

7-1-2015

The Charity Commission for England and Wales: A Fine Example or Another Fine Mess?

Debra Morris

School of Law and Social Justice, Liverpool

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Business Organizations Law Commons](#), [Comparative and Foreign Law Commons](#), [European Law Commons](#), [Nonprofit Organizations Law Commons](#), [Taxation-Transnational Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Debra Morris, *The Charity Commission for England and Wales: A Fine Example or Another Fine Mess?*, 91 Chi.-Kent L. Rev. 965 (2016).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol91/iss3/6>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

THE CHARITY COMMISSION FOR ENGLAND AND WALES: A FINE EXAMPLE
OR ANOTHER FINE MESS?

DEBRA MORRIS*

INTRODUCTION

The fact that the Charity Commission is the regulator of charities in England and Wales, responsible for regulating more than 164,000 registered charities, has rarely been called into question. Until now. Following a critical report from the National Audit Office in December 2013 which said that the Commission was in need of “radical change,”¹ the Chair of the Public Accounts Committee (PAC) described the Charity Commission as not “fit for purpose.”² In its formal response to the PAC report³ in April 2014, the Chair of the Charity Commission stated that the Commission would need adequate funding and stronger legal powers if it is to meet Parliament’s expectations.⁴ As “registrar, enabler and tackler of abuse in a large, diverse and virtually entirely voluntary charitable sector,”⁵ the Charity Commission faces an almost impossible task. This article examines how the Charity Commission got itself in such a mess and will consider what the future holds for the regulator.

* Charity Law & Policy Unit, School of Law and Social Justice, University of Liverpool, UK.
Email: Debra.Morris@liverpool.ac.uk

1. COMPTROLLER & AUDITOR GEN., THE REGULATORY EFFECTIVENESS OF THE CHARITY COMMISSION: HC 813, 2013–14 SESSION ¶ 26 (2013) (UK), www.nao.org.uk/wp-content/uploads/2013/11/10297-001-Charity-Commission-Book.pdf [hereinafter REGULATORY EFFECTIVENESS].

2. Rajeep Syal, *Charity Commission ‘Not Fit for Purpose’ says Margaret Hodge*, GUARDIAN (Dec. 3, 2013, 7:02 PM), <http://www.theguardian.com/society/2013/dec/04/charity-commission-not-fit-for-purpose-says-hodge>.

3. HOUSE OF COMMONS COMM. OF PUB. ACCOUNTS, THE CHARITY COMMISSION, FORTY-SECOND REPORT OF SESSION 2013-14 (2014) (UK), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublic/792/792.pdf> [hereinafter CHARITY COMMISSION].

4. Press Release, Charity Comm’n, Commission Chairman Calls for Adequate Funding and Stronger Powers (Apr. 10, 2014), <http://www.gov.uk/government/news/commission-chairman-calls-for-adequate-funding-and-stronger-powers> [hereinafter Charity Commission Press Release].

5. The Commission was described by its then Chief Executive, Sam Younger, upon the publication of the National Audit Office report. See Andy Ricketts, *Criticisms Are Unjustified, Says Regulator*, THIRD SECTOR (Dec. 4, 2013), <http://www.thirdsector.co.uk/national-audit-office-criticisms-unjustified-says-regulator/governance/article/1223652>.

Austerity measures have led to the Commission's budget being almost halved in real terms since 2007/08. Can all its recent troubles therefore be simply explained away by this severe lack of resources or is the Charity Commission (as we know it) coming to the end of its useful life?

The article will begin by briefly setting the scene, illuminating the intense scrutiny that the Charity Commission has undergone and some of the reasons behind that. It will then focus on the Commission's foray into the political arena, a turn of events which could impact significantly on its credibility as a regulator. It will also refer to questions that have been raised about the appointment processes for its key personnel and about the proper role of Board members, before turning to a potentially more positive development which is the strengthening of the legal framework for the Charity Commission. This will be considered alongside the corresponding important issue of how the Commission will be resourced in the years ahead. The article will conclude by considering what the future holds for a slimmed down but strengthened Charity Commission.

I. THE CHARITY COMMISSION UNDER SCRUTINY

Charity law in England and Wales⁶ was subject to major reform by way of the Charities Act 2006 (now largely consolidated in the Charities Act 2011). As well as providing the first statutory definition of charity and making various other changes to the legal framework for charities, it established the Charity Commission as a corporate body (as opposed to a group of individual Commissioners) and introduced a new constitutional framework which clarified the Commission's objectives, functions and duties, and how it should operate. In short, it restructured the Charity Commission and provided a new regulatory framework for charities.

6. This article is limited to the case of England and Wales. For constitutional purposes, charity law is a devolved matter in the United Kingdom. The supervision and regulation of charities have been devolved to the Scottish Executive (Scottish Charities Office) and to the Northern Ireland Assembly (the Charities Team in the Department for Social Development) for purposes other than tax. Reform in Scotland and Northern Ireland is the subject of separate local initiatives. In the past, provisions for regulating charities have differed significantly in each jurisdiction, but Scotland and Northern Ireland now have similar regulatory regimes to that in England and Wales, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005 and the Charities Act (Northern Ireland) 2008. The Scottish reforms precede the English ones and the Northern Irish ones came later.

It is crucial that the regulatory framework is robust so that charities are able to raise billions for good causes, deliver high quality public services and generate indirect benefits through social action and creating stronger communities. Without an effective system of regulation charities would not be able to do this. Such a system costs money. Over the last few years, government austerity policies have led to swinging spending cuts, resulting in a significant reduction in the Charity Commission's resources. Between 2007–08 and 2013–14, with the number of registered charities remaining reasonably static,⁷ the Commission's annual budget fell by 40 percent in real terms to £22.7 million.⁸ Ongoing government spending reviews mean that the Commission's budget will fall further to £20.4 million by 2015–16—a staggering reduction of 48 percent in real terms since 2007–08.⁹

The Charity Commission's regulatory performance has recently attracted considerable public and Parliamentary interest. The Charities Act 2006 included the requirement¹⁰ to review its operation within five years of Royal Assent and this took effect by way of a review carried out by Lord Hodgson. This was published and laid before Parliament in July 2012.¹¹ Lord Hodgson made some 115 recommendations covering wide-ranging aspects of charity law and regulation. He highlighted some gaps in the powers of the Charity Commission and made a number of recommendations related to its role including that it should prioritize its core functions¹² and that it should be a more proactive regulator.¹³ Lord Hodgson also recommended that the government should consider if and how to widen the types of criminal offenses disqualifying individuals from charity trusteeship, taking into account the need to support rehabilitation of former offenders.¹⁴

7. There are currently over 164,000 registered charities with a combined annual income of £61.4 billion. See Draft Protection of Charities Bill 2013-4, CM [8954] 5 (Eng.), <http://www.gov.uk/government/publications/draft-protection-of-charities-bill> [hereinafter Draft Charities Bill].

8. REGULATORY EFFECTIVENESS, *supra* note 1, at ¶ 1.12.

9. *Id.*

10. Charities Act 2006, 2 Eliz. c. 50, §73 (Gr. Brit.).

11. See MINISTER FOR THE CABINET OFFICE, TRUSTED AND INDEPENDENT: GIVING CHARITY BACK TO CHARITIES, REVIEW OF THE CHARITIES ACT 2006 (2012) (UK), www.gov.uk/government/consultations/charities-act-2006-review, for Lord Hodgson's review of the Charities Act 2006 [hereinafter REVIEW OF CHARITIES ACT 2006].

12. These should be: "(a) Registering charities (and maintaining an accurate register); (b) Identifying, deterring, and tackling misconduct and abuse of charitable status; and (c) Providing the public with information (in a relevant form which is easily understood by the public) about charities, and charities with information about charity law." *Id.* at 58.

13. *Id.*

14. *Id.* at 43.

Before the government published its response to Lord Hodgson's review, in June 2013, the House of Commons Public Administration Select Committee (PASC) published its report, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006*.¹⁵ This was another wide-ranging review in which the PASC urged the Commission to concentrate on regulation and noted the limitations on its powers to deregister suspect charities.¹⁶ The report stated¹⁷:

Ministers must decide whether they think it is necessary to have a proactive regulator of the charitable sector, and if so, the government must increase the Commission's budget and ask Parliament to clarify their powers. If funding cannot be found for the Commission to carry out such a role, ministers should be explicit that they accept that the regulatory role of the Commission will, by necessity, be limited.

The government made a joint response to both the Hodgson review and the PASC report,¹⁸ largely accepting all the points made about the Charity Commission's powers and role. The response stated that there was also a need to consider whether there were loopholes in the way that the current powers to suspend and remove trustees operated, and that the Law Commission¹⁹ had been asked to consider this recommendation. It was indicated, however, that "if an early legislative opportunity arises the government may take this recommendation forward outside of the Law Commission project."²⁰

High profile cases have also led to the recent publication of a number of critical reports on the work of the Charity Commission. Crit-

15. HOUSE OF COMMONS PUB. ADMIN. SELECT COMM., *THE ROLE OF THE CHARITY COMMISSION AND "PUBLIC BENEFIT": POST-LEGISLATIVE SCRUTINY OF THE CHARITIES ACT 2006*, THIRD REPORT OF SESSION 2013-14 76 (2013) (UK), www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/76.pdf.

16. *Id.* at ¶ 20.

17. *Id.* at ¶ 25.

18. MINISTER FOR THE CABINET OFFICE, GOVERNMENT RESPONSES TO: 1) THE PUBLIC ADMINISTRATION SELECT COMMITTEE'S THIRD REPORT OF 2013-14: THE ROLE OF THE CHARITY COMMISSION AND "PUBLIC BENEFIT: POST-LEGISLATIVE SCRUTINY OF THE CHARITIES ACT 2006 2) LORD HODGSON'S STATUTORY REVIEW OF THE CHARITIES ACT 2006: TRUSTED AND INDEPENDENT, GIVING CHARITY BACK TO CHARITIES, CM 8700 (2013) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237077/Response-charities-legal-framework.pdf [hereinafter GOVERNMENT RESPONSES].

19. Before the publication of the Law Commission's consultation paper on technical issues in charity law in March 2015, the terms of reference for its work on charity law were amended in February 2015 to remove an examination of the grounds on which charity trustees may be suspended or removed and the circumstances in which a person is disqualified from being a charity trustee, as a result of the draft Protection of Charities Bill.

20. See GOVERNMENT RESPONSES, *supra* note 18, at 25.

icism has focused upon its compliance and enforcement work, including its perceived reluctance to use available powers and its apparent lack of focus on dealing with serious wrongdoing. In the Cup Trust case, the Charity Commission came under the spotlight for its inability to regulate tax evasion involving charities. In that case, the Charity Commission was obliged to register the Cup Trust as a charity when it was established with a British Virgin Islands company as its only trustee, but then the Commission did not have the means of investigating potential tax fraud, which is the role of HM Revenue and Customs (HMRC). Although the Cup Trust generated “income” of £176 million, only £55,000 had been given to charitable causes, and the Cup Trust claimed Gift Aid tax relief of £46 million.²¹ Despite its declared charitable aims, it is clear that the Trust was set up as a tax avoidance scheme by people known to be in the business of tax avoidance. In June 2013, the House of Commons Public Accounts Committee (PAC) published its report on the Charity Commission’s handling of the Cup Trust.²² In its report, the Committee concluded that the Cup Trust was set up as a tax avoidance scheme and expressed dismay at the Commission’s handling of the case. The PAC asked the National Audit Office to review the Commission’s effectiveness as a regulator and to report back to Parliament.²³

Following this high-profile regulatory failure, alongside a report examining the Charity Commission’s investigation of The Cup Trust case,²⁴ in a more extensive report the National Audit Office (NAO) reviewed the Commission’s regulatory effectiveness and concluded that “the Commission does not do enough to identify and tackle abuse of charitable status” and “is not regulating charities effectively.”²⁵ As well as stating that the Charity Commission should make better use of existing statutory powers, the NAO’s recommendations included that the Cabinet Office should assist the Commission in securing legislative changes to address gaps and deficiencies in the Commission’s powers.

21. HOUSE OF COMMONS COMM. OF PUB. ACCOUNTS, CHARITY COMMISSION: THE CUP TRUST AND TAX AVOIDANCE, SEVENTH REPORT OF SESSION 2013-14 3 (2013) (UK), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublic/138/138.pdf>.

22. *Id.*

23. *Id.* at 11.

24. COMPTROLLER AND AUDITOR GEN., CHARITY COMM’N, NAT’L AUDIT OFFICE, THE CUP TRUST (2013) (UK).

25. REGULATORY EFFECTIVENESS, *supra* note 1, at ¶ 24.

The NAO report formed the basis of a hearing of the PAC which published a further highly critical report in February 2014,²⁶ describing the Charity Commission as a reactive regulator which did not use its powers properly. In its response to the recommendations in the report, the Charity Commission called for adequate funding and stronger legal powers to meet Parliament's expectations.²⁷

Further calls for stronger powers were also made by the Prime Minister's extremism taskforce,²⁸ set up following the killing of Drummer Lee Rigby in Woolwich. In its report, it was noted that some extremist groups target charities and seek to exploit and benefit from charitable status.²⁹ Similarly, in 2014, the Home Affairs Committee on Counter Terrorism reported that it was deeply concerned with the potential for "bogus" charities to dupe members of the public into raising funds which are ultimately used to support terrorist activity.³⁰ It recommended that the Charity Commission be granted extra resources and stronger legal powers to counter the abuse of charities by terrorists.

When the NAO published its report, the previous government released proposals to give the Charity Commission new statutory powers. After public consultation on extending the Charity Commission's powers to tackle abuse in charities,³¹ these proposals were refined and a draft Bill³² was published. The draft Bill was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament,³³ and following the government response³⁴ to its recommendations, the Bill

26. CHARITY COMMISSION, *supra* note 3.

27. Charity Commission Press Release, *supra* note 4.

28. HM GOVERNMENT, TACKLING EXTREMISM IN THE UK: REPORT FROM THE PRIME MINISTER'S TASK FORCE ON TACKLING RADICALISM AND EXTREMISM (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263181/ETF_FINAL.pdf

29. *Id.* at ¶ 2.1.

30. HOME AFFAIRS COMM., COUNTER-TERRORISM, SEVENTEENTH REPORT OF SESSION 2013-14 ¶ 134 (2014) (UK), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf>.

31. MINISTER OF THE CABINET OFFICE, CONSULTATION ON EXTENDING THE CHARITY COMMISSION'S POWERS TO TACKLE ABUSE IN CHARITIES, CM 8954 ¶ 1, at 3 (2013) (UK), www.gov.uk/government/uploads/system/uploads/attachment_data/file/263248/Consultation-on-Extending-the-Charity-Commissions-powers_4-December.pdf.

32. Draft Charities Bill, *supra* note 7.

33. HOUSE OF LORDS HOUSE OF COMMONS, JOINT COMM. ON THE DRAFT PROTECTION OF CHARITIES BILL ¶ 1-2, at 5 (2015), www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/108.pdf.

34. MINISTER FOR THE CABINET OFFICE, GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON THE DRAFT PROTECTION OF CHARITIES BILL, CM 9056 (2015) (UK),

was further strengthened. Following the general election in May 2015, The Charities (Protection and Social Investment) Bill 2015–16 was announced in the Queen’s Speech on May 27, 2015, and received its first reading in the House of Lords the following day. Following its passage through Parliament, the Bill received Royal Assent in March 2016 and is now an Act of Parliament.

Before turning to examine the powers contained in the Charities (Protection and Social Investment) Act 2016, the following sections will focus on other problems that have befallen the Charity Commission in recent times. First of all, we will look at the concerns that have been raised about the politicization of the Charity Commission and its over-active intervention in charities’ campaigning activities.

II. THE POLITICIZATION OF THE CHARITY COMMISSION

In the recent past, as well as the scandals and concerns referred to above, the Charity Commission has also been in the spotlight due to allegations that its reputation for independent regulation has been damaged. Over-reach into the workings of charities through the Commission’s draconian approach to limiting charities’ right to campaign has gone hand in hand with several Conservative Party politicians mounting vigorous attacks against individual charities for their campaigning activities. In September 2014, for example, Brooks Newmark, in his maiden speech as the new Minister for Civil Society,³⁵ said that charities should stay out of “the realms of politics” and “stick to their knitting.”³⁶ Whilst the current Chair of the Commission, William Shawcross, is not a member of any political party,³⁷ much of his message (particularly around the politicization of charities that he has raised as a concern for the sector, on par with terrorism, fraud and abuse of vulnerable beneficiaries³⁸) has become closely identified with the Conservative Party. Another related concern has been controversy

www.gov.uk/government/uploads/system/uploads/attachment_data/file/418029/government_response_to_the_joint_committee_on_the_draft_protection_of_charities_bill_Cm_9056_print.pdf.

35. He resigned shortly thereafter, as a result of a sex scandal, and was replaced by Rob Wilson who has retained the post in the new government.

36. Rowena Mason, *Charities Should Stick to Knitting and Keep Out of Politics, Says MP*, GUARDIAN (Sept. 3 2014), <http://www.theguardian.com/society/2014/sep/03/charities-knitting-politics-brook-newmark>.

37. He had been a member of the Labour Party briefly when he was “a very young person in the 1960s.” HOUSE OF COMMONS PUB. ADMIN. SELECT COMM., APPOINTMENT OF THE CHAIR OF THE CHARITY COMMISSION, FOURTH REPORT OF SESSION 2012–13 EV 15 (2012) (UK).

38. See, e.g., William Shawcross, Address to the National Federation of Women’s Institutes Annual General Meeting (June 1, 2013).

surrounding the appointment process adopted for the Chair of the Charity Commission and allegations of party political bias. It is somewhat ironic that the Charity Commission, charged with ensuring an absence of party political bias on the part of the charities that it regulates, appears to have allowed itself to fall into this trap.

The Charity Commission is a Non-Ministerial (government) Department (NMD). NMDs are government departments in their own right—but they do not have their own Minister. They have their own estimate (money voted directly by Parliament) and separate resource accounts.³⁹ Unlike some other regulatory NMDs, the Charity Commission is not subject to ministerial direction or control in the exercise of any of its functions or powers. This reflects the view that the Commission should be able to operate independently of government influence, but that it should have access to government. The Charities Act 2011⁴⁰ makes it clear 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.” Any *perception* of the Charity Commission’s lack of independence is damaging, whether that perception reflects reality or not⁴¹:

A charity regulator perceived to be political risks undermining perceptions of charities more generally It is not necessary to accept that the accusations of political bias levelled against both current and previous Commission boards have any merit in order to see that they can be damaging. Charities cannot afford for their regulator to be anything other than beyond all suspicion.

Any developments that suggest politicization at the Charity Commission are therefore of considerable concern, since they undermine the position of the Commission and its ability to be seen as a credible regulator of the charity sector.

One example concerns the Charity Commission’s treatment of the charity Oxfam.⁴² In December 2014, following complaints from a Conservative member of Parliament, Conor Burns, about Oxfam and its

39. CABINET OFFICE, CATEGORIES OF PUBLIC BODIES: A GUIDE FOR DEPARTMENTS 9 (2012) (UK), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80075/Categories_of_public_bodies_Dec12.pdf.

40. Charities Act 2011, 2 Eliz. c. 25 §13(4) (Gr. Brit.).

41. NCVO, CHARITY COMMISSION INDEPENDENCE: NCVO DISCUSSION PAPER 1 (2015), http://www.ncvo.org.uk/images/documents/policy_and_research/independence_and_values/charity-commission-independence-ncvo-discussion-paper-april-2015.pdf [hereinafter NCVO DISCUSSION PAPER].

42. See Debra Morris, *Charities and Political Activity in England and Wales: Mixed Messages*, 18 CHARITY L. & PRAC. REV. 109 (2016), for further detail of this case and others in which charity campaigning has been in the spotlight.

campaign on poverty in Britain, the Charity Commission rebuked the charity for sending a tweet which was considered to be critical of the government.⁴³ The concern was over an image that Oxfam sent from its Twitter account entitled “The Perfect Storm” which Burns suggested was “overtly political and aimed at the policies of the current government.”⁴⁴ The tweet contained a picture of a mock poster for an imagined film entitled “The Perfect Storm”. Under the title, a number of policy areas were cited and the text of the tweet suggested these were forcing more people into poverty. The tweet was part of a social media campaign leading up to the publication of a report on food poverty,⁴⁵ produced jointly by Oxfam, Church Action on Poverty and the Trussell Trust. The Charity Commission said that trustees should have clear oversight of the campaigning work of their charities including written authorization and sign-off procedures for sending tweets. So, the charity was admonished by the Charity Commission for linking welfare benefits cuts and zero-hour contracts with increased poverty in the UK.

Another scandal to embroil the Charity Commission, whilst raising concerns about its politicization and its consequent suitability as a regulator, stems from its treatment of CAGE, which became the subject of a judicial review. CAGE was granted permission by the High Court to proceed with its application for judicial review of letters sent by the Charity Commission in March 2015 to the Joseph Rowntree Charitable Trust (JRCT), the Roddick Foundation and a number of other charities. CAGE contended that the Charity Commission acted outside of its powers by exerting pressure on the Roddick Foundation and the JRCT with the alleged ultimate aim of discrediting and/or bankrupting CAGE.⁴⁶

CAGE is an advocacy group *without* charitable status and is consequently not subject to regulation by the Commission. It is “an inde-

43. CHARITY COMM’N, OPERATIONAL COMPLIANCE REPORT ON, OXFAM (202918) (2014) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431592/ocr_oxfam.pdf.

44. In a letter to the Chair of the Charity Commission dated June 10, 2014. See *Oxfam: MPs Shocked by ‘Disgraceful’ Political Campaigning*, TELEGRAPH (June 10, 2014, 12:38 PM), <http://www.telegraph.co.uk/news/politics/10888966/Oxfam-MPs-shocked-by-disgraceful-political-campaigning.html>.

45. NIALL COOPER ET AL., BELOW THE BREADLINE: THE RELENTLESS RISE OF FOOD POVERTY IN BRITAIN (2014), <https://www.trusselltrust.org/wp-content/uploads/sites/2/2016/01/Below-the-Breadline-The-Trussell-Trust.pdf>. This report shows that a combination of changes to the social security system, including a more punitive sanctions regime, a lack of decent work and rising living costs, are contributing significantly to food poverty.

46. Rebecca Ratcliffe, *Advocacy Group Cage Takes Legal Action Against Charity Commission*, GUARDIAN (June 4, 2015), <http://www.theguardian.com/society/2015/jun/04/advocacy-group-cage-takes-legal-action-against-charity-commission>.

pendent advocacy organisation working to empower communities impacted by the War on Terror. The organisation highlights and campaigns against state policies, striving for a world free from oppression and injustice.”⁴⁷ For example, it has campaigned, controversially, for the rights of detainees in Guantanamo Bay. In February 2015, the group attracted enormous (and largely critical) attention when one of its representatives suggested that contact with MI5 (the British security services) was partly responsible for the radicalization of a “beautiful young man” Mohammed Emwazi.⁴⁸ During the ensuing media frenzy, the Charity Commission effectively blacklisted CAGE by forcing two of its former funders with charitable status to publicly sever their relationships with the organization⁴⁹:

In these circumstances, the Commission took robust action and on Monday 2 March 2015 required further unequivocal assurances from the two charities that they have ceased funding CAGE and had no intention of doing so in the future.

One of those funders, the JRCT, whose funding to CAGE was already restricted for specific human rights purposes, then referred to the “intense regulatory pressure”⁵⁰ put upon its trustees to rule out any future funding.

In its judicial review application, CAGE contended that what the Charity Commission had described as “advice or guidance” was in effect the issuing of an order that it did not have the legal authority to issue, and it was therefore acting beyond its powers. The JRCT became an interested party in the case and submitted a skeleton argument to the court in which it stated that the Commission’s action could not be fairly seen as advisory only: “It was characterized at the time as a mandatory requirement to comply with the Charity Commission’s view of their fiduciary duties.”⁵¹ It concluded that the Commission “cannot

47. *About Us*, CAGE, <http://www.cageuk.org/about> (last visited Feb. 14, 2016).

48. Randeep Ramesh, *Cage Admits Mistakes After Scathing Report on Mohammed Emwazi Affair*, *GUARDIAN* (Oct. 18, 2015), <http://www.theguardian.com/world/2015/oct/18/cage-admits-mistakes-report-mohammed-emwazi-jihadi-john-isis-chief-executioner>. Mohamed Emwazi is better known by his nickname ‘Jihadi John’ who is believed to have beheaded several Western hostages in Syria and is now understood to have been killed by a drone attack in November 2015.

49. *Charity Commission Statement: Charities Funding CAGE*, *GOV.UK* (Mar. 6, 2015), <http://www.gov.uk/government/news/charity-commission-statement-charities-funding-cage>.

50. JOSEPH ROWNTREE CHARITABLE TRUST, JOSEPH ROWNTREE CHARITABLE TRUST’S RESPONSE TO TODAY’S CHARITY COMMISSION STATEMENT (2015) (UK), <http://www.jrct.org.uk/userfiles/documents/JRCT%20Media%20Statement%206%20March%202015.pdf>.

51. *The Advocacy Group Cage Has Done the Charity Sector a Service*, *THIRD SECTOR* (July 31, 2015), <http://www.thirdsector.co.uk/advocacy-group-cage-done-charity-sector-service/article/1358396>.

lawfully require trustees to fetter their future exercise of fiduciary discretion as to what may be in a charity's best interests in the light of future developments."

The outcome of the judicial review was eagerly awaited by the charitable sector, with its potential to have far-reaching implications in the future on relations between the sector and the Charity Commission. However, once the High Court hearing had begun, in front of the Lord Chief Justice, Lord Thomas, in a dramatic turn of events and upon exhortation from the bench, the judicial review was withdrawn after all three parties (CAGE, the JRCT and the Charity Commission) agreed the following statement⁵²:

(i) Trustees must be free to exercise their fiduciary powers and duties in the light of the circumstances that exist at the time, if acting properly within their objects and powers and in the best interests of the charity. The Commission does not seek to fetter charities' exercise of discretion whether to fund the charitable activities of CAGE for all time, regardless of future changing circumstances.

(ii) The Commission recognises that it has no power to require trustees to fetter the future exercise of their fiduciary powers under its general power to give advice and guidance. In consequence there is no obligation on the trustees of the JRCT to fetter the proper and lawful exercise of their discretion in future.

Clearly, an effective charity regulator must be able to prevent charity trustees from misusing their charitable funds. The question here was to define the boundaries of that misuse. Whilst CAGE's actions are obviously unpopular with "the establishment," the fact that no legal action was brought against it suggests that it did not do anything illegal. This, in turn, suggests significant over-reach on the part of the Charity Commission. It may also give the perception that the Commission's action was as a result of pressure exerted upon it by government. As the Charity Commission is soon due to acquire additional statutory powers through the enactment of the Charities (Protection and Social Investment) Act 2016,⁵³ it is important that it remains and, equally important, is seen to be remaining, impartial and independent from both government and party politics. A final ruling in the judicial review proceedings would have been helpful in this regard.

52. Order, *R. on the Application of Cage Advocacy UK Ltd. v. Charity Commission* [2015] CO/2562/2015.

53. See text *infra* note 68 et seq.

Some of the allegations around politicization at the Charity Commission have been personalized and focused on key people, such as its Chair, William Shawcross. It is not helpful therefore, that the process around his re-appointment has been called into question. Board members, including the Chair, are appointed by the Minister for the Cabinet Office. Each appointment is regulated and overseen by the Office of the Commissioner for Public Appointments. The Chair's appointment is subject to a pre-appointment hearing before the Public Administration and Constitutional Affairs Select Committee. In January 2015, William Shawcross' unexpected re-appointment for a second three-year term as Chair of the Commission,⁵⁴ eight months before the end of his first controversial term as Chair and less than four months before the general election, raised further concern about the politicization of the Commission.⁵⁵ This occurrence, together with more general concerns that successive Charity Commission Chairs have been subject to accusations of political bias in their work, led the National Council for Voluntary Organisations (NCVO) to undertake a review of the independence of the Commission.⁵⁶ The NCVO dismissed the idea of changing the legal status of the Charity Commission from Non-Ministerial (government) Department to some other kind of legal entity entirely. It then focused attention on the appointment process for the Commission's Chair and made the following proposals, with a view to increasing the involvement of parliament in the process:

- give formal control of the appointment to the House of Commons;
- widen the membership of the parliamentary committee responsible for the pre-appointment hearing so that it includes representatives of both houses;
- give parliament an effective power of veto at the pre-appointment hearing;
- make the term non-renewable and fixed;
- if there is to be reappointment, this should take place following a parliamentary hearing similar to the pre-appointment hearing; and,

54. Press Release, Cabinet Office, William Shawcross Reappointed as Chair of the Charity Commission (Jan. 25, 2015), <http://www.gov.uk/government/news/william-shawcross-reappointed-as-chair-of-the-charity-commission>.

55. Jill Sherman, *Charities Raise the Alarm After Watchdog Chief Gets New Term*, TIMES (Feb. 1, 2015, 11:28 AM), <http://www.thetimes.co.uk/tto/news/politics/article4340453.ece>.

56. NCVO DISCUSSION PAPER, *supra* note 41.

- require a unanimous vote for appointment.

These proposals are certainly worth considering for the future. As the Institute for Government noted in its report on the right role for Parliament in public appointments⁵⁷:

the credibility and authority of senior posts in important arm's length bodies (ALBs) - from the Charity Commission to the BBC Trust to the Bank of England - rests in large part on their actual and perceived independence from the executive.

Where questions of bias are concerned, perception is as important as reality.

Another problem to befall the Commission recently is around questions raised about the proper role of its Board members. This will be examined in the next section.

III. THE PROPER ROLE OF CHARITY COMMISSION BOARD MEMBERS

The Charity Commission has a Board consisting of a Chair and up to eight members who are responsible for its governance and strategy. Day-to-day management and operation of the Commission is delegated to the Chief Executive. Board members are office holders rather than employees; staff, including the Chief Executive, are all civil servants.

It has already been noted⁵⁸ that the Charity Commission was the subject of serious criticism in 2013, first from the Public Accounts Committee (PAC) for its handling of the Cup Trust case, and later, when both the PAC and the National Audit Office (NAO) concluded that it was not an effective regulator. This, together with the appointment of a new Chief Executive in early 2014, led to the Board of the Commission taking a much greater role in terms of providing leadership and tackling the serious issues that befell the Commission. However, a later report of the NAO has raised concerns about the extent of the Board's involvement in the workings of the Commission, blurring the executive and oversight functions of the Board⁵⁹:

there is a risk that if the board is too involved in executive decisions for an extended period the important separation between executive

57. AKASH PAUN & DAVID ATKINSON, INST. FOR GOV'T, *BALANCING ACT: THE RIGHT ROLE FOR PARLIAMENT IN PUBLIC APPOINTMENTS* 18 (2011) (UK), <http://www.instituteforgovernment.org.uk/sites/default/files/publications/Balancing%20Act.pdf>.

58. *See supra* notes 21–26.

59. COMPTROLLER & AUDITOR GEN., *FOLLOW-UP ON THE CHARITY COMMISSION* ¶ 4.18 (2015) (UK), <http://www.nao.org.uk/wp-content/uploads/2015/01/Follow-up-on-the-charity-commission.pdf>.

and non-executive becomes blurred, impairing the board's independence which is critical to its role of holding the executive to account.

One concrete example of this active involvement of Board members in operational cases was disclosed in the High Court in the CAGE judicial review proceedings. It became apparent that, following the press conference in which CAGE expressed some support for Mohammed Emwazi, internal emails were sent by a Board member to key personnel at the Commission including the Director of Investigations, Monitoring and Enforcement, pushing for the opening of a statutory inquiry into JRCT's funding of CAGE.⁶⁰ This led directly to the "intense regulatory pressure"⁶¹ that was brought to bear on JRCT and which then, in turn, led to CAGE's application for judicial review.

The Charities Act 2011 does give the Commission's Board the power to undertake executive activities⁶² and the NAO notes that it is understandable that Board members will spend time becoming acquainted with the details of the most difficult cases before the Commission.⁶³ However, it is the Chief Executive that is the Accounting Officer and ultimately accountable to Parliament for the Commission's performance. The Corporate Governance Code states that Board members should only exercise governance functions and not stray into the executive management of the department which is the role of officials.⁶⁴ The NAO report recognizes the tension here and notes that Board members "consider that they must be guided above all by the provisions of the Act."⁶⁵ The danger is that when Board members become too involved in the day-to-day activity of the Commission, it makes it very difficult to carry out their important oversight role, with the potential for a reduction in their ability to safeguard the Commission's independence. Following a review of the Charity Commission's

60. Stephen Cook, *Board Member Orlando Fraser Urged Charity Commission to Open Statutory Inquiry into Joseph Rowntree Charitable Trust*, THIRD SECTOR (Nov. 5, 2015), <http://www.thirdsector.co.uk/board-member-orlando-fraser-urged-charity-commission-open-statutory-inquiry-joseph-rowntree-charitable-trust/governance/article/1371496>.

61. See *supra* note 50 and accompanying text.

62. Charities Act 2011, 2 Eliz. c. 25 sch. 1 (Gr. Brit.).

63. FOLLOW-UP ON THE CHARITY COMMISSION, *supra* note 59, at ¶ 4.10.

64. HM TREASURY, *MANAGING PUBLIC MONEY* (2013) (UK),

http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454191/Managing_Public_Money_AA_v2_-jan15.pdf; HM TREASURY & CABINET OFFICE, *CORPORATE GOVERNANCE IN CENTRAL GOVERNMENT DEPARTMENTS: CODE OF GOOD PRACTICE* (2011) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220645/corporate_governance_good_practice_july2011.pdf.

65. FOLLOW-UP ON THE CHARITY COMMISSION, *supra* note 59, at ¶ 4.11.

governance framework and Board effectiveness, its re-stated governance framework acknowledges that in “fulfilling its responsibilities, the board pays particular attention to: . . . ensuring its independence.”⁶⁶ However, it is also noted that the Board has “the authority to intervene directly in operational matters, particularly those which affect the Commission’s reputation and performance.”⁶⁷

In the next section, we will turn to potentially more positive developments for the Commission—the legislative strengthening of its powers.

IV. STRENGTHENING THE CHARITY COMMISSION THROUGH LEGISLATION

It is not surprising to learn that the intense interest in and concern about charities and their regulation by the Charity Commission led to the publication of the Charities (Protection and Social Investment) Bill. As well as including powers to allow charities to make investments that generate both a social and a financial return,⁶⁸ the provisions in the new Act (which amend the Charities Act 2011) confer powers to strengthen the hand of the Charity Commission to tackle abuse more effectively.⁶⁹ The Commission has been seeking these powers and consequently is very much supportive of the new provisions. In addition, whilst some in the charitable sector (and others) questioned the need for some of the provisions or have concerns about what the Charity Commission will do with new powers, there was broad welcome for the Bill from key stakeholders.⁷⁰ Nevertheless, critics point to the Commission’s heavy-handed approach to the Joseph Rowntree Charitable Trust and other funders of CAGE⁷¹ as a note of caution, for example, and are seeking assurances that proper checks and balances are in

66. CHARITY COMM’N, *TRANSPARENCY DATA, GOVERNANCE FRAMEWORK* ¶ 5.9, at 8 (2015) (UK), <https://www.gov.uk/government/publications/charity-commission-governance-framework/governance-framework>.

67. *Id.* ¶ 5.7, at 7.

68. This follows recommendations from the LAW COMM’N, *SOCIAL INVESTMENT BY CHARITIES: THE LAW COMMISSION’S RECOMMENDATIONS* (2014) (UK), http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp216_charities_social_investment_recommendations.pdf.

69. Two new provisions were added to the Bill during its passage through parliament relating to charity fundraising. These will ensure that charities and professional fundraising organizations set out how they will protect vulnerable beneficiaries and the public in their agreements and also provide an obligation for larger charities to report annually on their fundraising activity and conduct. *See* Charities (Protection and Social Investment) Act 2016 §13–14 (UK).

70. *See, e.g.*, JOINT COMM. ON THE DRAFT PROTECTION OF CHARITIES BILL, *ORAL AND WRITTEN EVIDENCE* (2015) (UK), <http://www.parliament.uk/documents/joint-committees/draft-protection-of-charities/evidence-volume-protection-of-charities.pdf>.

71. *See supra* note 46 et seq. and accompanying text.

place to ensure that the Charity Commission remains accountable, objective and transparent in exercising these new powers.⁷²

The main provisions of the Charities (Protection and Social Investment) Act 2016 are intended to assist the Commission in tackling, preventing or correcting abuse in charities. First, the Act gives the Charity Commission a statutory power to issue charities with an official warning, so as to allow it to take a more proportionate approach to low-level misconduct and mismanagement. Apparently, when the Commission sends a “non-statutory” warning letter, up to 30 percent of charities that are contacted in this way fail to respond adequately.⁷³ Whilst the current version of this power contains more detail and stronger safeguards than the original proposal, charity practitioners are still very concerned about how this power will be used and then its use publicized, bearing in mind that its exercise is *not* subject to appeal to the Charity Tribunal.⁷⁴

Secondly, there are a number of provisions relating to disqualification. Existing criteria which automatically disqualify a person from charity trusteeship are to be extended to include people with unspent convictions for money laundering, terrorism offenses, bribery, misconduct in public office and perjury, and individuals subject to a terrorist asset-freezing designation. The new Act also gives the Charity Commission a discretionary power to disqualify individuals whose conduct makes them unfit to be a charity trustee. The Commission will be able to act subject to three tests: criteria must be met relating to the person’s past or present conduct; the Commission must consider the person unfit to serve as a charity trustee; and the Commission must be satisfied that disqualification was expedient in the public interest. The exercise of such a power by the Commission will be subject to appeal to the Charity Tribunal. Disqualification powers are also to be extended to include those who hold senior management positions. These powers in relation to automatic and discretionary disqualification have both caused concern. Whilst the Commission has sought to provide reassurance that it will use the new powers only when there is a clear case for doing so, the grounds for disqualification are wide-ranging and

72. Press Release, ACEVO, Charity Leaders Welcome CAGE Settlement Securing Trustees’ Rights (Oct. 22, 2015) (on file with author).

73. 10 June 2015, Parl Deb HL (2015) col. 800 (UK).

74. Rebecca Cooney, *Power to Warn Charities Could Become Commission’s ‘Weapon of Choice’*, *Says Solicitor Jo Coleman*, THIRD SECTOR (Oct. 9, 2015), <http://www.thirdsector.co.uk/power-warn-charities-could-become-commissions-commission’s-“weapon-of-choice-”,-says-solicitor-jo-coleman/governance/article/1367791>.

could threaten the independence of charities and the principle of voluntarism upon which the charitable sector relies so heavily.

Thirdly, the Act gives the Charity Commission power to direct that a charity be wound up following a statutory inquiry. This power would be used in rare situations where it can be shown that the continued existence of a charity would be harmful.

The combination of extreme funding cuts and harsh criticism about its competence has, somewhat understandably, forced the Charity Commission to focus on its core function of regulation or policing. The Charities (Protection and Social Investment) Act 2016 is clearly focused on strengthening the Commission's enforcement powers, as opposed to enhancing its advisory role, in terms of providing advice, information and support and other services that regulated charities should be able to expect from a regulator. Some may be of the view that the latter is more important for the regulator in terms of maintaining and raising standards of good practice, especially for the vast majority of the charitable sector, which is made up of small charities. Publicizing good practice and providing support can prevent serious incidents from occurring. Nevertheless, the provisions do address gaps and weaknesses in the Commission's existing powers and the Commission claims that it has "universal" support for the provisions. The Charity Commission commissioned a survey that found that 82 percent of members of the public support it being able to disqualify people with certain criminal convictions from trusteeship and to shut down charities following an inquiry into misconduct or mismanagement.⁷⁵ It then used this evidence to suggest that there was general broad support for the Bill. Its press release reacting to the survey suggests that the public "overwhelmingly support new powers for the Charity Commission"⁷⁶ despite the fact that only 47 percent of survey respondents said that they had even heard of the Charity Commission.

It is recognized that, even assuming that the new powers will be beneficial to the Commission and its overall objectives, using these powers is going to consume precious resources which have been systematically removed from the Charity Commission. It will be recalled

75. CHARITY COMM'N, TRUST AND CONFIDENCE IN THE CHARITY COMMISSION 61 (2015) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438017/Trust_and_Confidence_in_the_Charity_Commission_2015.pdf [hereinafter CHARITY COMMISSION RESEARCH STUDY].

76. Press Release, Charity Commission, Overwhelming Support for New Powers for Commission (June 25, 2015), <https://www.gov.uk/government/news/overwhelming-support-for-new-powers-for-commission>.

that public spending cuts have led to a budget reduction of almost one half since 2007–08.⁷⁷ It is not surprising therefore to learn that there have been calls for alternative sources of funding to be found for the Commission and these will be discussed in the next section.

V. STRENGTHENING THE CHARITY COMMISSION THROUGH ADDITIONAL RESOURCES

The drastic decline in the Charity Commission's budget has undoubtedly reduced its capacity to achieve its objectives. In October 2014, alongside the publication of the draft Protection of Charities Bill, the Treasury announced that it would allocate up to £8 million in investment over three years to the Charity Commission, which would be available from 2014–15.⁷⁸ The £8 million "invest to save" funding is being targeted at implementing risk-regulation and increasing the digitization of the Commission's services. Low risk transactions will be moved completely online so that resources will be focused on proactive regulation. This will generate efficiencies and release capacity which will be predominantly redeployed to high risk work. Whilst this short term injection of £8 million is welcome, it will soon be spent and the government is unlikely to provide additional stable funding for the Commission over the long term.

One obvious concern about giving more responsibility and control to the Charity Commission in the Charities (Protection and Social Investment) Act 2016 is that, in order take advantage of these powers, the Commission will need personnel and resources, thereby increasing its work load without any commensurate increase in its budget. For charities to be regulated effectively, the Charity Commission must be sufficiently funded. In a recent survey of key stakeholders, the most commonly cited reason to be concerned about the effectiveness of regulation was adequate funding, believing that the Commission has insufficient resources to regulate a large and diverse charity sector.⁷⁹

Charity regulation is currently entirely funded by the state and it is unsurprising to note that any suggestion of change to the status quo would generate much debate. There has been much discussion lately

77. See REGULATORY EFFECTIVENESS, *supra* note 1, at ¶ 1.12; *supra* Part I.

78. Press Release, Charity Commission, Charity Regulator Welcomes New Funding and Legislation to Strengthen its Powers (Oct. 22, 2014), <http://www.gov.uk/government/news/charity-regulator-welcomes-new-funding-and-legislation-to-strengthen-its-powers>.

79. CHARITY COMMISSION RESEARCH STUDY, *supra* note 75, at 48–49.

about whether charities should pay for (or at least contribute to the costs of) their own regulation. Lord Hodgson's review of the Charities Act 2006 acknowledged the Commission's dire funding situation and recommended that government should work with the Commission to develop a fair and proportionate system of charging for filing annual returns with the Commission and for the registration of new charities.⁸⁰ It was also suggested that options for charging for the provision of bespoke advice and authorizations should be explored. Since then, the Charity Commission has made it clear on a number of occasions that it is keen to encourage a debate about charging. The publication in June 2015 of its new strategic plan for 2015–2018⁸¹ is the closest that this has come to reality and could suggest that, whilst it may take some time,⁸² the introduction of some form of charging system may be inevitable. The strategic plan, published alongside the Charity Commission's annual report, notes that one of its four strategic priorities is to operate as an efficient, expert regulator with sustainable funding. In an attempt to reduce its "dependence on taxpayer funding," the Commission plans to consult on proposals for alternative funding options, including the introduction of an annual charge for registered charities.

Whilst no one would question the charity regulator's need to be well funded, this has raised all sorts of questions. For example, the Charity Commission must remain independent of government and the sector that it regulates, however it is funded in the future. The Commission's Chair himself raised this issue in a speech to a charities forum⁸³:

There are indeed very real questions to answer - including how the Commission's independence, which is so vital, would be protected under such an arrangement.

If the Commission were to be funded entirely by the sector, this would reinforce the Commission's independence from government. It

80. REVIEW OF CHARITIES ACT 2006, *supra* note 11, ¶ 6.61, at 75.

81. CHARITY COMMISSION, STRATEGIC PLAN 2015–18: GIVING THE PUBLIC CONFIDENCE IN CHARITIES (2015) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/439327/Strategic_plan_2015-18.pdf.

82. In October 2014, the Charity Commission Chief Executive said, "[Y]ou'll see the debate move at the speed of a glacier I think over the next two years." Alice Sharman, *Lord Hodgson and NCVO to Host Roundtable on Charities Funding the Charity Commission*, CIVIL SOCIETY (Oct. 7, 2014), http://www.civilsociety.co.uk/governance/news/content/18298/ncvo_and_.n_charities_providing_funding_for_the_charity_commission_says_sussex.

83. William Shawcross, Chairman, Charity Comm'n, Address at the Princess Royal Charities Forum (June 10, 2015), <https://www.gov.uk/government/speeches/on-24-june-2015-william-shawcross-addressed-the-princess-royals-charities-forum-at-buckingham-palace>.

would, however, give rise to a strange relationship between the Charity Commission and the sector that it regulates. If charities were paying for their regulation, they may well play a role in the way that the Commission operates. This could give the perception of the Commission being beholden to the sector, especially to the larger charities that may be making the largest contributions (depending on the charging system adopted).

In any event, it could be argued that the state has a responsibility to support the integrity of the sector. "In principle, regulation's the duty of government, not something you ought to be paying for as one who is regulated."⁸⁴ Some sectors do pay for all or part of their own regulation. For example, the Advertising Standards Authority is entirely funded through a levy paid by advertisers. However, there is a difference. Charities are non-profit making organizations, set up to benefit the public. The value of charities to society is already acknowledged through the generous tax benefits afforded both to charities themselves and their donors. Any money spent on regulation is money that is not spent on the charities' objects and therefore their beneficiaries and the public at large (since charities provide public benefit) will suffer. It is arguable therefore that it is for the public benefit for charities to be properly regulated and that this should be paid for out of the public purse.

A survey commissioned by the Charity Commission in 2015 unsurprisingly found that there is a clear difference of opinion between charities and the general public regarding how charity regulation should be funded.⁸⁵ Whilst two-thirds (68 percent) of charities believe that charity regulation should be funded entirely through general taxation, just a quarter (25 percent) of the general public share this view. In contrast, over two-thirds (69 percent) of the general public support charity regulation being partly or fully funded by a charge to charities, compared to under one quarter (23 percent) of charities. Charities also expressed views on the effect that introducing a charge might have on their expectations of the services provided by the Charity Commission. Half of the charities surveyed (54 percent) stated that paying for services would mean that they would expect a better service from the Charity Commission. One quarter (27 percent) of charities were of the view that paying would decrease their trust in the Charity Commission,

84. CHARITY COMMISSION RESEARCH STUDY, *supra* note 75, at 58.

85. *Id.* at 7.

although almost as many (21 percent) thought that it would make no difference to their attitudes towards the Charity Commission.

So, whilst the Charity Commission is (obviously) keen on pursuing this, and there is precedent with other regulators, charities are clearly not convinced. This is inevitable; there is unlikely to be strong support for a move to pay for what has previously been provided without charge. The Charity Commission will have to win over charities if this change is to happen smoothly, and, in order to do so, it will need to show how charging charities will result in a better service and will be of benefit to charities' beneficiaries.

Currently this concept is only being discussed in the abstract, but there are real questions to be considered about how charging would work in practice. The devil is, as always, in the detail. Comparisons have been made with the registrar of companies, Companies House. Anecdotal evidence gathered during the Hodgson review indicated that, although charging by the Charity Commission remains a very divisive subject, many could see the logic and need, particularly for small fees set on a cost recovery basis, similar to those charged by Companies House.⁸⁶ Hodgson noted that charities benefit from registration with and regulation by the Charity Commission, as it strengthens their brand and increases trust and confidence. The companies' regulator charges a range of statutory fees.⁸⁷ All charities with income over £10,000 are required to complete an Annual Return and charities with incomes over £25,000 are required in addition to submit annual accounts.⁸⁸ These annual submissions could trigger a fee in the future, although Hodgson recognized that there is slight risk that this may discourage compliance. Another option would be to charge charities for registration—although with only 4,648 new registrations in 2014–15,⁸⁹ this would not seem likely to raise a significant sum of money. It has also been suggested that fees may be charged only to charities above a certain size⁹⁰:

86. See, e.g., REVIEW OF CHARITIES ACT 2006, *supra* note 11, at ¶ 6.59.

87. See Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2012, SI 2012/1907 (UK) for a full list of current fees. For example, for: filing of annual documents (£13 for online filing, £40 for paper filing); name change (£8 or £10); same-day registration (£30 or £100).

88. Charities Act 2011, 2 Eliz. c. 25 pt. 8, ch. 3, §145 (Gr. Brit.).

89. CHARITY COMM'N, ANNUAL REPORT AND ACCOUNTS, 2014–15 6 (2015) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/439357/Charity_Commission_Annual_Report_and_Accounts_2014_15_web.pdf.

90. 762 Parl Deb HL (3rd ser.) (2015) col. GC178 (UK) (Baroness Pitkeathley).

I suggest that a very high threshold would have to be set. I think that the commission itself has suggested a £100,000 a year income, but in my view that is not nearly high enough and the threshold would have to be much higher—say, income of £1 million before any fees were charged, and then there would have to be a sliding scale.

Given the fact that the income of registered charities is unevenly distributed, this would also substantially cut down the number of potential contributors. Latest figures from the Charity Commission⁹¹ show that 40.2 percent of the 165,277 registered charities have an income of £10,000 or less. These small charities have less than 1 percent of the income recorded. At the other end of the scale, around 6.6 percent of charities receive over 90 percent of the total annual income recorded. Just over 2,000 charities (1.3 percent of those on the register) attract over 70 percent of the total income. The easiest (and perhaps most profitable) form of fee collection might be to levy an annual uniform flat fee on all registered charities. An annual fee which were set as low as £25 would raise over £4.1 million per year. However, the costs for the Charity Commission of collection, particularly from the very large numbers of smaller charities, would also need to be factored into the equation. Instead of being funded from one source as is currently the case, the Charity Commission would have to put in place a new payment system, which would inevitably draw on resources which are currently directed towards the Commission's core functions.

There is also the possibility of charging fines to charities that fail to submit their annual accounts or are found guilty of some kind of misconduct. Again the numbers are unlikely to be very significant. In any event, the Charity Commission may then find itself conflicted in that its primary responsibility will be to ensure compliance, not to gain additional income from lack of compliance.

Whilst the Charity Commission survey suggests that "the general public" are largely supportive of charities contributing to the costs of their regulation, there are concerns that this may impact charitable donors in the future. Perhaps these concerns can be answered by an acknowledgment that donors already accept that charities pay reasonable expenses to cover the costs of running their charitable services and that this sum would simply be a small element of these overhead costs.

91. See *Official Statistics: Recent Charity Register Statistics: Charity Commission*, Gov.UK <https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission> (last visited Apr. 13, 2016).

Beyond England and Wales, the Office of the Scottish Charity Regulator (OSCR) and the Charity Commission for Northern Ireland do not currently charge charities. David Robb, Chief Executive of OSCR, has recently confirmed at a meeting of the All Party Parliamentary Group on Civil Society and Volunteering that OSCR has no plans to charge fees in the foreseeable future.⁹² Whilst the newly formed Australian Charities and Not-for-profits Commission does not charge fees, the Charities Services unit of the New Zealand Department of Internal Affairs does—charities with gross incomes of more than NZ\$10,000 (about £5,000) pay about £23 for online annual return filing or £34 on paper. Elsewhere, including Canada, and a number of U.S. states, charities pay for registration and similar services by virtue of the fact that charities register with the equivalents of Companies House or HMRC.

This is an issue that is unlikely to be resolved quickly.

VI. FUTURE PROOFING FOR THE COMMISSION

Since having been condemned by the Public Accounts Committee (PAC) as being not fit for purpose in 2013, the Charity Commission has recruited a new Chief Executive with IT and change-management expertise, revised its regulatory strategy, developed a new business model and launched a 3-year change program.⁹³ In addition, the Charities (Protection and Social Investment) Act 2016 has identified some of the legislative chinks in its armor which will be removed through the coming into force of the legislation.⁹⁴ The Commission is proving its resilience and is soldiering on. The most recent National Audit Office (NAO) report acknowledges that good, early progress has been made in addressing all of the recommendations made by the PAC and the NAO⁹⁵:

[The Charity Commission] has clearly stated its strategic intent to become a robust regulator. In support of this, it has developed a credible high-level business model and transformation programme

92. “[David Robb] said that there was ‘no appetite’ in Scotland to start charging, but added: ‘Had our budget suffered cuts of that scale, I could understand why the question is being asked. But we remain relatively well provided for, so it is not a line we expect to hear in Scotland.’” See Alice Sharman, *Paying for the Charity Commission Would Involve a Change in Primary Legislation*, CIVIL SOCIETY (Oct. 14, 2015), http://www.civilsociety.co.uk/governance/news/content/20569/paying_for_the_charity_commission_would_involve_a_change_in_primary_legislation Civil Society, 14 legislation.

93. See, e.g., FOLLOW-UP ON THE CHARITY COMMISSION, *supra* note 59.

94. In March 2016, the Act received Royal Assent but at the time of writing it has not yet come into force.

95. FOLLOW-UP ON THE CHARITY COMMISSION, *supra* note 59, at 10.

to deliver the necessary change. It is using its statutory powers more to tackle abuse of charitable status. It is also working to improve the way it assesses regulatory risk and uses data.

The Charity Commission's 2014–15 annual report⁹⁶ shows significant progress in becoming a more effective and efficient regulator. The Commission strengthened the pace and robustness of its approach to tackling serious abuse and mismanagement in charities. Perhaps as a taste of things to come, it reports a large rise in the use of its statutory powers over the past year. In 2014–15, the Commission opened 103 statutory inquiries⁹⁷ and used its enforcement powers 1,060 times—up from 64 and 790 respectively in 2013–14. The number of operational compliance cases (a less serious form of investigation) fell from 1,865 in the previous year to 1,024. This may be because more work is being done in the Commission's first contact division and in its investigation and enforcement division. Equally as important, the Commission continues its enabling work through permissions casework, providing online services to charities, and through guidance and engagement to support trustees in fulfilling their legal duties when managing their charities.⁹⁸ The Commission also received a larger number (2,129, compared to 1,282) of serious incident reports,⁹⁹ and put this down to its “concerted campaign to promote awareness among trustees of their responsibility to report serious incidents.”¹⁰⁰

It is hoped that the new powers that the Commission will receive through the legislative changes in the Charities (Protection and Social Investment) Act 2016, together with its internal overhaul, will give it a much needed boost in terms of its ability to regulate the sector adequately. It is also hoped that the political spotlight is diverted away from the Charity Commission and that it is allowed to get on with its

96. ANNUAL REPORT AND ACCOUNTS, *supra* note 89. For further details, see also CHARITY COMM'N, TACKLING ABUSE AND MISMANAGEMENT, 2014–15 FULL REPORT (2015) (UK), <https://www.gov.uk/government/publications/tackling-abuse-and-mismanagement-2014-15/tackling-abuse-and-mismanagement-2014-15-full-report>.

97. ANNUAL REPORT AND ACCOUNTS, *supra* note 89, at 41. These are launched when the Charity Commission suspects serious wrongdoing. This figure is significant when set against the 15 that were opened in 2012–13. CHARITY COMM'N, ANNUAL REPORT AND ACCOUNTS, 2012–13 (2013) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246790/0016.pdf.

98. In 2014–15, in the Commission's first contact alone, it dealt with over 57,000 calls, 55,000 emails and granted over 2,500 permissions. ANNUAL REPORT AND ACCOUNTS, *supra* note 89, at 30.

99. This is a report from trustees if their charity has been threatened by loss of cash, mismanagement or reputation damage. *Id.* at 4.

100. *Id.* at 17.

job without the intense scrutiny that it has undergone in the last few years.

Signs of a more active and (some might say) aggressive Commission are emerging. It is not just in the data produced in its most recent annual report¹⁰¹ that we see evidence of a firmer stance from the Charity Commission. Its latest publications, providing guidance for the sector, also reflect this approach. For example, its recent revised guidance to trustees¹⁰² which explains the key duties of charity trustees and what they need to do to carry out these duties competently, is notably different in tone and content, reflecting a tougher approach throughout. For example, the definition of “should” in the guidance is that it refers to “something [which] is good practice that the commission expects trustees to follow and apply to their charity.”¹⁰³ This clearly goes beyond stating that trustees must only comply with legal requirements. They must also effectively follow suggested good practice in the document. The exact consequences of not following such good practice as is laid down in the document (where this does not amount to a breach of any legal requirement) is not spelled out, but it can only be assumed that the Commission will take seriously any failures to follow such practice. It is stated, somewhat ominously¹⁰⁴:

The commission expects you to be able to explain and justify your approach, particularly if you decide not to follow good practice in this guidance.

The Charity Commission has certainly been “shaken up” by its recent step into the spotlight. Some may argue that it had no choice but to focus on a reduced core service in order to both justify and resource its existence. However, the Commission’s strategy to improve its regulatory function should not come at the expense of its other important roles, such as production of guidance for the sector, its advice or permissions work and its work maintaining the public register of charities. The short-term injection of additional cash that was received is very welcome. Nevertheless, there is a clear need to increase and then stabilize the budget of the Charity Commission so that it can both fully exercise its enforcement powers, and continue to act in its advisory role.

101. See *supra* note 89.

102. CHARITY COMM’N, THE ESSENTIAL TRUSTEE: WHAT YOU NEED TO KNOW, WHAT YOU NEED TO DO (2015) (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509664/cc3_1owink.pdf.

103. *Id.* at ¶ 1.1

104. *Id.*

Many of the significant number of small charities on the register¹⁰⁵ rely heavily on the guidance and support that has been provided in the past. Public expenditure on the regulatory framework for the charitable sector should be regarded as much needed investment. After all, by their very nature, all charities exist for the public benefit. Whilst the introduction of fees for charities might appear to be an attractive solution for the Charity Commission in the short term, there is a real concern that the negative consequences for smaller charities and their beneficiaries will outweigh any real public benefit.

Whatever happens in the course of time to solve the funding crisis for the Commission, in order to maintain its position as a credible and respected regulator of charities, the Charity Commission must strongly resist any pressure in the future to become involved in the pursuit of any political agendas, whether through its perceived closeness to the government or any opposition party and their desires to further their own policies. The Charity Commission's close brush with the judiciary, in the judicial review brought by CAGE but ultimately withdrawn, is a serious warning for the Commission not to act beyond its powers, however strong the political pressure of the day may be.

105. *See supra* note 91.