility to maintain access to justice; and the National lottery commission has a statutory responsibility for the health of the lottery.
Therefore, this, in and of itself, should not be seen as a driver for change when considering the independence of the Commission.

2. The Charity Commission’s Funding Model

The need for the Charity Commission to operate independently from Government has of course particular implications for its current funding arrangements. The current arrangements have the advantage that the Commission negotiates its budget directly with Treasury rather than forming part of another department’s budget; however, the downside of this is that there is nobody within Government who acts as a ‘champion’ for the Commission (although it is acknowledged that even the presence of a champion would not necessarily protect the Commission’s budget, at a time of widespread cuts).

A number of different models have been considered as alternative solutions to the Charity Commission’s current constitutional and funding arrangements.

i) Non-Departmental Public Body ("NDPB")

There are four types of NDPBs:

- Executive NDPBs
- Advisory NDPBs
- Tribunals, and
- Independent Monitoring Boards.

Only the first of those might be remotely suitable for a regulatory body such as the Commission - there are many examples of Executive NDPBs with significant regulatory functions (the Health and Safety Executive and the Equalities and Human Rights Commission being two). Executive NDPBs are set up by Ministers (usually by statute) to carry out administrative, commercial, executive or regulatory functions on behalf of the Government. Their board members are appointed by Ministers, following Public Appointments rules, but Executive NDPBs are at “arm’s length” in their day to day operations – that is, Ministers do not direct or control them in the daily execution of their functions. However, Ministers are accountable – to Parliament and otherwise - for the performance of Executive NDPBs. That means that in practice Ministers are entitled to (and do) exercise influence over the general policies and direction of NDPBs, as well as over their budgets: Executive NDPBs are funded by grant-in-aid from their sponsoring departments rather than directly by the Treasury. Accordingly, an Executive NDPB has a lesser degree of independence from Ministers than the Charity Commission currently has, especially in view of the provision that is now s. 13(4) of the Charities Act 2011, which provides that “In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department”.

ii) Executive Agencies

Executive Agencies were created in the 1980s to enable specified executive functions of Government to be carried out by a separate business unit in accordance with policies decided by Ministers. Agencies are generally required to deliver specified outputs, operating at arms’ length
from Ministers but accountable to them. Ministers in turn account to Parliament for the performance and activities of their Agencies. Arrangements for appointments and governance vary but are generally similar to those of Executive NDPBs, with the exception that an Agency’s chief executive is directly accountable to the Minister responsible for the Agency. The funding of Agencies varies: Companies House, for example, is funded entirely by the fees it receives from those who use its services. By contrast, Jobcentre Plus is funded largely by its parent department. However, the role of performing executive functions of Government makes this model inappropriate for the Commission.

iii) Servants of Parliament

There are three bodies performing public functions of national significance which are servants of, and accountable to, Parliament. As such they are subject to no institutional control by the Government over their policies, operations, funding, or anything else. The first two – the National Audit Office and the Parliamentary and Health Service Ombudsman – perform on behalf of Parliament functions which serve to hold the executive to account. The third – the Electoral Commission – performs functions which serve to ensure the fairness of the process of electing a Parliament along democratic lines. It is easy to see why such functions must be under the control of Parliament and not of the governing executive. It is less easy, though not impossible, to see how an equivalent case could be constructed for the function of regulating charities. Looking at these three bodies in turn:

a) National Audit Office

The distinctive responsibilities of the Charity Commission point to having a court-based system of appointment and accountability as the most appropriate basis for its independence. The National Audit Office therefore offers a good starting point as an analogy for what might be considered.

- The National Audit Act 1983\(^2\) specifically provides that neither the Comptroller and Auditor General nor NAO staff ‘shall be regarded as holding office under Her Majesty or as discharging any functions on behalf of the Crown’ (s.3(5)). The appointment of the Comptroller by the Queen on the recommendation of the Prime Minister having consulted the Chairman of the Public Accounts Committee, is likewise specific to the parliamentary role.

- The 1983 Act makes special provision for the resourcing of the NAO. It creates a Public Accounts Commission consisting of the Chairman, the Leader of the House of Commons and seven other non-ministerial MPs. The Comptroller submits annual estimates to the Commission, which must ‘have regard to any advice given by the Public Accounts Committee and the Treasury’ in laying the estimate before the House of Commons to be met out of public funds.

If the Commission were to adopt a model similar to that of the National Audit Office, the advantage would be that its budget would be submitted directly to Parliament, without the

\(^2\) Part 2 of the Budget Responsibility and National Audit Act 2011 ("BRANA") establishes the NAO as a statutory corporation and makes arrangements for its governance, staffing, procedures and other matters. However, little of Part 2 of BRANA is yet in force; and, even when it is wholly in force, it will not change the status of the C&AG as a servant of Parliament or the way in which the NAO is funded.
need to engage in lengthy negotiations with Treasury every year at the time of the spending review, which can be quite a struggle and resource-intensive.

b) Parliamentary and Health Service Ombudsman

The post of the Parliamentary and Health Service Ombudsman combines the two statutory offices of Parliamentary Commissioner for Administration and Health Service Commissioner for England. The Ombudsman’s function is to investigate complaints about poor administration or service by Government departments and other specified public bodies.

The Ombudsman is appointed by the Queen, on the recommendation of the Prime Minister. She is wholly independent of Government and has statutory responsibilities and powers to report directly to Parliament. The Ombudsman is solely responsible and accountable for the conduct and administration of all work carried out by the Office of the Parliamentary and Health Service Ombudsman and for the decisions made in each case.

The running costs of the Ombudsman (2010/11: £33.1m) are met entirely out of money voted by Parliament.

c) Electoral Commission

The Electoral Commission is a statutory corporation set up under the Political Parties, Elections and Referendums Act 2000 to oversee the registration and funding of political parties and the conduct of general elections. Its members are formally appointed by the Queen, on House of Commons recommendation. Its recruitment and selection process was devised and is overseen by the Speaker's Committee, a Committee of Members of Parliament chaired by the Speaker of the House of Commons and formed for the purpose of overseeing the Commission. The Speaker’s Committee performs more or less the same functions that Ministers perform in relation to their NDPBs.

The Commission's running costs (2010/11: £24.5m) are covered by money voted by Parliament “so far as it cannot be met out of income received by the Commission”. The Commission collects a small amount (2010/11: £128,000) in fines from political parties but must pay those funds over to the Treasury.

The Commission is “not to be regarded as a servant or agent of the Crown”. Its staff are therefore not civil servants – but in setting pay, terms and conditions for its staff the Commission is required to have regard to the desirability of keeping pay, terms and conditions broadly in line with those in the civil service.

3. The possibility of the Charity Commission charging for services

In the context of the Spending Review and cuts to the Commission’s budget, there has been a lot of debate about alternative forms of funding that would ensure a better fit between the job that needs to be done and the resources available.

In particular, the Charity Commission has in the past advanced the possibility of the following money-raising options:
- payment of a one-off registration fee;
- fees for services provided.

**i) Payment of a one-off registration fee**

The obvious advantage of this type of charging is that it would be a one-off payment. In addition, it could be used as a way of incentivising more thought about the need to set up a new charity, and therefore act as a policy instrument to influence behaviour. However, the reaction from the sector is likely to be opposition: there would be strong resistance to advocating that, across the board, new charities should be subject to yet another additional slice (however small) of their money going to non-charitable causes at a time when the dialogue is that administration costs are too high.

**ii) Fees for services provided**

The demand that charities pay for guidance and advice, as opposed to regulation, is slightly more palatable, because in this case payment would only be required following a market choice, as opposed to being the direct implication of a regulatory requirement. The danger, however, is that the Charity Commission could become beholden to the charities that pay and, therefore, there would be potential negative impact on its independence from the sector.

At a practical level, it is also necessary to consider the costs of setting up charging mechanisms and of their administration: the evidence available leads to conclude that any option, in order to be viable as a self-sustaining source of income for the Charity Commission, would have to set the fees at a considerably high level.

Moreover, it is generally understood that the main driver for considering the introduction of these types of charges is the reduction in the Charity Commission’s budget following the 2010 Spending Review. While there is obviously sympathy for this situation, charges should not be a way to make up for the cuts that are inevitable in difficult economic times. This leads to the conclusion that introducing charges is not a viable solution and would not necessarily provide a more stable financial base.

On the other hand, it is acknowledged that there are some potential benefits in the levying of penalties as a way of driving compliance and incentivising good behaviour. For example, there is not complete resistance within the sector to the prospect of the Charity Commission applying penalties for the late filing of accounts: the main reasons for this being first of all that it is avoidable and, also, it is seen as a method of deterring bad practice.

A comparative example is the Canadian Charities Directorate within the Canada Revenue Agency. It imposes an extremely rigorous approach to ensuring that an annual return is filed on time by applying penalties for failure to file: charities that fail to file an annual return are subject to the revocation of their charitable status. Organisations that have had their charitable status revoked for not filing their annual information return and that choose to apply for re-registration are subject to a $500 penalty before their new application will be considered. In addition, a complete range of “intermediate sanctions” are available to the regulator. Far from being an attempt at revenue generation, the law requires that penalties assessed in amounts greater than $1,000 must be paid to another charity to ensure that the money remains within the charitable sector.
Such an approach does however raise concerns about the potential personal liability of trustees for allowing their charity to incur into a penalty. Furthermore, if penalties were to be introduced as a source of income for the Commission, their assessment by the Commission itself could create the perception of there being a conflict of interest. The potential benefits of penalties would therefore be conditional on their automatic application (i.e. by operation of law), without any control from the Charity Commission over the amounts, the circumstances in which would be applied or in which they could be waived.

At present therefore, penalties should not be introduced as a form of revenue. Any penalty, if introduced, should be the result of detailed consultation on what purposes they are intended to achieve (e.g. an incentive to promote efficiency and effectiveness), what specific type of behaviour is being targeted, what harm is trying to be corrected with their introduction. The cost of enforcing a system of penalties is also an important issue to consider.

4. The Charity Commission’s Powers and Responsibilities

The provisions introduced by the Charities Act 2006 contain overly detailed and often contradictory provisions about the Charity Commission’s objectives, general functions and general duties. This is an area of legislation that would benefit from being clarified and simplified.

Within the range of opinions expressed by the members of the sub-committee, some consensus emerged in identifying the following key statutory functions of the Charity Commission:

1. determining charitable status and registering charities;
2. setting the framework of accountability of charities;
3. ensuring charities comply with the legal requirements deriving from their constitutions and charity law;
4. promoting good governance and administration by charities.

There is, however, a danger in narrowing down the Charity Commission’s statutory responsibilities, due to the fact that this could limit the Commission’s role to a technocratic level. This, in turn, could lend support to those who espouse the notion that the totality of charity regulation could be handed over to HMRC, which is highly undesirable and certainly not a view supported by the sector.

A possible solution to ensure clarity, while at the same time avoiding limiting the Commission in any way, would be to focus on the following strategic objectives:

1. **The compliance objective**
   - The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

2. **The public benefit objective**
   - The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
3. **The charitable resources objective**

The charitable resources objective is to promote the effective use of charitable resources.

4. **The accountability objective**

The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

The six general functions (now contained in s.15 of the 2011 Act) that back up the Commission’s strategic objectives could therefore be interpreted as merely illustrative of the Commission’s activities in seeking to achieve its objectives, and could be dispensed with.

5. **The Charity Commission’s relationship with other regulators**

There has been much talk about the pursuit of a ‘sub-regulation approach’, whereby the Charity Commission would delegate some of its responsibilities to ‘approved sub-regulators’, either following the sub-regulator model operated by the Financial Services Agency in relation to Independent Financial Advisers, or adopting the ‘principal regulator’ approach introduced by the Charities Act 2006 for the regulation of exempt charities.

However, it is necessary to avoid charities being subject to a number of different regulators for the purposes of charity law compliance, as this would cause confusion and fragmentation. There is also the danger that over time yet another new layer of regulation is created at sub-regulator level, causing different standards and inconsistencies throughout the sector. In the long term this would have a negative impact on public trust and confidence, because people would see that different groups of charities are subject to different regimes and different levels of compliance.

There are also practical arguments against adopting a sub-regulation approach. Once again, the main reason why this option is being considered now appears to be the lack of current resources available to the Charity Commission. However, sub-regulation is not necessarily a cost-saving solution: the process of identifying potential sub-regulators, allocating responsibilities and then monitoring their role would create a lot of work for the Charity Commission. Further, all the principal regulators that have been appointed for exempt charities are Government departments or Non-Departmental Public Bodies. Their costs in regulating charities are met by the taxpayer, so there is no cost-saving to the public purse: the effect is simply to transfer costs from the Charity Commission’s budget to the budgets of other publicly-funded bodies. Indeed cost-saving was not one of the policy aims of the principal regulator arrangements which were introduced by the 2006 Act: the main aim was to bring exempt charities within a system of charity regulation, while avoiding regulatory duplication between the Commission and the bodies that became principal regulators. All of the latter had some existing and ongoing relationship with the group of charities for which they became principal regulator.

Sub-regulation also raises a number of questions, such as:

---

25 It is however acknowledged that the regulation of fundraising is an exception to the arguments made in the present report, and that co-regulation may present a solution to the present problems identified with the self-regulation system.
- Would the public still view organisations that are no longer within the Charity Commission’s remit, but delegated to a sub-regulator, as properly-regulated charities?

- For a sub-regulator that was itself a charity, would the function or activity of regulating its constituency fall within its own charitable purposes? The answer might be that the activity of regulating charities could be a legitimate activity for a sub-regulator which already had a charitable purpose to do with promotion of the efficiency and effectiveness of charities. If so, any proposed sub-regulator without such a purpose could not be a sub-regulator unless its purposes were changed. That might need to be done by primary legislation.

- Umbrella bodies and “headquarters” charities of federations of smaller charities are very unlikely to make effective sub-regulators, in the sub-committee’s view. The relationship they have with their constituency is not a regulatory one at present and any attempt to convert them into the Charity Commission’s “special constables” would be likely to meet with great resistance from their constituent charities.

A similar reasoning lies behind the concern about extending exempt charity status to more groups of specialist charities, coupled with the principal regulator approach. Registration as a charity with the Charity Commission gives donors and the general public a degree of certainty and comfort about an organisation. It is generally understood by the public that registered charities are established for purposes accepted as charitable, are run for the public good by trustees acting solely in the interests of the charity's objects/its beneficiaries, and are properly regulated, with accounting and other information about them readily available.

Exempt charities do not appear on the Charity Commission register and have different reporting requirements from registered charities. For example, they are not required to automatically produce or publish an annual report under the charity accounting framework, or to report on public benefit, although they are required to provide a copy of their accounts to any member of the public who asks. Placing more and more groups of charities outside the Charity Commission’s jurisdiction would therefore lead to a meaningful reduction in their accountability and transparency.

For these reasons these proposals could have unintended consequences, which would be detrimental to the integrity of the legal framework that supports public trust and confidence in charities.

**Conclusions and Recommendations**

**The Charity Commission’s Independence from Government**

1. It is acknowledged that there exists a perception that the Charity Commission’s independence is an issue.26 This is understandably a concern for both the sector and the Commission itself, and an issue that therefore the Commission should consider when carrying out its duties.

---

26 For example, Prof. Peter Luxton’s paper ‘Making Law? Parliament v. The Charity Commission’ warns against political interference by the Commission and is widely accepted within academic circles.
2. However, there is no hard evidence that the Commission operates other than independently from Government, and the perception issue is not of sufficient magnitude to warrant changes to the Charity Commission's current constitutional arrangements.

**The Charity Commission’s Funding Model**

3. Although each of the models examined above has distinct advantages, there is no other structure that would be more appropriate. The Charity Commission's current constitutional and funding arrangements are realistic and working well, so there is no practical necessity for change.

**The possibility of the Charity Commission charging for services**

4. The cuts to the Charity Commission's budget and the limited resources with which as a consequence it has to operate are clearly a concern, and it is hoped that this situation is reviewed as soon as change in the economy makes it possible. A strong sector that complies with high standards of transparency and accountability needs a properly resourced regulator that can carry out its full role and ensure a proper level of compliance. In the meantime however, it is not appropriate or advisable for the Commission to implement money raising strategies such as one-off charges or the introduction of penalties.

**The Charity Commission’s Powers and Responsibilities**

5. In the run up to the 2006 Act, much was made of the need to clarify the Charity Commission's objectives, functions and duties. The resulting provisions reflect the Commission's role as both regulator and friend of charities. This dual role has long been an issue: some see the functions as complementary and therefore want the Commission to retain both, but others are concerned about the potential blurring between regulation and advice, and would prefer the Commission to focus on its regulatory functions.

6. While it is likely that there will always be different views on this, what is clear is that the public and the charity sector warmly endorse the role of the Commission as the independent regulator in protecting the public interest in charity and holding charities accountable for the privileges of charitable status. The Charity Commission has a very important regulatory function that needs to be carried out effectively but also in a way that is sympathetic to charities and their beneficiaries, and seeks to safeguard their legitimate interests.

**The Charity Commission’s Relationship with other Regulators**

7. The introduction of a system of co-regulation or sub-regulation for the purposes of charity law compliance would have more disadvantages than advantages, and is therefore not recommended.

8. Instead of a transfer of functions, there is strong support for co-reporting as the way forward, particularly between the Charity Commission, HMRC and Companies House. There is an urgent need for discussion between these three main statutory regulators so
they can coordinate what type of information they ask for and how they ask for it, and put an end to the current duplication of reporting requirements. In particular, all regulators should take steps to adopt the same type of software in order to enable the standardisation of data collected. It is important that any such software or system is fully fit for purpose for all types of charities, affordable and does not place a further financial burden on charities which is not outweighed by the benefit of more streamlined reporting.

---

THE LAW ON PUBLIC BENEFIT

The legal and regulatory framework in which charities operate with reference to the public benefit requirement in the light of the Charities Act 2006 (now subsumed into the Charities Act 2011) and subsequent decisions of the Upper Tribunal in ISC v Charity Commission (the Schools case) and the Attorney General’s Reference concerning charities for the relief of poverty with a restricted class of beneficiaries (the Benevolent Funds case). Charities’ experiences and what is happening in Scotland and Northern Ireland has also been taken into account.

The key question to address was whether:

- change is required to the statutory provisions on public benefit, and more specific legislation is required to allow the Charity Commission to produce guidance on something that isn’t quite so nebulous, especially considering the effect of the Tribunal’s decisions (although if this option is adopted, then it would be necessary to also consider how charity law must be allowed enough flexibility to develop); or
- legislation is satisfactory/adequate and it is just a question of revising and improving the Charity Commission’s guidance.

Consideration of these questions was undertaken without any preconceived ideas, except that there could be no question of reintroducing any kind of presumption of public benefit. The Upper Tribunal has now clarified that this concept was something of a ‘red herring’ because: a) technically there was never such a presumption; and b) it didn’t affect whether the beneficiaries were a ‘section of the public’ but only the nature of the charitable purpose. The abolition was really a political statement, which has affected practice and perception but hasn’t actually altered the law, which is that every charity must be established for a purpose which is for the benefit of the public. This also shows that there was a misunderstanding about the effect that the 2006 Act would have when removing the presumption.

1. The Charity Commission’s Guidance on Public Benefit

In keeping with its duty under the 2006 Act, the Charity Commission has made intensive efforts to bring its guidance on public benefit (and the requirement to cover it in the annual report) to the attention of charity trustees, who are obliged to ‘have regard’ to it. However, there is evidence that relatively few trustees have personally read the guidance, and that, of those who have, many may not have fully understood it.

Probable reasons for the seemingly low impact of the guidance seem to include the following.

- The sheer volume of the guidance and the complexity of the concepts it seeks to explain, and the fact that most charity trustees are volunteers for whom charity administration is a spare time occupation. Most lay trustees would think of a requirement to demonstrate ‘public benefit’ as a need to show that their charity’s activities have a beneficial impact on the community. In charity law terms, however, this is not the entirety of what ‘public benefit’ actually means. The legal meaning involves a complex and highly technical concept which relates principally to the charity’s purposes and, in many cases, the nature of its beneficiary class. There is no codified law on public benefit: the position has to be inferred from case law which is neither comprehensive nor fully consistent. The
fact that the recent Tribunal case on schools took several days in court, eight counsel, three judges and a judgment more than 100 pages long, and the likelihood that the drafters of the Act themselves misunderstood the legal position, illustrates how complex the issue is.

- The likelihood that the obligation on the Commission to publish guidance arose from a mistaken understanding of the effect of the Act. The original intention of the proposal from NCVO which led to the relevant provisions in the Act was that the public benefit requirement would be strengthened across all four heads of charity and lead to consistency of treatment, compelling many charities for the first time to positively demonstrate public benefit. Before the Act it was commonly thought that the so-called ‘presumption’ (never a true presumption in law) made it unnecessary to prove public benefit in the case of charities for the relief of poverty, the advancement of education or the advancement of religion unless there were some reason to believe otherwise. Rather than spelling out in detail what charities were now to be required to demonstrate, Parliament imposed on the Commission a duty to provide guidance on the meaning and application of the public benefit requirement in order to complement, and to some extent to implement, the intended change in the law. The Upper Tribunal has now established that (in relation at least to independent schools and charities for the relief of poverty) the 2006 Act did not alter the substantive law on public benefit. All charities, including those within the first three heads of charity, were already fully subject to the public benefit requirement before the 2006 Act, as indeed the Charity Commission had argued at the time. But the new law has not removed the differences in the way the public benefit requirement applies to differing types of charitable purpose or made it easier to explain.

- The fact that the Commission’s guidance is addressed to all charity trustees (or, in the case of the supplementary guidance, to the trustees of all charities in the specified category), rather than being targeted specifically at those where the concept of public benefit raises difficult issues or where its scope may be in doubt. Evidence from the study on public benefit reporting undertaken by Sheffield Hallam University,28 and anecdotal evidence, suggests that this can lead to confusion on the part of some trustees of traditional types of charities whose compliance with the substantive law on public benefit is unlikely to be open to serious doubt, but who may have gained the impression that public benefit imposes some separate and additional requirement.

- The failure of the guidance to distinguish adequately between the purposes of a charity and the obligations of trustees to further those purposes. The distinction was clarified in the schools case. There has been much uninformed media speculation about loss of charitable status which in some cases, including in Northern Ireland, has caused sincere but unrealistic fears among trustees that their charity is at risk of being removed from the register of charities.

The main elements of the Commission's published guidance to date are (a) a core document, 'Charities and Public Benefit'; (b) a short summary; and (c) supplementary guidance on specific types of charities, i.e. fee-charging charities and charities concerned with education, religion and the relief of poverty. Each guidance document is supported by a technical document containing

detailed legal analysis of relevant cases. Other material, including assessments that the Commission has made of specific charities in various categories, is also available on the Commission's website.

The supplementary (specialist) guidance is intended for trustees and their advisers in charities where specific issues about public benefit arise. It aims to be rigorous on legal issues while remaining accessible to a determined lay reader. Leaving aside issues of the substantive law, it is fair to say that it generally succeeds in being fit for purpose for its particular audiences. None of the Commission's guidance on the subject can, however, altogether avoid the twin dangers of becoming too general for a technical readership and too technical for a general one. This led to the Tribunal's critical reference in the schools case to obscurity in the guidance and its conclusion that the language used by the Commission in parts of the guidance gave the wrong interpretation of the law on trustees' duties. As is well known, this has resulted in the Commission's wholesale withdrawal of the supplementary guidance for fee-charging charities as well as of parts of the core guidance, and its decision to revise and re-issue the guidance as a whole.

Whilst the core guidance 'Charities and Public Benefit' is a creditable attempt at explaining a highly technical subject in general terms, the study on public benefit reporting suggests that many lay trustees are likely to find themselves at sea about the subject matter, or its relevance to their charity, or both, before they have gone far into its forty pages. This is especially so in the cases of small charities which are not run by charity specialists and do not have ready access to professional advice. The summary is more accessible, but is still based on the assumption that all trustees will be willing and able to use the guidance to achieve an abstract understanding of the main features of the law of public benefit and to analyse and apply them in relation to their own charity.

However, there is a feeling that this expectation is unrealistic: the difficulty lies, not so much in a failure by the Commission to draft skilfully enough, but in the complexities and uncertainties of the case law on public benefit as it currently stands.

2. The Public Benefit Reporting Requirement (PBR)

The law requires that, for the financial years which began on or after 1 April 2008, the Trustees' Annual Report (TAR) must include:

a) a report of the activities undertaken by the charity to further its charitable purposes for the 'public benefit'; and
b) a statement by the charity trustees as to whether they have considered, i.e. had regard to, the Charity Commission's guidance on public benefit as required by the 2006 Act.

Whilst the obligations may not appear particularly onerous, they imply a requirement on all charity trustees to have read and understood the Commission guidance. The requirements apply to registered charities of all sizes (even those with income of no more than £25,000, which do not have to submit their TAR and accounts to the Commission), though more detail is needed by charities above the audit threshold (currently an annual income of £500,000 in most cases). PBR is not a requirement for exempt or excepted charities, as charity law does not
require them to produce a TAR, although we note that the principal regulators of certain exempt charities (notably HEFCE) have imposed a PBR requirement of their own.

The Study by Sheffield Hallam University found that levels of compliance with PBR were relatively weak in its first year of application: only 26% of registered charities over the audit threshold were judged to have fully met the requirements, and for smaller charities the compliance was much weaker still. However, some of the problems related to lack of understanding of the TAR itself: across all income bands only 53% of charities in the Study had filed a validly approved TAR within 10 months of the charity’s year end (and the Study excluded charities which had not filed at all).

Where PBR was attempted but not fully achieved, it was sometimes due to lack of clarity about the beneficiaries, but the greatest difficulty was in explaining how the charity’s activities benefited the beneficiaries.

Interviews with charity staff and trustees found that in most cases, however, PBR was not perceived as onerous in itself. Some charities treated it purely as a box-ticking exercise (in particular, cases were found where the trustees reported that they had considered the Commission’s guidance but in reality the phrase had just been inserted by an accountant preparing the TAR and accounts, with no real awareness by trustees). Some charities found PBR was valuable in helping the trustee body refocus on the charity’s objects and its beneficiaries. In a small number of cases, PBR was seen as a high concern issue, leading charities to devote enormous effort – these tended to be charities in the field where public benefit issues had received media attention (e.g. fee-charging schools) – but many other charities involved in fee-charging were unaware that limitations on access to their services were relevant to PBR.

Broadly speaking, PBR is recognised as being a worthwhile requirement in encouraging charities to refocus on their aims and beneficiaries, but there is confusion as to what is needed, with many small charities completely unaware of the requirement. As on other issues concerning charity accounts and reports, its effectiveness depends to a considerable extent on the Commission’s resources to review at least a proportion of the reports and accounts submitted and contact the charity when requirements have not been met.

For many charities there are few (or no) issues for official concern about public benefit in their purposes or activities, and it appears that some may therefore be worrying unduly about the demands of PBR. On the other hand, many charities which have significant restrictions on those qualified to benefit are not actually discussing these issues in their TARs. So PBR is clearly not working as well as it should.

3. The Definition of Public Benefit

The Upper Tribunal’s decisions in the Schools and Benevolent Funds cases usefully clarify the law in relation to those types of charity and have implications for other fee-charging charities and more generally for the approach to and analysis of the public benefit requirement under English law. The conclusion might be drawn that the law relating to the public benefit element in the new definition of charitable purposes and to the meaning of a ‘section of the public’ in relation to those types of purpose where this element is relevant, has not changed as a result of
the 2006 Act. It is true that there has not yet been any subsequent judicial consideration of the nature of public benefit of charities for the advancement of religion, the meaning of which for charity law purposes has been specifically extended beyond the kind of religion which involves worship of a deity, and further clarification may come, especially in view of the Equality Act 2010. However, it may well be that the focus of the public benefit requirement for religious charities will remain on intangible effects such as are discussed in the Charity Commission’s existing supplementary guidance relating to charities for the advancement of religion.

Flexibility is said to be the main characteristic of the status quo. Leaving the law as it is involves no effort on the part of Parliament. However, it is a limited type of flexibility and comes at a price:

- The law itself, having developed incrementally, is highly complex and hard for the average trustee to understand except in the most general of terms. This inevitably places very considerable emphasis on the Commission’s guidance, which is itself lengthy and complex and not very easy to understand or assimilate.

- Secondly, the law is not as flexible as might be thought. At least at the level of the Upper Tribunal, the doctrine of precedent applies to prevent the tribunal or court from reopening questions decided in years gone by which can now be regarded as entrenched through longevity and capable of reform only by Parliament (or conceivably a very bold Supreme Court). For example, there is little or no prospect of a court or tribunal altering the rule whereby an individual can set up a charity exclusively to benefit poor members of his own family.

- Added to that, difficult questions arise through the application of the relatively obscure provisions in the Equality Act 2010. These provisions, which have not been the subject of direct judicial scrutiny in relation to charities, reflect a different concept of ‘public benefit’. They originate in public law and the duties of official decision-makers rather than deriving from charity law and the duties of charity trustees – a distinction underlined in the decision in the Schools case which led to the withdrawal of part of the Commission’s core guidance.

The Tribunal’s clarification that the so-called presumption of public benefit does not exist in law is welcome. However, the 2006 Act has served to bring the public benefit of charitable status to public attention and more particularly to the attention of specialist professional advisers, and can be applauded for its good intentions - although doubts remain about its practical effect for a significant number of trustees. But the relative simplicity which the NCVO and others were hoping for has gone, as has the hope that appeals from the Charity Commission on registration and other matters might be heard without a substantial investment in legal representation. Charity trustees have lost out compared with the legal profession.

The main problem in defining public benefit by statute is that it would either be very lengthy, and still fail to cover all relevant situations, or be so broad and vague as to be virtually meaningless and allow far too much discretion to the Charity Commission, HMRC and/or the Tribunal, with the risk of great uncertainty or subjectivity in the decisions made.
4. The UK dimension

It is recognised that there is a clear case for the devolution of charity law at the operational level, and that the three jurisdictions have charity sectors with different cultural traditions and other features which demand different approaches to regulation.

But while it is acceptable in principle to have three separate regulators, it is an unnecessary distraction for charities to be over-concerned with different regulatory approaches, and it is almost impossible for the average trustee to understand that an organisation may be a charity under one area of legislation but not under another.

Furthermore, tax law is not a devolved matter. Practically all charitable organisations need recognition as charities for tax purposes, which means that wherever in the UK they are based, they have to satisfy the definition of ‘charity’ in the Charities Act 2011 and the management condition which imposes the ‘fit and proper persons’ test (which from 2012/13 is being extended to charity recognition in all areas of tax law). This has the effect of imposing a major piece of English and Welsh legislation on charities in Scotland and Northern Ireland.

Unless tax law were also to be devolved, there is very little merit in the separate definitions of ‘charity’ under the laws of Scotland and Northern Ireland. In practice, most charities operating in Scotland have to meet both the charity test in the Charities and Trustee Investment (Scotland) Act 2005 and the definition in the 2011 Act. It seems clear that the same principle will apply in Northern Ireland once its Assembly has passed the necessary amendments to the Charities Act (Northern Ireland) 2008 and implemented the definition of ‘charity’ under that Act.

OSCR has recommended in its 2010/11 Annual Report that Scottish Ministers explore with Ministers in England and Wales and Northern Ireland a route by which HMRC might formally accept, for the purposes of tax relief, all organisations recognised by any UK charity regulator. However, it seems hard to see how this outcome could be reached in law unless it were concluded that the definitions of ‘charity’ in Scotland and Northern Ireland were either identical to the English definition (and would always remain so) or that they would always fall within the English definition such that any institution recognised under the laws of Scotland or Northern Ireland would necessarily meet the tax definition if it also passed the ‘fit and proper persons’ test.

But it is not possible for either of those conclusions to be reached without primary, UK-wide legislation. It is necessary to consider the separate elements of the statutory definition of ‘charity’ in each jurisdiction. In all three cases the test hinges on the purposes of the (intended) charity, and those purposes must firstly fall within a specific list of heads (or within the general ‘sweep up’ provision applicable only in England and Wales and Northern Ireland) and secondly the purposes must be for the public benefit. In Scotland (but not in England and Wales, and unlikely in Northern Ireland) there is an additional activities test linked to this second requirement, in that extent to which a body provides or intends to provide public benefit must be considered. A third requirement in Scotland concerns party political activity and ministerial control.
There are significant differences in each jurisdiction between the specified heads of charity available. In each case there is at least one head (or part of a head) not explicitly listed in the other jurisdictions, for example:

- in England and Wales, the promotion of the efficiency of the armed forces of the Crown and of the emergency services,
- in Scotland, the advancement of public participation in sport,
- in Northern Ireland, the advancement of peace and community relations.

There are also significant differences in the public benefit requirement. It seems likely, based on announcements by the Minister for Social Development in Northern Ireland, that the 2008 Act will be amended to use the same public benefit wording as in England and Wales, but in Scotland as well as the ‘intent to provide public benefit’, s 8 of the 2005 Act adds additional requirements by way of ‘no unduly restrictive conditions’ in considering the benefit to members of the public. This places considerable focus on the activities of the charity, whereas in England and Wales (and probably in Northern Ireland) the public benefit test is (or will be) concerned solely with the purposes of the charity.

It might be argued that these differences are small, but they are sufficient to cause considerable difficulties for charities, especially those working on a cross-border basis. For example, many charities established in England and Wales or Northern Ireland have to register with OSCR as a result of s 13 of the 2005 Act if they wish to make any claim to charitable status in Scotland. But in order to do so they have to meet the charity test in that Act. Where a charity’s governing document has broad references (e.g. in a dissolution clause) to the assets being applied ‘for charitable purposes’, OSCR generally requires amendments to the governing document to restrict this to purposes which are charitable under the law of Scotland. Moreover, the trustees then have to meet various extra requirements as dual-registered charities: for example the accounts of a charity registered in England and Wales which is also registered in Scotland must comply with the accounting regulations under both the 2011 Act and the 2005 Act.

This issue does not apply as such to cross-border charities operating in Northern Ireland as they will generally be entered on the ‘section 167 list’ under the 2008 Act and thus will not be required to register in Northern Ireland. However, the important distinction between the Scottish and Northern Ireland requirements on this issue is not widely understood: another reason for simplifying the rules.

This overview illustrates the problems caused by having different definitions of charity in the different jurisdictions of the UK. The establishment of different definitions largely derives from the recommendations in Scotland arising from the McFadden Commission in 2001, but the McFadden team did not directly consider interaction with tax law, nor the detailed issues for the significant number of charities operating in more than one country of the UK.

There is therefore strong reason to believe that the vast majority of charities would welcome legislative changes to unify these differences to give a single definition for the purpose of charity regulation/registration and for tax purposes throughout the UK, and that this would help to reduce the extent to which resources are applied to technical compliance issues as opposed to a charity’s real work. It would also tend to avoid potential ‘jurisdiction-shopping’ by less scrupulous organisations seeking the least onerous regime.
Conclusions and Recommendations

The Charity Commission’s Guidance on Public Benefit

1. The Commission should be enabled and encouraged to target the resources that it devotes to the monitoring of public benefit much more selectively. The core guidance, which should be all that is needed for many charities, should in our view be much simpler and shorter.

2. The core guidance should contain the minimum necessary to allow trustees to identify whether they are administering their charity in accordance with the law on public benefit, or whether there are issues requiring further investigation. Wherever possible, it should give examples as an aid to the understanding of crucial points, and explain the difference between merely nodding to the public benefit requirement and ensuring it is actually complied with in a thought-out manner.

3. The core guidance should distinguish clearly between (a) the legal requirements for charitable status (relating solely to a charity’s purposes), (b) the duty of trustees to administer the charity consistently with its purposes (which must by definition be for the public benefit), (c) the duty of trustees to have regard to the guidance and (d) PBR. The Commission might also consider whether the risk of confusion would be reduced by providing guidance on (c) and (d) in a separate document from that dealing with (a) and (b).

4. It is suggested that the guidance should adopt a triage approach. Only those charities where significant public benefit issues may apply, principally charities which have a restricted beneficiary class, confer significant private benefits, charge high fees or engage in novel areas of charitable endeavour, need be signposted to more detailed guidance on the applicable law and the options in complying with it.

5. The Commission should complete the current review of its detailed guidance on public benefit and consult on it, paying particular attention to the views of NCVO and other voluntary sector representative bodies and charity professionals, and aiming at a version which is as clear and straightforward as possible and commands wide support.

The Public Benefit Reporting Requirement

6. On balance, and subject to any change in the substantive law, no changes to the 2008 Regulations are needed, but greater understanding of the TAR itself is required. This would be helped by a fresh design for and organisation of the guidance on both the public benefit requirement and its observance and PBR.

7. The smallest charities (annual income up to £25,000 p.a.) are required to produce a TAR and accounts, but the study found that only 2% of them were actually complying with PBR. At the very least, the Commission should encourage such charities to file their TAR and accounts voluntarily and if possible make them available online so that other stakeholders can view them. Without this, PBR is an almost pointless requirement for charities at this level. It would also be beneficial to see PBR extended to all exempt and excepted charities: without this their accountability is much diminished.
**The Definition of Public Benefit**

8. Further legislation is highly desirable to clarify the law, but this should not be an attempt to produce a comprehensive definition of the public benefit requirement in a statute.

9. It would be helpful for the legislation to set out the main principles by which public benefit is to be judged, as has been done in the Scottish legislation, whilst retaining a genuine capacity for the law to develop with time.

10. It would be particularly helpful if the legislation were to make it clear that previous decisions on public benefit need not always be followed. One possibility would be to copy what has been done in relation to cy-près schemes and place an explicit requirement on the Commission/tribunal/court when considering whether the purpose of an institution fulfils the public benefit requirement, and/or whether the trustees have administered the charity in accordance with that requirement, to have regard to the prevailing ‘social and economic circumstances’ (see s 62(2) of the 2011 Act). This would enable the concept to be updated even at the cost of departing from previous judicial decisions on similar facts where the surrounding circumstances were different.

**The UK Dimension**

11. The Government, the devolved administrations, the three regulators and HMRC should work towards agreeing on a single definition of charity and a single public benefit requirement for the whole of the UK, which would also apply for tax purposes.
MEANS OF REDRESS AVAILABLE FOR AND AGAINST CHARITIES

Ensuring that there is a system to address the range of complaints that relate to charities is a credible way in which charities can demonstrate their trustworthiness to the public.

First of all, charities can be drastically affected by the Charity Commission's decisions: a decision not to register a charity, a delay in responding to a charity's query, or a decision to institute an inquiry will all affect the organisation and its ability to help its beneficiaries. This in turn can also have an impact on how the charity is perceived by the public, with potentially damaging effects to public trust and consequence. It is therefore crucial that charities and trustees should be able to question how the Commission acts, and challenge how they have been treated. The introduction of an independent Charity Tribunal, responsible for hearing appeals against a raft of legal decisions, directions and orders of the Commission, was therefore one of the major – and most welcome – changes effected by the 2006 Act.

But the Tribunal does not have jurisdiction over a different set of complaints relating to charities, which it is equally important to resolve in order to maintain and improve the trust and confidence of their users, wider stakeholders and the general public. These are the complaints made to charities themselves about the services they provide to their users, or about decisions that have been made by the board.

Well-governed charities provide good-quality services that meet the needs of those they serve, and they are open and transparent in their governance. It is therefore important to address the concerns that have been raised about the lack of a formal and authoritative process to manage complaints of this kind.

1. Charity Tribunal

i) Aims and role of the Tribunal

The establishment of the Charity Tribunal was seen as necessary for the following reasons:

- firstly, charities wishing to challenge formal decisions taken under the Charity Commission's statutory powers had no avenue of appeal beyond the internal review process, except for the High Court proceedings which were rarely chosen due to the high costs involved;

- it was also seen as inappropriate for a modern regulator to be in the position of knowing that it could not be challenged, so the creation of a low-cost and informal independent judicial tribunal was intended to provide not only a more accessible, cheap and user-friendly means of challenging the Commission’s decisions, but also to form part of a better accountability framework;

- the lack of issues coming before the High Court meant that charity law was said to have ossified and was unable to keep pace with the changing role of charities in society, so the tribunal was intended to be the forum for the development of this new case law for charities.
ii) Number of Tribunal decisions

In 2008, the tribunal planned to deal with up to 50 cases a year and there were high hopes for its impact. During the passage of the Charities Act 2006, the government accepted there should be a presumption in favour of including within the tribunal's remit any Commission decision that there was no strong reason to exclude. But the Act provides no general right of appeal to the tribunal on Commission decisions. Instead, narrow parameters place extensive restrictions on the Tribunal's remit: in order to establish whether a particular matter is within the Tribunal's remit, a potential applicant must look at the detailed Table in the new Schedule 1C of the 1993 Act that sets out which decisions, directions or orders are subject to appeal or review, by reference to the section of the 1993 Act containing the power which the Commission has exercised, or failed to exercise.

The approximate number of cases heard by the Tribunal since its creation is only 20, so the expectations about its role and the volume of work now seem overestimated. A number of reasons have been identified as causing this limit to the work of the Tribunal so far:

- The restrictions placed by Schedule 1C mean that many decisions are not subject to appeal to or review by the tribunal, including cases where the Commission has taken no action, where there is no relevant decision, order or direction in the first place.

- A change in approach by the Commission, which in recent years has opened fewer statutory enquiries, and has delivered more informal decision reviews under its internal procedures; this mechanism can be of assistance in many cases because it provides an opportunity for cheaper and faster 'local' resolution, but it also means the outcome is outside the tribunal's remit.

- The risk aversion of charities and their consequent reluctance to undertake litigation of any kind.

- The relatively short time frame to bring an appeal, i.e. only 42 days from the date of the decision being challenged. In particular, if a charity decides, as an initial step, to trigger the Commission's own decision review process, but that process does not lead to a fresh decision being made, then the charity may be out of time to bring an appeal in the Tribunal.

- It has also been suggested that another possible explanation is that the extent of suppressed demand to challenge the Commission's decisions may simply have been overestimated.

2. The role of the Attorney General

The Attorney General's potential role in the cases coming before the Tribunal is wide ranging. In addition to references, the Attorney General may initiate any action allowed by the Schedule 1C table; he may also be joined as a party to any appeal from the First tier Tribunal to the Upper Tribunal, whether or not he was a party to the original proceedings; and he can be asked to "assist" the Tribunal with any question arising in proceedings, without necessarily participating in the whole case.

29 See the summary of the Charity Tribunal's cases since its creation in Annex IV.

30 It has in fact been noted that comparatively few of the Commission's decisions are challenged: in the financial year 2008-09 the Commission made an estimated 8,364 decisions that were capable of being appealed to the Tribunal, but only 17 of those went through the decision review process and only 2 were subsequently appealed to the Tribunal.
Although it is acknowledged that there is a need for some latitude in the role of the Attorney General and the relationship with both the Charity Commission and the Tribunal in order to allow flexibility when considering what is potentially a very wide variety of cases, as currently understood it can cause some weakness to the current system. This is because of the uncertainty surrounding when, why and how the Attorney General decided to act, particularly with regards to references. There is insufficient transparency on the process followed when references are made what their outcome is, and what is the relationship with the Charity Commission in these circumstances.

There is also little clarity on what remedies are available to the Tribunal in a reference and in particular uncertainty as to the precise legal status and effect of any declaration the Tribunal may issue.

The extent and nature of the Charity Commission’s duty to comply with the Tribunal’s declarations in references is also unclear and would benefit from guidelines.

3. Charities Ombudsman

The main reason behind the proposal of creating a ‘charities Ombudsman’ is that presently there is no formal centralised procedure for handling complaints concerning the actions and decisions of charities.

Where complaints relate to a particular service delivered by the charity, particularly when commissioned by a public body, complainants may have access to the commissioning body’s complaints process and then to an ombudsman responsible for the specific type of service. However, this is usually a complex and ineffective route to redress and, in any event, can be seen as a patchwork approach to the issue, which is unsatisfactory in the context of the increased role in service delivery by charities.

The other types of complaint relate to internal dispute, which currently can only be addressed by the charity itself through its own internal complaint procedure, if one is in place. However, this is not a mandatory requirement, so there are many cases where the interested individual has no options for redress.

Although the Charity Commission receives a high number of both these types of complaint (indeed, they make up the majority of complaints it receives) its powers to intervene are limited by a number of factors, particularly the extent to which the legal framework governing charities and their regulation allow involvement.

The creation of a ‘charities Ombudsman’ has therefore been suggested to fill these identified gaps in the system and ensure that there is a body responsible for investigating and resolving the complaints about charities that are currently left unresolved.

There are a number of possible advantages that having a ‘charities Ombudsman’ would bring:

- individuals with a genuine concern about how they have been treated by a charity would have an avenue to remedy their situation;
- charities against which complaints have been filed but left unresolved due to lack of jurisdiction would no longer linger in an ambiguous situation;
- charities would have a mechanism to move complainants on, thereby relieving the burden on the organisation and staff who may be unable to bring complaints to a close;
- the number of erroneous complaints made to the Charity Commission and the Independent Complaints Reviewer would most likely be reduced.

However, the creation of a ‘charities Ombudsman’ also raises a number of problems, such as:
- the potential impact on trustees’ independence;
- an increased burden on charities, caused by a requirement to have an internal complaints procedure;
- the danger of overlap and confusion with other bodies responsible for dealing with complaints or reports against charities;
- the willingness of parties to be bound by the Ombudsman’s decisions;
- and of course the key question of how such a service would be funded.

Conclusions and Recommendations

**The Charity Tribunal**

1. It is generally agreed that it would be a retrograde step to scrap the Tribunal. First of all, it may be too early to conclude that the number of cases reaching it will always be so low. And, although it is not yet the public perception, the Tribunal does have advantages compared to an administrative court in terms of ease of access, and it has very wide case management powers. The Charity Tribunal’s costs of operation are relatively moderate: it has a strong administrative base and the new centralised system means that costs are spread across different tribunals because the judges serve on a number of jurisdictions.

2. Furthermore, one of the real benefits of the Tribunal is that it is a court that can effectively specialise in charity law, and will therefore develop a body of expertise that will not only enable it to achieve its aims in the longer term but also be beneficial to the sector. Indeed it should be acknowledged that, despite the number of cases heard so far being low, the Tribunal has dealt with some significant issues affecting charities, including the two landmark rulings clarifying the public benefit requirement.

3. The operation of the Tribunal could however be improved in a number of ways. In particular:
   - The table of challengeable decisions in Schedule 1C to the 1993 Act (now Schedule 6 to the 2011 Act) is simplified so that appellants do not have to go through the process of cross-referencing what decisions can be appealed (column 1), who can appeal them (column 2) and what the Tribunal can do if the appeal is upheld (column 3). It would also be appropriate to reconsider whether the Tribunal’s jurisdiction should be based on a list of appealable decisions, or whether the Tribunal should have power to hear appeals against any decision or act of the Charity Commission, including ‘non decisions’ and inaction.\(^{\text{31}}\) As well

\(^{\text{31}}\) This is particularly because of the concerns about an increasing lack of action on behalf of the Charity Commission following the cuts to its budget, and the need for a strong Tribunal to counteract a possible tendency to only act in extreme situations.
as increasing the availability of the appeal option to cover a wide variety of decisions and acts not currently covered by its jurisdiction, such a widening would also have the advantage of being much easier for potential appellants to understand.

- The time limit for bringing an appeal should be lengthened, and the Charity Commission’s decision review process and the Tribunal process should be brought into line so that it is possible to utilise the Charity Commission’s decision review process without jeopardising any subsequent right of appeal to the Tribunal.
- The Tribunal’s decisions could be made more accessible to non-legal experts, for example by being written in simpler language where possible, and including a summary that brings together key points with practical implications for trustees and others.
- The Charity Commission should be equipped with the power to make a reference directly to the Tribunal, without the need for the Attorney General’s consent. The possibility that legal issues of wider significance for the sector and the public might be decided in the Upper Tribunal, whose decision will establish legal precedent, makes the prospect of referring questions of charity law in this way an attractive option. This is a much needed aspect of the tribunal’s jurisdiction, given that opportunities for the authoritative clarification of charity law by the courts in the past have been rare. There are several difficult areas of charity law, where there is either no contemporary or relevant case law, which would certainly benefit from authoritative clarification.
- The standard model procedure followed in Tribunal proceedings should be self-representation on the parties involved in order to allow for a simple process and swift, low cost justice. The need for legal representation should only be accepted by the Tribunal in exceptional circumstances and following a submission by the parties.
- Where it is possible to identify matters that can be decided quickly, on paper, or without the need for examination of witnesses, for example, cases should be assigned to a new, fast-track system where the Tribunal uses its existing case management powers to achieve a faster determination than the current 30 week target time.
- The Ombudsman should be able to refer appropriate cases to the Tribunal.

**The Role of the Attorney General**

4. The recent involvement of the Attorney General has proved extremely useful to the Tribunal, but it remains difficult to predict how frequently these powers of intervention will be exercised in future. It is therefore necessary to provide more clarity on the role of the Attorney General in charity references.

5. Specifically, it would be welcome if the Attorney General’s Office published a policy statement describing in broad terms the situations in which References might be made to the Tribunal on matters of general concern for the charity sector, and providing

---

32 Cases such as *UTurn UK CIC* and *Derek Maidment & Lennox Patrick Ryan* should be the standard model procedure followed.
Charities and other interested persons with information about when it will (and will not) get involved and how to petition the Attorney General in order to request it to do so.

The Charities Ombudsman

6. Charities need to engage with the public in ways that maintain and enhance people’s trust and confidence. The creation of a ‘charities Ombudsman’ might provide a means to address some of the concerns raised by the public about the sector and how it operates that are currently left unanswered due to the absence of a responsible body.

7. The creation of the Ombudsman should not take away from the principle that charity trustees act at their own discretion: it would not be for the Ombudsman to seek to substitute its decision for that of the trustees, but only to ensure they have acted in accordance with their duties in law. The first line of complaint about a charity should always be to the charity itself (the senior management and trustees): only if the complainant is still unsatisfied once this process is followed should the Ombudsman option become available.33

8. It is recognised that the creation of an Ombudsman service presents substantial issues. First of all in relation to the financial resources required to set up and run this new body. There is also the implication that it will become mandatory for all charities to have a (published) complaints procedure to deal in a timely and fair way with their beneficiaries, donors, current and former trustees, and members of the public who are unhappy with decisions taken.

9. While charities should have an internal complaints procedure as a matter of good practice, making this a mandatory requirement is different. This consideration and the other issues identified above lead to the recommendation that there should be a full consultation on the possible creation of a charities Ombudsman and the details of how this new body should operate. In particular, it will be essential to gather charities’ views on whether the decisions will be final and binding, and on how the structure should be financed.

10. It is also important that, if a ‘charities Ombudsman’ were to be established, strong safeguards would need to be put in place in order to clearly define its remit and therefore avoid the potential confusion to the public about where to place a complaint. In particular, the Ombudsman would need to be part of an integrated system and to the extent there are existing bodies already dealing with certain types of complaints, then its primary concern would have to be to direct complaints to those other bodies.34 In this way, the existence of a ‘charities Ombudsman’ could have the additional advantage of providing a filter for cases that need to be re-directed to the Tribunal, and could therefore help improve potential appellants’ access to justice.

---

33 The common procedure with other ombudsmen is that complaints are first handled by the body complained against before the complainant can go to the ombudsman; the same should apply to charity complaints.

34 As an example, the Advertising Standards Authority has this useful page on its website listing complaints outside its remit and signposting to other forums for complaint: [http://www.asa.org.uk/Regulation-Explained/What-we-cover/Complaints-outside-remit.aspx](http://www.asa.org.uk/Regulation-Explained/What-we-cover/Complaints-outside-remit.aspx).
11. It is therefore recommended that if, following full consultation, a charities Ombudsman is created it should be accompanied by a joint study involving all bodies with a role in redress to clarify their respective remit and responsibilities. This should be aimed at improving the handling of cases, especially those where more than one body might be involved.

12. It is also proposed that a possible way forward to explore is the creation of a 'triage system', formed by three prongs in the following hierarchy: a) an open and administratively informal conciliation process to deal with internal disputes between individuals or disputes between charities themselves; b) a charities Ombudsman to examine complaints made against charities (for example, about the services a charity provides) or between charities; and c) the Tribunal, to deal with the genuinely substantive legal questions. The handling of complaints could be managed through a single 'inbox', possibly a single web portal, and would also be a track structure, so a brief assessment is carried out the moment a claim placed in order to allow for the speedy allocation to the most appropriate forum. It is recommended that detailed consultation should be undertaken on how such a system could be structured and financed, should it be deemed appropriate.
REGULATION OF FUNDRAISING

One of the issues explicitly listed by s.73 of the Charities Act 2006 that the review must address is ‘the level of charitable donations’ and public trust and confidence, so there has been an expectation within the sector that the regulation of fundraising would be a particular point of focus.

This was confirmed by Lord Hodgson’s terms of reference, which propose to address the following specific matters:

- the success of self-regulation of fundraising as delivered by the Fundraising Standards Board (FRSB), and should also consider whether the scheme could be strengthened or whether Ministers should consider exercising the reserve power in the 2006 Act to regulate fundraising;
- the licensing regime for public charitable collections - the review should consider whether the 2006 Act provisions are workable and represent value for money, or whether there is an alternative approach under existing or new legislation that could meet the objective of a licensing scheme that is proportionate, facilitating responsible fundraising whilst deterring bogus collections and preventing public nuisance.

NCVO’s Charity Law Review Advisory Group has a specific interest in asking whether the current fundraising regime is operating effectively, because of the direct link between charities’ fundraising activities, their relationship with the general public, and ultimately their resilience and independence.

Fundraising is one of the most important public interfaces of charity, and it is therefore essential that it is undertaken responsibly and transparently, in ways that encourage the public to give confidently. It was therefore agreed that the sub-committee would consider the general criteria necessary to ensure an effective framework for fundraising that strikes the appropriate balance between deregulation and safeguarding minimum standards, with the priority of maintaining and enhancing public trust and confidence. In particular, it is important to find a solution that ensures charities can fundraise effectively, and therefore have the resources necessary to support their beneficiaries, while avoiding undue inconvenience to members of the public.

1. Current levels and trends in giving

Research carried out by NCVO and CAF on the trends and characteristics of charitable giving in the UK shows that the proportion of the population who give to charity each month is relatively stable (since 2004/05 it has varied between 54%-58% of adults, which equates to an average of 28.4 million donors). However, evidence suggests that in the longer term there is a decline in giving population and the amount given tends to be flat, since there appears to be a psychological price point of £10 a month (a median that hasn’t changed since the start of the surveys in 2003). The high end of the philanthropy sector has also experienced a flattening.

---

Furthermore, according to the results of a recent YouGov survey commissioned by the Institute of Fundraising\(^{37}\), as many as 61% of people have said a major obstacle that stops them from giving to charity is that they can’t afford to, and have cited having a higher income and earning more money as the biggest factor that would encourage them to give more to charity.

### 2. Drivers of public trust and confidence

There is much talk about declining trust in institutions, including charities, and the effect this is having on public support. However, surveys carried out over the past years show that public trust and confidence in charities remains high. Charities are still the third most trusted group, just behind the armed forces and the NHS, and ahead of the police, schools and businesses.\(^{38}\) This most recent data about public attitudes to charities shows that the most important factor influencing trust is a charity’s compliance with high standards in fundraising (57%). Personal experience of, and familiarity with charities also remain important factors relating to trust (47%).

Furthermore, there is a clear difference between generalized trust, which relates to very broad societal factors (not least norms around how trustworthy one ought to admit to being) and particularized trust, which relates to a person’s own lived experience. The classic example of the difference between these two levels of trust is the finding that people tend to have low levels of trust in the legal sector and the education service, yet high levels of trust in their own lawyer and children’s teachers. This is good news for the charity sector, as donors do not experience charities en masse, but through personal interactions. On this basis the figures for generalized public trust and confidence in charities are less concerning, as they say more about people’s contemporary fears of ‘being had’ or ‘taken for a ride’. It is more important that charities focus instead on what is controllable, i.e. the experience of those with whom the organization has a relationship.

However, the fact that overall trust and confidence in charities is consistently high should not lead to complacency: on the contrary, upholding these levels requires continued efforts by the sector to maintain and improve its performance, including when carrying out fundraising activities. This is especially true considering that the Charity Commission can only be responsible for providing and overseeing the appropriate framework for charities to engender and maintain trust. But it is the role of charities themselves to adhere to the Institute of Fundraising Codes of practice and behaviours encouraged, which make trust a key attribute for the sector. The fact that the public are usually willing to give the benefit of the doubt to charities and their fundraising techniques given the good causes they pursue, must never be taken advantage of.

### 3. Self-Regulation

There is general agreement that the self-regulation of fundraising has been a success. The commitment of the sector has had a positive effect on transparency and accountability in charity

---

\(^{37}\) The YouGov Survey results are available at [http://labs.yougov.co.uk/publicopinion/archive/4721/](http://labs.yougov.co.uk/publicopinion/archive/4721/).

\(^{38}\) nfpSynergy ‘Trust in Charities and its Drivers’ March 2012.
fundraising, and has led to improved compliance with best practice. This is also confirmed by the relatively low number of complaints recorded by the FRSB in its Annual Complaints Return, which monitors the total level of complaints about fundraising activities across the sector.39

However, it should also be recognised that there are some issues that need to be addressed in order to improve the current system.

- First of all, the FRSB membership model means that compliance is ‘self-selecting’ because organisations are only members by choice. Furthermore, the number of charities that have signed up to membership remains relatively small, and public awareness of the FRSB stood at only 11% in February this year. This causes an obvious concern about ‘free-riding’ and about non-member charities not behaving properly bringing the whole sector into disrepute.
- There is broad support across the sector for the FRSB to be equipped with ‘stronger teeth’, in particular the ability to issue more effective sanctions for non-compliance compared to the current only option of expulsion from membership.40
- There is also confusion both within the sector and the general public about the respective roles and responsibilities of the various fundraising bodies (FRSB, Institute of Fundraising and Public Fundraising Regulatory Association) and their interaction, with many having described the current situation as a ‘patchwork quilt’.

4. Regulation of Public Charitable Collections

Failure to implement part 3 of the 2006 Act, which would have introduced a unified system, means that the current framework of existing legislation for regulating public charitable collections fails to cover the full range of collecting activity and remains out of date and ineffective. The current system is difficult to enforce, hard to police and confusing to both the public and collecting organisations. In particular, the legislation that regulates public collections is complex, causing local authorities to have inconsistent views on the licensing requirements and how they should be implemented.

Furthermore, although both street and door to door collections are entirely legitimate forms of fundraising employed by charities, these activities are often subject to criticism by the public and in the media, which tends to focus on the hassle and inconvenience experienced by some members of the public, or on the criminal networks responsible for fraud and theft through bogus collections.

However, charitable collections continue to be key source through which the public provides its support to charities, many of which rely heavily on this source of income. It should also be noted

that the issue of bogus collections is relatively small, and those who voice distaste for street collections are a vocal but small minority.\textsuperscript{41}

**Conclusions and Recommendations**

1. Self-regulation continues to be the most appropriate way to ensure an operating framework that is ‘fit for purpose’, in which charities are encouraged to fundraise effectively and responsibly. The guiding principle should be the concept of striking a balance between the potential upset and inconvenience caused to members of the public when asking for donations, and the loss or damage caused to beneficiaries because the organisation doesn’t have the resources to support them. Statutory intervention, on the other hand, could restrict fundraising activities and therefore stifle charities ability to gather public support. Statutory regulation would also have the disadvantage of causing higher costs to both charities and tax-payers, and would provide less flexibility to adapt to changing circumstances.

2. Requirements must be tailor made depending on whether they apply to the national or local level, large or small organisations, in order to be proportionate and not cause an unnecessary burden. Guidance should be made available for cases in which transgression takes place unknowingly and the charity has acted in good faith. However, charities have the responsibility to follow the codes of best practice produced by the Institute of Fundraising.

3. As a matter of best practice, all charities should strive to adopt the codes of practice produced by the Institute of Fundraising. The aim should be to create a culture of expectation whereby all charities comply with the codes, and ultimately achieve universal adoption of the codes across the whole sector. This would be an essential step to ensure that the sanctions against bad practice are effective.

4. Stronger sanctions are desirable to ensure high standards in fundraising behaviour and therefore maintaining public trust and confidence. Various options have been advanced, such as restricting the charity’s ability to use a certain fundraising technique or introducing financial penalties. It is strongly recommended that a proper consultation is carried out to explore in detail the available solutions and their implications. In particular, it is worth exploring the possibility of adopting a model similar to the one of the Advertising Standards Authority, which combines a range of sanctions (such as ‘naming and shaming’) with the commitment of media owners to help enforce its rulings by refusing to feature advertising that breaks the codes. As a last resort against advertisers who persistently break the codes, the ASA can refer to the Office of Fair Trading for legal action or Ofcom which has the power to impose a fine or revoke the licence. In any case it will be important that sanctions are proportionate to the level of risk. Furthermore, financial penalties should only be introduced as a last resort, because of the detriment caused not only to the charity but also due to the fact that it is donor’s money at stake.

5. The main purpose of the regime should be not only to help charities raise funds more effectively, but also to meet consumer needs. In particular it is important to provide a system that addresses any feelings of inconvenience, intrusion and irritation that may be

\textsuperscript{41}Furthermore, fundraising in its various forms has a history of facing public resistance: for example in the 1980s, targeted cold mail was the bête noir of the fundraising world; in the 1990s this became telephone fundraising, with a media outcry against the costs paid to the telephone fundraisers to make each call. Yet both these methods now appear to be generally accepted as standard practice.
felt by the public by having clear means of redress if a complaint has been made or concerns have been raised. In addition complaints need to be carefully monitored and public data provided on them so that trends can be quickly picked up.

6. The importance of the consumer perspective requires the regime to be structured in a way that ensures that the public knows where to make a complaint if necessary. This in turn means that there is an immediate need to resolve the current confusion about the different roles and responsibilities of the 3 bodies involved in the self-regulatory system - the Institute of Fundraising, the FRSB and the PFRA. In particular, it is necessary to clarify: a) who sets the standards; b) who enforces and adjudicates those standards; c) what is the role of charities with regards to ensuring the standards are followed?

7. The inherent unfairness of the current regime for public charitable collection needs to be addressed so that charities are not subjected to regulatory requirements that put them at a disadvantage compared to commercial collectors.

8. There has been much debate about whether it is desirable that the current self-regulatory regime is made universal. A universal scheme would ensure standards that apply equally across all charities. This would have clear advantages for both the sector, because the scheme would be stronger, and the general public, because people would be more aware of what they should expect. However there is a need to also be realistic and prove that there is a business case for such a change: in particular, it is necessary to consider the costs that financing a universal system would entail. In any case, it would not be desirable to make membership to the various bodies compulsory, since this runs counter to the concept of self-regulation. A possible solution could be to introduce a system of co-regulation, following a model similar to the one adopted by the ASA for broadcast advertising.42 This is a complex issue that needs to be examined in detail, and it is therefore recommended that - following Lord Hodgson’s review of the Charities Act – if such a system is under serious consideration then an independent detailed review of the fundraising regime should be carried out. Such a review should specifically address the question of universality and how it can be achieved, and should also include proposals for an appropriate payment/funding mechanism.

9. Any recommendation needs to ‘future proof’, taking into account the fast changing environment in which fundraising takes place and the developing methods by which charities fundraise, ranging from mobile phones to social media. Different methods of fundraising are emerging every day, and each implies different types of interaction between the public and the charity. This means that different levels of risk are created, and what can be seen as constituting ‘undue inconvenience’ for members of the public varies greatly depending on the method of fundraising adopted and the context in which it takes place. On the other hand, in the context of limited funding charities will be competing in an increasingly difficult market, and it is important to enable them to do so in a way that facilitates innovation and growth. Self-regulation and the widespread adoption of a set of sector standards or codes of practice is at the heart of this: the presence of core principles would provide the flexibility for charities to adapt to the changing environment and to the range of new fundraising mediums that will inevitably

---

42 Since 2004 Ofcom has established a co-regulatory partnership with the ASA. The system has been described as self-regulation within a co-regulatory framework. In practice, this means that the ASA is responsible on a day-to-day basis for broadcast advertising content standards. Broadcasters are obliged to comply with the Advertising Codes under their broadcast licences from Ofcom. When the ASA adjudicates on an advertisement, broadcasters comply with rulings immediately under the conditions of their licences. However, where necessary and appropriate, the ASA is able to refer licensees to Ofcom for regulatory action. Ofcom is able to levy fines and revoke licenses.
emerge in future years. It is therefore important that the Institute of Fundraising continues to update and improve the Codes in light of modern circumstances and new ways of giving, so that they continue to meet the needs of fundraisers and address the concerns of the public in relation to all forms of fundraising.

THE LAW ON CAMPAIGNING AND POLITICAL ACTIVITIES BY CHARITIES

Independence is a fundamental and defining characteristic for a charity, and one aspect of this independence is a charity’s right to campaign to further its purposes. Charities have a long tradition of using their independence of voice to speak out on behalf of their beneficiaries.

However, much has changed in the six years since the 2006 Charities Act was implemented. Aided by social and digital media, charities are becoming more sophisticated in their campaigning and political activity. These new developments are offering charities more and more opportunities to reach and engage with wider audiences and to get people involved in influencing the activities and decisions that affect them. We are seeing numerous examples of charities harnessing new social media and technologies to promote effective and influential campaigns.

At the same time, the commissioning and contracting environment in which some charities operate is becoming more complex. Charities have to consider carefully the balance between the type, nature and conditions imposed by the contracts that they are entering into, and what the contract terms might mean for their freedom of action and voice.

The Panel on the Independence of the Voluntary Sector has also heard evidence that, even where there are specific requirements and commitments for local and national government to consult with voluntary bodies - for example, when contracts are modified or withdrawn - these requirements have been ignored, compounding a feeling that the voice of the sector is not always being heard.

More positively, overall, public trust and confidence in charities remains high. A 2010 Ipsos MORI survey for the Charity Commission found that charities are the third most trusted group, just behind doctors and the police, and ahead of social services, local authorities and private companies. Faith in charities to make ‘independent decisions to further the cause they work for’ is strongly associated with overall trust.

At the same time there is anecdotal evidence suggests that the public is becoming more discerning in their support for particular campaigns. A more ‘knowing’ public reinforces the importance of charities providing a good evidence base to support their campaigns and work, and to help maintain confidence in charities’ work. The charity regulator and membership bodies, such as NCVO, should continue to promote the importance of charities using well founded evidence to back their political campaigns.

43 http://www.independencepanel.org.uk/
1. The legal environment

There have been no landmark cases in England and Wales since 2006 touching on charities’ political campaigning activities.

However, whilst not precedent setting in the UK, the High Court of Australia decision in *Aid/Watch Incorporated v. Commissioner of Taxation* is an interesting example of a similar jurisdiction taking a progressive attitude towards charities’ political campaigning activities.

At issue was whether or not the appellant, Aid/Watch, which campaigns for the effective delivery of the government’s international aid, qualified as a charity. Specifically, the case considered whether Aid/Watch could include "the generation of public debate" about the distribution of aid as one of its objects, on the basis that its political lobbying was for the purpose of relieving poverty and for the advancement of education.

The majority of the High Court agreed with Aid/Watch’s submission that the generation of a public debate concerning the efficiency of foreign aid to the relief of poverty, was itself ‘a purpose beneficial to the community’ which qualified as being charitable. The judgment has been hailed as an important marker for Australian charities that are politically active in advocacy and lobbying. It is likely, and desirable, that charities, charity lawyers, the Charity Commission and Government will have an interest in further discussing the Australian decision and its potential implications for English law. However, there is no immediate need for this case law development to be reflected in an amendment to the Charities Act 2006.

2. The regulatory environment

In 2008 the Charity Commission published updated guidance *Speaking out: Guidance on Campaigning and Political Activity by Charities (CC9)*. The guidance makes it clear that:

- A charity cannot exist for a political purpose nor have political activity as any of its charitable purposes. Nor can a charity undertake political activity that is not relevant to supporting its charitable purposes.

- Political campaigning, or political activity, as defined in the guidance, must be undertaken by a charity only in the context of supporting the delivery of its charitable purposes and that, unlike other forms of campaigning, it must not be the continuing and sole activity of the charity.

- When campaigning, charity trustees must comply not only with charity law, but also with other civil and criminal laws that may apply. Where applicable they must also comply with the Code of the Advertising Standards Authority.

- Any claims made in support of a charity’s campaign must be well founded on robust and objective research.

Importantly, the Charity Commission’s guidance unequivocally endorses the right of charities to campaign, by explicitly stating that political activity is legitimate, provided it is not a charity’s ‘continuing and sole’ activity.

When it was published, the guidance was welcomed by charities, as the previous guidance had caused confusion for some charities, leading to them being overly cautious in their approach to campaigning. This also caused a regulatory burden as, without the clarity that now exists, charities needed to seek legal and regulatory advice.

3. The charitable status of think tanks

The Charity Commission’s regulatory investigations into the Atlantic Bridge Education and Research Scheme (Atlantic Bridge)\(^46\) and, previously, into the Smith Institute, highlighted the difficulty the Charity Commission has sometimes faced in determining the charitable status of think tanks, and in determining whether such charities are, in effect, engaging in political purposes.

The Charity Commission’s guidelines allow charities to engage with political parties and their representatives; as such contact is a natural part of some campaigns and of raising the organisation’s profile. The guidance also urges charities to exercise some caution in order to protect their reputation and ensure public perceptions of neutrality.

Charities therefore need to pay particular consideration to the consequences of working with politicians, and be as open and transparent as possible about any contact they have.

During the House of Commons Public Administration Committee hearing on the work of the Charity Commission, it was nevertheless acknowledged that the assessment of think tanks is a subjective process and their charitable status remains a controversial area. In particular, it remains very difficult to determine the point at which educational research slips into political activity.

The Charity Commission has indicated that it will be producing additional guidance on how think tanks can conform with the requirement for educational charities to provide public benefit.\(^47\) This is a welcome announcement, as it will assist in clarifying the status of these charities, and will help to uphold public trust in their work as charities.

Conclusions and recommendations

1. The existing legal and regulatory framework provides the right balance between upholding charities’ freedom to politically campaign whilst also ensuring that they operate for the public benefit, are not party political, and are transparent and accountable in what they do. This balance means that charities can speak with an independence of voice, which gives the public and donors confidence in their work.


\(^47\) See ‘When think tanks are charities’, Solicitors’ Journal vol. 156 n. 15, 17 April 2012, which sets out the Charity Commission’s current thinking and why existing think tanks are not being removed from the register.
2. Therefore, there is no need for any additional regulatory or administrative requirements in this area, as such a change would cause a disproportionate regulatory burden on charities, and would stifle their desire and ability to campaign.

3. In particular it is recommended that:

- the existing regulatory guidance on charities and political activities is endorsed as continuing to be fit for purpose, as it is a clear statement that enables charities to undertake political campaigning activity;
- it is nevertheless desirable that charities, charity lawyers, the Charity Commission and Government further consider the Australian Aid/Watch decision and its potential implications for English law;
- the Charity Commission’s previous announcement that it will produce further guidance on the circumstances in which a think-tank can have charitable status is welcomed;
- the Charity Commission, and membership bodies such as NCVO, should encourage charities as best practice to have a well-founded evidence base to support their political campaigning activity.
ANNEX I - CHARITY LAW REVIEW ADVISORY GROUP

The Advisory Group is formed by:
- Baroness Howe of Idlicote (chair)
- Lord Low of Dalston
- Sir Stuart Etherington
- Sir Nicholas Young
- Jonathan Burchfield
- Rosie Chapman
- Dominic Fox
- Christine Rigby
- Tanya Steele
- Francesca Quint
- John Stoker

The Baroness Howe of Idlicote CBE

Elspeth Howe was appointed a Crossbencher member of the House of Lords in 2001. She was Chairman of the BOC Foundation for the Environment from 1990 to 2003 and was President of UNICEF UK from 1993 to 2002, and Vice-Chairman of the Council of the Open University from 2001 to 2003. From 1992 to 1994 she chaired the Archbishops’ Cathedrals Commission resulting in the publication of Heritage and Renewal in October 1994. From 1975 – 1979 she served as the first Deputy Chairman of the Equal Opportunities Commission. She is an Emeritus Governor and Honorary Fellow of the London School of Economics. She has chaired the Broadcasting Standards Commission (1993-99), Business in the Community’s Opportunity 2000 initiative (1994-98), an Inner London Juvenile Court (1970-90), and served as a member of the Parole Board (1972-75).
Lord Low of Dalston, CBE

Colin Low has been a lifelong campaigner for the rights of blind and disabled people, especially in the field of education. He taught Law and Criminology for 16 years from 1968-84 at Leeds University, before moving to London as Director of the Disability Resource Team, an organization providing advice and services on disability. He then went on to become Senior Research Fellow at City University, London, where he carried out research on theories of disability, retiring in 2000. He was made a Companion of the Order of the British Empire (CBE) for services to RNIB and disabled people's rights in January 2000 and was appointed to the House of Lords in 2006. Former Chairman, and now Vice President of RNIB, he is also President of ICEVI (International Council for Education of People with Visual Impairment) and has undertaken important roles in a range of other organizations, and carried out various projects, such as chairing the recent Low Review into the importance of the Mobility component of DLA for those resident in care homes.

Sir Stuart Etherington, Chief Executive, National Council for Voluntary Organisations

Sir Stuart Etherington was appointed Chief Executive of NCVO in 1994. Previously he was Chief Executive of the Royal National Institute for Deaf People, a major UK charity.

Stuart is Pro-Chancellor of Greenwich University, a Council Member of the Institute of Employment Studies, an Advisory Group member for the Policy Centre at the British Academy and for the Lord Mayor's Trust Initiative and a member of the Economic and Social Committee of the European Union. He has been a trustee of Business in the Community, the Chair of the BBC Appeals Advisory Committee, a member of the Community and Social Affairs Committee of Barclays Bank, former Chair of Guidestar UK, Chair of CIVICUS Europe, and Treasurer of CIVICUS, a global civil society organisation.
His Government appointments have included the Prime Minister’s Delivery Unit. He has also served on the Cabinet Office Performance and Innovation Unit’s Advisory Board on the Voluntary Sector and HM Treasury’s Cross Cutting Review on the role of the Voluntary Sector.

Stuart was knighted in 2010 for services to the voluntary sector.

**Sir Nicholas Young, Chief Executive, British Red Cross**

Before re-joining the Red Cross in 2001, Nick was Chief Executive of Macmillan Cancer Relief. Prior to that he was Director of UK Operations at the British Red Cross, following 5 years with the Sue Ryder Foundation setting up new Sue Ryder Homes. He started his career as a commercial solicitor, in the City and then as a partner in a firm in East Anglia.

Nick was knighted in the year 2000 for services to cancer care and was made a Freeman of the City of London in 2007. In 2011, Nick was the awarded the Outstanding Leadership Award by the Civil Society.

**Jonathan Burchfield – Partner, Head of Charity Team, Stone King LLP**

Jonathan’s experience covers both private client and charity matters but he has concentrated almost exclusively on charity matters since the early 1990s. He was a partner with Nabarro Nathanson before joining Stone King LLP in May 2006.

Jonathan’s work focuses on advising charities on all aspects of charity law and practice, and on their corporate governance. He is also head of our Legacy Team and as such advises charities on
all aspects of legacy fundraising and administration. He regularly speaks and writes on charity law matters.

Jonathan stepped down in June 2007 after some 12 years' service on the Executive Committee of the Charity Law Association (having acted as its Deputy Chairman for some years). He is a Trustee (and former Chairman) of The Tubney Charitable Trust, a significant grant-making charity.

He has recently completed a term as Trustee of Creativity Culture & Education, a charity established by the Arts Council in order to take over from it the running of the Government’s flagship creative learning programme with schools, and is a Governor of St Edward’s School, Oxford.

Jonathan is a member of the firm’s Management Team.

**Rosie Chapman, independent charity adviser**

Rosie is an independent charity advisor and co-founder of Belinda Pratten and Rosie Chapman Associates, a consultancy specialising in assisting charity trustees with strategic planning; regulatory and governance advice; policy development; campaigning and research evaluation.

Until summer 2011 Rosie was director of policy and effectiveness at the Charity Commission, a role she held for ten years. Prior to joining the Commission, Rosie spent six years at the Housing Corporation in a variety of roles culminating as Assistant Director (Regulation Policy). In the past she has held a senior role in a housing association, and has acted as company secretary for a number of charities.

Rosie is a trustee of Charity Finance Group and of Catalyst Gateway, a community development charity. She is also a Fellow of the Institute of Chartered Secretaries and Administrators.
Dominic Fox, Chief Executive of the Association of Charitable Organisations

Dominic Fox has worked in the voluntary and community sector for over 35 years. Dominic has held a number of senior management posts including Director of the Kings Cross Homelessness Project, Acting Chief Executive at National Homeless Alliance, CEO of a disabled children’s charity, Kidsactive, and was Director of the Children’s Centre Project, a collaboration of seven national charities based at the National Children’s Bureau.

He has been a trustee of NCVO since 2002 and was until recently a member of the Poverty Strategy Group at Joseph Rowntree Foundation, now an Advisory Group member on the Minimum Income Standard. Dominic stood down as Chief Executive of The Stone Ashdown Trust in December 2008 when it became one of the UK’s first charitable foundations to “spend out” its capital. After a period as CEO at care charity Hoffmann Foundation for Autism he took up post at the Association of Charitable Organisations, the umbrella body for benevolent funds in February 2011.

Francesca Quint, Barrister, Radcliffe Chambers

Francesca is a well-known charity law barrister, practising from Radcliffe Chambers, Lincoln’s Inn. The first part of her career was spent as a lawyer at the Charity Commission and she resumed independent practice in 1990. Her work focuses mainly on charity law but is very varied involving many different types of organisations with a wide variety of problems. She has a particular interest in charity law reform, having given evidence to the Tumim Committee which led to the Charities Act 2006, and acted for NCVO in the Independent Schools case and for the Police Federation in the Benevolent Funds case. Francesca writes and lectures extensively, drafted the Charity Law Association’s model governing documents (now in their 3rd edition) and
is co-editor of ‘Charities: The Law & Practice’. She has for many years been a trustee of Elizabeth Finn Care and a member of the Advisory Body of the Almshouse Association.

**Christine Rigby, Solicitor, Bates Wells and Braithwaite and co-author of ”Charities - The new law 2006”**

Christine trained at Clifford Chance and on qualification joined the Intellectual Property Department. Deciding to become a charity lawyer, she spent four years in the Charity Department at Sinclair Taylor & Martin before joining the Charity and Social Enterprise Department at BWB. A Partner from 2000-2004, she had a two year break and has rejoined in a different role doing some client work but focusing mainly on updating clients on new legal developments, delivering training and writing books (including ”Charities - The New Law 2006: A Practical Guide to the Charities Acts”).

**Tanya Steele, Director of Fundraising at Save the Children**

As Director of Fundraising, Tanya is responsible for communicating the cause of Save the Children to the UK public in order to raise much needed funds and build support for the life saving work taking place around the world.

Tanya’s early career was in the technology sector where she held a number of senior business, marketing and communications roles. Her management career started at Siemens AG where Tanya became the youngest senior manager worldwide. She then went on to successfully lead BT’s 0800 business through dramatic growth before joining Lucent Technologies/Avaya in 2000 where she became the Marketing Director for the UK and Northern Europe.

Since joining Save the Children in 2004, Tanya has travelled extensively to see the life changing work of the organisation and most recently has played a pivotal role in leading Save the Children’s biggest campaign to date – No Child Born To Die. In July 2009, Tanya was appointed
as a Trustee of The Institute of Fundraising where she works alongside her sector peers to face the collective challenges of fundraisers.

Tanya graduated from the University of Lancaster in 1990 with a BSC in Marketing. Tanya lives in London with husband Mark and son Edward.

**John Stoker**

Between 1999 and 2005, John was the Chief Commissioner of the Charity Commission for England and Wales, having previously served as the Director General of OFLOT, the National Lottery regulator.

John led the London Bombings Fund through its set-up stage in 2005. During 2006 and 2007 he was the first Commissioner for the Compact - advising the voluntary and community sector and Government about ground rules that should be followed on matters such as funding and consultation when they work together.
Annex II - Charity Law Review Advisory Group Terms of Reference

Background

Section 73 of the Charities Act 2006 states that:

(1) The Minister must, before the end of the period of five years beginning with the day on which this Act is passed, appoint a person to review generally the operation of this Act.

(2) The review must address, in particular, the following matters –
   (a) The effect of the Act on –
       (i) excepted charities
       (ii) public confidence in charities,
       (iii) the level of charitable donations, and
       (iv) the willingness of individuals to volunteer,
   (b) the status of the Charity Commission as a government department, and
   (c) any other matters the Minister considers appropriate.

(3) After the person appointed under subsection (1) has completed his review, he must compile a report of his conclusions.

(4) The Minister must lay before Parliament a copy of the report mentioned in subsection (3).

The Charities Act 2006 is the result of a campaign led by charities themselves, having recognised that it was necessary to modernise the law. NCVO’s own work also indicated that there was a strong level of support for the reforms, both within and beyond the sector.

Government has published a Charities Bill consolidating charities legislation into one act of Parliament, with the aim of making it easier to follow charities legislation. Work on the consolidation was begun in response to parliamentary criticism about the fragmentation of charity legislation during the passage of the Charities Act 2006. The Bill will include law from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006.

Therefore NCVO has set up a Charity Law Review Advisory Group to lead an independent sector review of existing charity legislation.

Mandate

The work of the Charity Law Review Advisory Group will shadow the review undertaken by the individual appointed by Government according to s.73 of the Charities Act 2006.

The aim of the Advisory Group is to develop and consider proposals for improving the legal and regulatory framework in which charities operate, with reference to the current status of implementation of charity law.

The Advisory Group will examine a range of issues concerning the regulation of charities and their activities, involving a targeted review of areas of charity law that have been identified as causing uncertainty and carrying disproportionate regulatory or administrative burdens.

In particular, the Advisory Group will be referred to enquire and report on the operation of the Charities Act 2006 and its overall effect on public trust and confidence in charities.

Other specific issues on which the Advisory Group will focus will be selected on the basis of the following broad criteria:
• importance – the extent to which the current law is unsatisfactory (for example by being unduly complex or failing to achieve its purpose) and the potential benefits likely to be achieved by undertaking a review;
• suitability – whether the review would be suitable on the basis of legal and policy evidence (this would exclude subjects where the considerations are shaped primarily by political judgements);
• resources – the internal resources needed for the effective management of the review, the external resources needed for implementing any proposed change (in particular, whether primary or secondary legislation will be required) and whether those resources are available.

**Structure**

The Advisory Group shall comprise a chair and not more than nine other members who will jointly have knowledge and experience of charity law and more broadly of civil society.

The Advisory Group will oversee and coordinate the work of special sub-committees, which will focus on specific areas of legislation and / or policy.

Each specialist sub-committee may include one member of the Advisory Group.

NCVO will provide the secretariat for the Advisory Group and will coordinate and administer the operation of the sub-committees.

**Mode of Operation**

The Advisory Group will operate for a period between 6 and 9 months, concluding in 2012.

Baroness Howe of Idlicote has been invited to act as chair of the Advisory Group.

The Advisory Group will meet in plenary for the first time to set out its work programme and identify the areas of legislation that it wants to address.

A final meeting at the end of the 6-9 month period will be scheduled for the formal approval of the report.

A maximum of two other meetings will take place in the interim period to discuss the findings and proposals of the sub-committees, and to comments on the draft report.

Any other communication and decisions can occur through email.

Agenda items will be compiled by the secretariat from suggestions by any group member. Agenda items and papers will be circulated to members of the group one week in advance of the meeting.

Each sub-committee will be allocated a specific area and then asked to formulate proposals for improving the issues identified within its specific area of competence. Sub-committees will be able to interview key members of civil society and the charity legal sector in order to gather written and oral evidence.

The research and other preparation work required for the operation of each sub-committee will be supported by the Secretariat.

The analysis and proposed recommendations will be reported back to the Advisory Group for plenary discussion.
Media releases will be prepared by the NCVO secretariat and circulated to the Advisory Group for approval. Individual members of the Advisory Group will be invited to act as spokesperson as appropriate.

**Outcomes**

The Advisory Group is to produce a report which will set out its findings and recommendations. The Advisory Group’s findings will be made available to Government and other relevant bodies where appropriate.

NCVO will endeavour to take forward the Advisory Group’s recommendations where it is appropriate to do so.
Annex III - Charity Law Review Advisory Group Sub-Committees

The impact of charity law on trustees
Christine Rigby, consultant at Bates Wells & Braithwaite (chair)
Mike Hudson, Founder and Director of Compass Partnership Management Consultants
Cath Lee, Chief Executive of the Small Charities Coalition
Lindsay Driscoll, Bates Wells & Braithwaite
Anne Moynihan, Director & Senior Consultant at Anne Moynihan Consulting Ltd.

The future of the Charity Commission
Jonathan Burchfield, Head of Charity Team at Stone King LLP (chair)
Caron Bradshaw, Chief Executive of the Charity Finance Group
Lynne Berry, former Chief Executive of the WRVS, currently transition trustee of the British Waterways charity
Terry de March, former Director General at the Charities Directorate of the Canada Revenue Agency
Richard Corden, former Chief Executive of Commission for the Compact, currently consultant at Central Lobby Consultants
Richard Fries, Chief Charity Commissioner from 1992 to 1999, currently Visiting Fellow at the Centre for Civil Society at the London School of Economics

The Public Benefit Requirement
Francesca Quint, barrister at Radcliffe Chambers (chair)
Gareth Morgan, Director of the Centre for Voluntary Sector Research at Sheffield Hallam University
John Stoker, public sector, charity and lottery consultant, former Chief Commissioner of the Charity Commission and Director General of OFLOT
Jenny Ebbage, Solicitor at Edwards & Co.

Among other written evidence including academic articles and official guidance, the sub-committee considered specific contributions from
- Simon Mackintosh, Turcan Connell WS (focusing on Scotland)
- Michael King, Stone King Solicitors (focusing on religion) and
- Kenneth Dibble, Head of Legal Services at the Charity Commission (focusing on the Charity Commission's role in relation to public benefit).

The sub-committee also benefited from the external contributions of Richard King of Tozers Solicitors, Vicki Bowles of Stone King Solicitors, Jane Hobson of the Charity Commission and Dr Alison Dunn of Newcastle University.

Means of redress
Dominic Fox, Chief Executive of the Association of Charitable Organisations (chair)
Among other written evidence including academic articles and official guidance, the sub-committee considered in particular the contributions from Debra Morris, Director of the Charity Law Unit at the University of Liverpool.

The sub-committee also held an evidence taking session during which specific contributions were made by:

- Alison McKenna, Charity Tribunal (focusing on the work of the Tribunal over the past 5 years);
- Kenneth Dibble, Head of Legal Services at the Charity Commission (providing information on the Charity Commission’s approach to Tribunal proceedings); and
- Kevin McGinty, Attorney General’s Office (explaining the role of the Attorney General in charity cases).

**Regulation of Fundraising**

Tanya Steele, Executive Director of Fundraising at Save the Children (chair)
Peter Lewis, Chief Executive of the Institute of Fundraising
Mike Wade, Director of Fundraising & Communications at the National Deaf Children’s Society
Dan Corry, Chief Executive of New Philanthropy Capital
Helen Parker, Assistant Chief Executive at Which?
Nicky Bishop, Fundraising and Development consultant

In order to better inform its work, the sub-committee held a number of evidence sessions during which it heard from the following people:

- Karl Wilding, NCVO, on the trends and characteristics of UK giving;
- Joe Saxton, nfpSynergy, on trust in charities and its drivers;
- Alistair McLean, FRSB, on the experience of the FRSB over the past 5 years and whether the self-regulation regime needs to be improved;
- Toby Ganley, PFRA, on the role of the PFRA and the regulation on ‘face-to-face fundraising’;
- Warren Alexander, Charity Retail Association, on the problems experienced with the present regime of licensing of public charitable collections.

The sub-committee also received written evidence from:

- Beth Breeze, Centre for Philanthropy of the University of Kent, on the giving levels and trends within major donors;
- John Miley, National Association of Licensing and Enforcement Officers, on licensing for charitable door to door collections.
Sub-committee on charities and political activities

Rosie Chapman, independent charity advisor, Belinda Pratten and Rosie Chapman Associates, and former Director of Policy & Effectiveness, Charity Commission (chair)
Sarah Shimmin Gilbert, NCVO Senior Advisor for Campaigning and Effectiveness
Brian Lamb, Policy and Public Affairs Consultant
Linda Butcher, CEO Sheila McKechnie Foundation
Caroline Cooke, Head of Policy Engagement & Foresight at the Charity Commission
Rosamund McCarthy, partner at Bates Wells & Braithwaite
Kay Boycott, Director of Communications Policy and Campaigns at Shelter
Annex IV - Summary of Charity Tribunal cases since its creation

Determinations in which the matter was struck out or transferred

1. The Reverend Sophy Wahab v The Charity Commission for England and Wales, CA/2010/0009:
The Reverend Sophy Wahab was the trustee of the charity called the Watford Apostolic Pentacostal Church. She raised concerns about alleged misconduct and mismanagement in the administration of the charity. She sought to appeal purported decisions of the Charity Commission, which were characterised as, inter alia, decisions not to make an order under section 26 of the Charities Act 1993. The Tribunal found that none of the decisions satisfied this definition and stated that the decisions did not otherwise engage appeal or review rights before the Charity Tribunal.

2. Christopher Lasper v The Charity Commission for England and Wales, CA/2010/0006:
Mr. Lasper sought to appeal a decision of the Charity Commission not to remove 'The Town Field' (a piece of open land) from the register of charities. He submitted that any charitable trusts on which the Town Field may originally have been held had been extinguished. The Tribunal found that he was not a person who was or who may have been affected by the decision, and so he did not have standing.

3. Pat Cumbers v The Charity Commission for England and Wales, CA/2010/0005:
Pat Cumbers, a former trustee of the Melton Mowbray Town Estate, sought to appeal the response of the Charity Commission following complaints about the charity's governance and the conduct of its trustees. The Tribunal held that the matter challenged (a decision of the Outcome Review Panel) was not a decision, order or direction falling within column one of the Table in Schedule 1C to the Charities Act 1993 (as amended by the Charities Act 2006) and so there was no jurisdiction to hear the matter.

4. Philip Donald Moss v The Charity Commissioner for England and Wales, CA/2010/0004:
Philip Donald Moss sought to appeal in relation to the same matter as Pat Cumbers (above), and his case was struck out on the same grounds.

5. Basharat Hussain v The Charity Commission for England and Wales, CA/2010/0003:
Mr. Hussain, a trustee of the Imamia Mission London, sought to appeal the alleged failure of the Charity Commission to investigate misconduct in the administration of the charity. There was no identifiable decision, order or direction falling within column one of the Table in Schedule 1C. There was no jurisdiction and but points of administrative law were raised. The matter was transferred to the Administrative Court.

6. Professor Leon Poller v The Charity Commission for England and Wales, CA/2010/0002:
A former trustee of the Manchester and District Home for Lost Dogs sought to appeal a determination by the Charity Commission which reviewed a complaint about the conduct of the trustees of the charity. This did not fall within the Table in Schedule 1C. Accordingly, the Tribunal decided there was no jurisdiction to hear the matter.

7. Geoffrey Morris, Mr Edward Mason (appeal in respect of Romsey Public Walk and Pleasure Ground), CA/2010/0001:
Mr. Morris and Mr. Mason sought a review of the orders of the Charity Commission (under sections 26 and 36 of the Charities Act 1993) allowing a charity, the Romsey Public Walk and Pleasure Ground, to authorise a trustee to grant an easement over part of the charity land for use as a church car park. Mr. Morris and Mr. Mason were beneficiaries of the charity and submitted that the use of the land as a car park would represent a breach of trust and loss of amenity for local people. The Tribunal held that there is a right to have a decision reviewed if the Charity Commission actually refuses to make an order under s.26 or s.36 of the Charities Act 1993, but not where it makes a positive decision to make such orders. In relation to s.26 orders, it is only the charity or its trustees who may apply for a review, whereas a wider class of persons (including beneficiaries) may apply to the Tribunal for review of a s.36 Order. Mr. Morris and Mr. Mason did not have standing and there was no jurisdiction to hear the matter.

8. Eyob Ghebre–Sellassie, African Aids Action (the Charity) and the Charity Commission for England and Wales, CA/2009/0004:
The Charity Commission issued an ‘Action Plan’ requiring that the trustees and former trustees of the charity, African Aids Action, must account for payments which had not been authorised by the Commission or by the charity’s governing document. The issue was whether this was a decision, order or direction within column one of the Table in Schedule 1C. The Tribunal held that it was not: a finding of fact or other conclusion reached during an inquiry was not in itself a decision, order or direction which may be appealed to the Tribunal. There was no decision following the inquiry, so there was no jurisdiction to hear this aspect of the intended appeal. In relation to the other decisions on which appeal was sought, there was jurisdiction in principle. These were the Charity Commission's decision to institute an inquiry under section 8 of the Charities Act 1993 and the decision to make a Freezing Order under section 18 of the Charities Act 1993. However, the appeal against these decisions was time-barred.

9. Mr. David Holland and Mr. Vince Piffero v The Charity Commission for England and Wales, CA/2010/0008:
The appellant was a trustee of the charity ‘Litcham Relief in Need’. He appealed against a purported decision of the Charity Commission not to make a decision under s.26 of the Charities Act 1993 to make an order sanctioning a proposed course of action in the administration of the charity. The course of action proposed by the appellant was that either a new trustee body be appointed or that the charity be wound up and its assets distributed to another charity. The Tribunal held that a decision of the Charity Commission not to make a decision under s.26 of the 1993 Act was within the jurisdiction of the Tribunal. Such a decision was amenable to review rather than to appeal. However, there was no jurisdiction because no explicit or implicit request had ever been made for an order under s.26 of the Charities Act 1993. Moreover, the course
of action proposed was not one of a kind that could be sanctioned under s.26 in any event.

Substantive determinations

1. **UTurn UK CIC v Charity Commission for England & Wales, CA/2011/0006:**
   A company, Utturn UK CIC, appealed against the Charity Commission's refusal to enter it on the register of charities. The reason for the refusal was that the purpose for which it was established, namely, the promotion of "street associations", did not represent an exclusively charitable purpose, under section 2(2) of the Charities Act 2006. The Tribunal dismissed the company's appeal, holding that there was no way in which the company could have oversight over the activities of a "street association": it could operate for purposes other than charitable ones.

2. **Ground, Pople, Lemieux & Lawrence v Charity Commission for England and Wales and The Guildford Diocesan Board of Finance, CA/2011/0004:**
   The Tribunal exercised its power to amend a Scheme established by the Charity Commission under section 14B of the Charities Act 1993 (Cy-près schemes). The property was given to the Dunsfold Church of England School Trust as a gift to be used as a Church of England school. It could no longer be used for the charitable purpose intended (the available schools not being Church of England schools). The Charity Commission Scheme established that it could be let on such terms as the trustee thought fit for charitable educational purposes and consistently with Church of England values. The dispute between the parties focused on the adequacy of the scheme and whether it would allow the property to be let to a secular school. The Tribunal amended the terms of the scheme to allow preferential consideration of schools operated in a manner consistent with the principles of the Church in the Dunsfold region.

3. **Full Fact v Charity Commission for England and Wales, CA/2011/0001:**
   The appellant company appealed against the decision of the Charity Commission to reject its application for registration as a charity. The Charity Commission had determined that Full Fact did not meet the statutory definition of a charity, which required that the institution be established for exclusively charitable purposes and that its activities be for the public benefit. The Tribunal held that the following were charitable purposes: “Promoting the advancement of citizenship and community development”, “Promoting the advancement of civic responsibility and engagement” and “Promoting the advancement of public education” [in relation to the above]. However, the following was not an exclusively charitable purpose: “Promoting informed public discourse and debate on matters of public concern [in relation to the above] by making available full, accurate and relevant facts concerning the same.” This was neither an exclusively charitable purpose nor was it necessarily for the public benefit: it permitted a political purpose to be pursued.

4. **Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales, CA/2010/0007:**
The Catholic Care (Diocese of Leeds) appealed against the decision of the Charity Commission ("the Commission") to refuse its consent for the charity to amend the objects clause in its Memorandum of Association so as to permit it to refuse to offer its adoption services to same sex couples. The Charity argued that unless it were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters, on which it relied to run the adoption service. It would therefore have to close its adoption service permanently on financial grounds. The Charity submitted that the less favourable treatment it proposed to offer to same sex couples would constitute a proportionate means of achieving a legitimate aim, as required by s.193 of the Equality Act 2010, namely, increasing the number of adoptive families available to ‘hard to place’ children. The Tribunal dismissed the appeal, finding that the charity's proposed means of achieving this aim would fail: the pool of potential adopters would be decreased by excluding same sex couples from assessment by the Charity itself and by potentially causing the loss of suitable same sex couples from the adoption system as a whole.

[Subsequently overturned on appeal]

The appellants objected to a Charity Commission Scheme concerning a parcel of land within a recreational park in Dartford, which was held on distinct charitable trusts. The Tribunal examined and subsequently amended the terms of the Scheme. The Tribunal found that the charitable purpose of the gift (the provision of a public recreation ground) could be carried on in perpetuity on other land. The Council as trustee could dispose of the land, provided it acquired replacement land which would be suitable for the furtherance of the charity's purposes.

The appellant appealed against the decision of the Charity Commission to remove him from the position of trustee, officer and agent of the charity Sivayogam, under section 18(2)(i) of the Charities Act 1993. The Tribunal was not satisfied that the Appellant's conduct constituted misconduct or mismanagement in the administration of the charity. The appeal was allowed.

Cases not yet listed for substantive hearing:

1. Raleigh Ltd v Charity Commission for England and Wales, CRR/2011/0001;

2. Raymond Allis & Mr Martin Hesketh v The Charity Commission for England & Wales and Lytham Schools Trustee Ltd and The United Church Schools Trust, CA/2011/0007.

Note on the significance of the substantive Tribunal determinations:
It is arguable that the only cases in which the Tribunal’s determinations have made a real difference were *Ground and others* and *Derek Maidment*. In these determinations, the Tribunal substituted its own provisions for those in the Charity Commission’s Schemes. However, the changes made by the Tribunal to the Schemes in question were fairly minor:

- In the *Derek Maidment* case, the Tribunal had ruled that the charitable purpose of the gift (the provision of a public recreation ground) could be carried on in perpetuity on other land and that the Council as trustee could dispose of the land provided it acquired suitable replacement land. The Tribunal’s amended Scheme included a framework within which a Code of Conduct could be developed to regulate the identification and management of the conflicts of interest.

- In *Ground and others*, the Scheme was amended by the Tribunal in a relatively minor way. The provisions substituted for those in the Charity Commission’s Scheme provided for prioritised consideration to be given to Church of England Schools, for the school to provide for the children of residents in the parish of Dunsfold and for an independent expert to assess a school’s eligibility.

The determinations in *Full Fact* and *UTurn* upheld the Charity Commission’s decisions that these two bodies could not be entered on the register of charities because their purposes were not exclusively charitable.

The Tribunal’s determination in the *Catholic Care (Diocese of Leeds)* case was overturned upon appeal to the High Court (ref [2010] EWHC 520 (Ch)).

In *Seevaratnam*, the Tribunal’s determination was largely academic: the Tribunal did not restore the appellant to office because he had indicated his intention to retire.