

The purpose of charities

1. What is the role and purpose of charities in civic society in England and Wales?

1.1 It is important to remember when asking such questions that there is no single, homogenous 'charitable sector' and that a 'one size fits all' approach to both support and regulation in the sector will not help to sustain it (e.g. this explains the different reporting requirements that exist in the Charities Statement of Recognised Practice (SORP)). Smaller local charities need support and guidance, which might be lacking as a consequence of cutbacks at the Charity Commission. They also need 'light-touch regulation'. Larger charities that engage in complex contracting arrangements might need more intensive regulatory oversight, not least because they are handling large amounts of taxpayers' money.

1.2 In light of the significant diversity in the sector, it is also essential to exercise extreme caution in considering any potential changes to its legal and regulatory regime – especially where one of the driving forces for such consideration taking place may be a period of high-profile, negative media scrutiny of the sector.

- How has this changed?

1.3 Many charities have moved away from having a primary role of filling gaps in public sector (and other) provision towards becoming primary providers of services (e.g. in housing¹, in advice or in specialised local services) under contract with local government. There is concern that this linkage with direct provision of services, which can lead to a lack of independence (see para 1.9 below), is also harming the ability of charities to challenge changes in service provision or draw attention to the deficiencies of such services.²

- What makes them distinct from other organisations doing similar work?

1.4 Charities' distinctiveness stems from their core value of voluntarism and from their unique legal status and structures. These are based on specific legal requirements with regard to their focus and activities: they must provide public (not private) benefit as defined by law; they must be exclusively charitable; and they must fulfil their stated charitable purposes. All three requirements can cause problems, particularly as trust is the 'voluntary sector currency', and the drive to 'do good' can unseat legal duties.³ Their unique legal status also brings an additional layer of regulation, and charities that provide services under contract must therefore comply with the distinct regulatory regimes placed both on specific service providers (e.g. as care home providers under the Health and Social Care Act 2008) and on charities.

- What role can charities play in community cohesion and civic action?

1.5 Charities can play a central role in community cohesion and civic action, as both small local charities and many national charities operating at a local level are integrated into and are trusted by their beneficiaries at a community level – they therefore have a deep knowledge of specific local issues.

- How does the sector benefit from volunteering?

¹ See Warren Barr, 'Big Society and Social Housing: Never the Twain Shall Meet?' (2013) In: N Hopkins (ed), *Modern Studies In Property Law: Vol 7* (Oxford: Hart Publishing) pp 39-58.

² See Debra Morris & Karen Atkinson, 'Charities Biting the Hand that Feeds: Relationships with Their Funders' (2003) In D Morris & J Warburton (eds), *Charities, Governance and the Law: The Way Forward* (Oxford: Key Haven Publications) pp 195-218.

³ In the context of management of tenancies in housing, see Warren Barr, 'Leases: rethinking possession against vulnerable groups' (2007) In: E Cooke (ed), *Modern Studies in Property Law: Vol 4* (Oxford: Hart Publishing) pp 119-142.

1.6 Charities and their beneficiaries benefit hugely from volunteering and annual surveys show that the sector would not survive without them – in terms of both the huge armies of volunteer trustees who govern charities and the hands-on volunteers who carry out their work.

- How has the status of volunteers changed?

1.7 In many charities, the status of volunteers has become more akin to that of employees, both in terms of skill-levels associated with tasks completed by volunteers and in terms of volunteers' rights and expectations (e.g., in terms of training).⁴ This is partly due to the fact that many charities are now replacing the state as providers of specialised services. This is also likely to be linked to several social phenomena, including an expanding retired (but active) population available for volunteering,⁵ and the phenomenon of self-interested altruism in the millennial generation as intense competition in the employment market triggers a need for young people to make their CVs distinctive through voluntary activity prior to seeking paid employment.⁶

- What challenges do charities face in trying to fulfil their role in civic society?

1.8 When trying to fulfil their role in supporting the many beneficiaries who rely upon them, charities face significant challenges to their independence.⁷ However, it is vital that this is retained, for several reasons: it is a legal requirement (trustees must act solely in best interests of charity and beneficiaries); it is vital for democratic society (emerging democracies in Europe and elsewhere point to England and Wales and have sought to foster an independent civil society as a key hallmark of their own democratisation process); and it enhances public trust and confidence in charities (which underpins donations of money and time – essential for the very survival of charities).

1.9 The most obvious challenge to the independence of charities is that, as many charities become more entwined with state provision of services under contract with national and local government,⁸ their advocacy role comes under threat. Further, where a charity becomes the sole provider (or one of only a few large providers) of particular services, beneficiary advocacy eventually becomes self-criticism and becomes difficult to maintain. This undermines the unique strengths and distinctiveness of these charities; they are no longer trying to solve problems with state provision, but are themselves becoming organs of the state.

1.10 A related challenge is the fact that whilst maintaining independence is crucial in retaining trust and confidence in the charity sector, accountability of charities both to their direct funders and (where they provide public services) to the state and to the taxpayer is also vital. Independence and accountability are not always easy to balance. The legal framework governing charities should ensure this, but law and practice do not always coincide. Some trustees are either insufficiently aware or insufficiently capable of meeting their legal obligations, and this can have a dramatic and detrimental impact on the charity for which they are legally responsible.

1.11 The challenge presented by the balancing act between independence and accountability can be compounded by a lack of awareness within the general public and the media of the constraints of charity law, which charities must comply with but which other NGOs need not take into account. There can be a conflict between the principle of voluntarism and the need to operate in an efficient, business-like manner, and charities that have to juggle these considerations may appear in a poor light in comparison to organisations that do not have the same constraints.

1.12 These challenges are further exacerbated by shrinking state provision of services and greater expectations being placed upon the charitable and voluntary sector, both to meet the increasing demand for services under contracts with reduced budgets and to provide for increasing levels of

⁴ See Debra Morris, 'Charities and the Big Society: a doomed coalition?' [2012] *Legal Studies* 132-153.

⁵ See NfP Synergy, *Facts and Figures: Baby Boomers, Charities and an Ageing Population*, 2015.

⁶ In this regard, we have seen a change in attitude in recent years in University law students that we teach.

⁷ As comprehensively explored by The Panel on the Independence of the Voluntary Sector over several years.

⁸ See Debra Morris, 'Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict' 1999, Liverpool: Charity Law Unit.

unmet need through their charitable funds. For example, local Citizens Advice agencies, which have long had an important civil society role in feeding up information about how social welfare changes are impacting society, are so overburdened with advice seekers that they do not have time for social policy or campaigning work.⁹

- How can these challenges be overcome?

1.13 Funding from the State should match the increasing levels of service provision that charities are expected to provide under contract.

1.14 Consolidation and rationalisation of the charitable sector is often raised as a solution to some of the challenges faced. However, no legal or policy remit exists that could force charities to consolidate. Even if such a remit existed, it would be in danger of undermining both the diversity of the sector and its mission-led, altruistic and voluntary value base. Instead, we recommend that charities of all shapes and sizes should be encouraged and reminded to always retain a focus on their specific charitable purposes and beneficiaries and to continually review and reflect on whether they are meeting the needs of those beneficiaries in the most efficient and innovative way possible. They should also be encouraged to make good use of the support provided by infrastructure bodies such as NCVO and local CVS organisations.

Pressures and opportunities

2. What are the main pressures faced by charities currently, and what impact have these had?

2.1 Financial pressures: There have been significant cuts to funding from the public sector (see para 1.12 above). Fundraising from the public has also become more difficult in a constrained economic environment over the last few years. The potential impacts of this for individual charities can include the inability to meet their operating costs (resulting in full closure or closure in specific locations) and mission drift resulting from homogenisation of services or reduction of service levels.¹⁰

2.2 Media scrutiny and negative publicity: The recent swathe of negative news stories surrounding charities has the potential impact of reducing public trust and confidence in charities. This may disproportionately affect larger, national charities, but there is the potential for a generalised reduction of trust in the ability of the regulatory system to properly police charities. This may affect charities of all sizes. There is an additional concern that scrutiny of charities (particularly religious charities) may be linked to the high level of interest in terrorism displayed by some parts of the media, and that this could both inflict major reputational damage on charities and further inflame existing racial tensions within communities served by these charities.

2.3 Complex legal and regulatory burdens, in particular where multiple legal and regulatory regimes interact: It can be extremely difficult for charities to keep up with legal requirements as they develop and are interpreted. This can particularly affect those engaged in specific multi-agency working, e.g., those working in partnership with NHS bodies, but can also more broadly affect those working across sectors. There have been two striking recent examples of where charities have struggled to navigate the new legal landscape. First, the so-called Lobbying Act 2014 has been a minefield for charities in terms of the interaction between charity law and electoral law. The confusion created has had a chilling effect on charities' campaigning voices.¹¹ Second, charities have been ill-equipped to address the complex legal questions generated by the Equality Act 2010. The Act tightened the exceptions that allow charities to target their services to particular sectors of the population, e.g. along gender lines.¹²

⁹ See Jennifer Sigafoos & James Organ 'What if there is nowhere to get advice?' (2016) In: A Flynn & J Hodgson (eds.), *Legal Aid and Access to Justice: Comparative Perspectives of Unmet Legal Need* (Oxford: Hart Publishing) pp 161-178.

¹⁰ See e.g. note 9 above.

¹¹ See Debra Morris 'Legal limits on political campaigning by charities: drawing the line' [2016] *Voluntary Sector Review* 109-115.

¹² See Debra Morris, Anne Morris and Jennifer Sigafoos, 'The impact of the Equality Act 2010 on Charities' 2013 (Liverpool: Charity Law & Policy Unit).

Charities are unlikely to appreciate that non-compliance may mean that they are considered not to be acting in the public benefit, resulting in loss of charitable status.

2.4 Competition from social enterprises and commercial providers: A further consequence of the multiple layers of regulation under which charities must operate is that other types of organisation which do not have to comply with charity law and regulation may be able to operate more efficiently and with lower operating costs. This may exclude charities from service provision in areas where they have unique skills and knowledge, and may also increase scrutiny and criticism of their operations and levels of efficiency.

- What opportunities do charities have in the current environment?

2.5 Charities can capitalise on the current (widely reported) renewed and enhanced interest in voluntarism and altruism present in society. Whilst bodies such as social enterprises have taken advantage of this phenomenon, charities should consider how best to position themselves so as to benefit from this.

2.6 Some charities may view current pressures and challenges as an opportunity to rationalise and reinvigorate their operations, using a challenging environment as an opportunity to reflect on how well they are maintaining their independence and serving their beneficiaries.

- Are there specific pressures affecting particular types of charity that you can highlight?

2.7 The taxonomy of charities included in the question (and frequently used elsewhere), whilst useful for the purposes of *describing* charities' current operations, can be constraining and can work against charities' abilities to be dynamic and responsive. For example, 'service delivery' can (and should) only be the method that the charity is *currently* using to achieve its objects, and this should be reviewed as circumstances change. If charities ensure that they remain responsive in meeting their charitable missions, as outlined above (para 1.14), these labels may continually change.

2.8 As a corollary to this point, the language used to label charities in media and other coverage, such as 'campaigning' charities, can further serve to confuse and inappropriately label charities based on their chosen method of achieving their aims. Distinguishing 'campaigning' from 'meeting the needs of beneficiaries' – rather than viewing it as just one method of meeting those needs through tackling the root cause of a problem rather than just its symptoms – is a prime example of labelling which can confound clear understanding of a charity's mission.

Innovation

3. How do charities seek to innovate, particularly in the digital arena? No particular comments.

- What more could be done to promote innovation, and by whom? No particular comments.

- What barriers are there to being innovative?

3.1 From a legal perspective, one notable barrier is that the legal environment does not always manage to keep pace with new ways of working. For example, the Gift Aid system has taken a long time to catch up with digital fundraising methods.

Governance and leadership

4. What skills are required to lead and manage a charity? No particular comments.

5. What role should trustees play in the performance and effectiveness of a charity?

5.1 Trustees should play a central role. They are critical in ensuring that charities function properly. In well-governed charities that provide public services under contract and which are run on a day-to-day basis by professional management, unpaid trustees might bring expertise from other walks of life (e.g. accounting, PR, management), equipping them to oversee and steer the professional management. They should engage with this task fully, in line with their legal responsibilities for the charity as explained in Charity Commission guidance. In other charities (often smaller, local organisations), the trustees are likely to provide the day-to-day management by themselves. Again, published Charity

Commission guidance is important to this type of trustee. If they do a good job, many charity scandals will not occur. If they are also *perceived* as doing a good job, public trust and confidence in charities will improve.

- How can trustees be best equipped, enabled and supported to fulfil their responsibilities?

5.2 It is important that trustees understand their legal obligations and are competent to carry them out. They must be helped to appreciate that trusteeship is a substantive position, even if it is not remunerated, and is not simply an honorary role whereby their name is seen as supporting the cause – if this is what a potential trustee envisages, they would be more suitable as a charity patron. However, there is a fine balance to be struck between the need to appoint people who understand their legal obligations and the need not to deter suitable people from taking up the role. The key is appropriate induction and ongoing training and the dissemination of good practice examples. A lesson can be drawn from the practices used to appoint school governors – training is the norm, and public funding is available to support it. It is clear that charity trustees need more support in order to carry out their largely unremunerated role – many are crying out for such support. Continuing Professional Development (CPD) for trustees, linked to the size of the charity and the funds that the trustees are responsible for, may be worth exploring. It is also important that trustees are equipped to know when they should move on from the role.

- What, if any, changes might this mean for current arrangements?

5.3 Wider provision of insurance for trustees may help to encourage suitable people to take on the role. Payment for trustees could be a possibility, but this raises questions of whether voluntarism and professionalism can exist side by side. This is an ongoing debate, and there are no easy answers – but it may be time to take another look at this issue.

5.4 There is a key role here for sector umbrella bodies and other support groups, and wider provision of pro bono legal and other advice for charities, which takes into account the great diversity in size and shape of individual charities within the sector. Championing of charity trusteeship (by both Government and infrastructure bodies), including high-profile trustee role model examples and a mentoring network may assist in engendering an awareness of both the responsibilities and the benefits of trusteeship.

Accountability

6. How can charities ensure that they are properly accountable to their beneficiaries, their donors, and the general public?

6.1 Charities should focus on their charitable missions, but not simply rely on their charitable status as ‘proving’ their worth. If they follow all current legal guidance and requirements and are transparent, they should easily be able to evidence proper accountability. They should be less defensive and publicise the positive work that they carry out, rather than just responding to negative publicity.

- What, if any, changes might this mean for current arrangements?

6.2 Charities need to follow guidance from the Charity Commission which is already in place, e.g., risk management guidance, reserves policy guidance etc.

- How should charities assess their long-term viability and/or sustainability?

6.3 It is important to acknowledge that not all charities will have long-term viability, whether this is for positive reasons (because their mission has been fulfilled or is obsolete) or for less positive internal or external circumstances. However, *all* charities should consider their beneficiaries in the long-term as part of their focus on their mission and beneficiaries – they should have a process of succession planning in place to avoid a service vacuum for those who rely on them, should they become unviable.

Resource management

7. What are the current challenges to financial sustainability, as well as efficient resource and risk management for the sector? No particular comments.

Social investment

8. What is the potential of social investment and social impact bonds? No particular comments.

The role of the Government

9. What should the role of Government be with the sector?

9.1 Both national and local Government should facilitate, champion and partner the charity sector. Where it funds charities to provide statutory services, it should fund them properly and not expect charities to make up funding shortfalls.

- **What should be the role of local Government?** No particular comments.

- **What should be the role of the Charity Commission?**

9.2 The Charity Commission's acknowledged role is as both regulator and promoter of the sector, but there is an inherent tension between the two, and the Commission has been forced recently to see itself as a regulator first and an adviser second. A structural split of its advice and regulatory functions would remove some fear among charities that seeking advice will attract regulatory attention with its attendant reputational risks. The advice function of the Charity Commission remains very important – the publications that it produces are heavily relied on in the sector.

- **Have these relationships changed? If so, how?** No particular comments.

- **How should Government (national or local) focus its resource to deliver its civil society agenda?**

9.3 National Government should focus its resource on providing adequate funding to the Charity Commission in order to enable it to perform its vital functions effectively. It should give the charity and voluntary sector a high profile within an appropriate Government department and champion its role, backing this up with evidence-based policy funded through well-chosen research partnerships.

- **What is the likely impact of greater local devolution on the charitable sector, or particular types of charity?** No particular comments.

- **What are the opportunities and challenges associated with local devolution?** No particular comments.

Lessons from other sectors and countries

10. What can the charitable sector in England and Wales learn from other sectors and/or approaches taken in other countries, including from Northern Ireland and Scotland?

10.1 There are interesting lessons to be drawn from the recent establishment of the Australian Charities and Not-for-profits Commission. Whilst its establishment was difficult and its maintenance has been challenging, the process was expertly conducted through close work with the sector and with academics, and the body successfully defended its position despite operating in an adverse political climate. The Charity Commission may find this of particular interest.

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