

***Trusted and Independent: Giving charity
back to charities***

Review of the Charities Act 2006

Presented to Parliament by the Minister for the Cabinet Office, pursuant to
section 73 of the Charities Act 2006

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Contents

Foreword	6
1. How we've got where we are – a potted history of charities	8
In the beginning	8
The Tudor Age.....	8
Developments in charity regulation	9
Developments in charity law	9
The Twentieth Century	10
2. Private Action, Public Benefit and the Charities Act 2006	12
Private Action, Public Benefit	12
The Charities Bill 2004	12
The Charities Act 2006 and its impact	13
Public confidence in the charity sector	14
Willingness to volunteer	16
Level of charitable donations	17
Looking back on the Charities Act 2006.....	18
3. Principles underpinning the Review.....	20
4. Fundamentals of charity.....	26
What is a charity?	26
A statutory test for public benefit?	27
Enlarging the list of charitable purposes?	30
Establishing a UK-wide definition of charity?	30
Public concern about charitable status	31
Practical implications.....	32
Supporting the essential contribution of trustees.....	34
Recommendations	41
5. The Charity Commission and charity registration	44
The Charity Commission	44
Role and structure	44
Regulator or friend?	45
Objectives, functions, duties and title	47
Performance	50
Relationships with other regulators	51
The register of charities	53

Excepted charities.....	56
Recommendations.....	58
6. Co-regulation, sub-regulation and exempt charities	61
Exempt charities and the Charities Act 2006.....	61
What are exempt charities?	61
The role of the principal regulator	62
Co-regulation and partnership working	63
Accounting, Reporting and Transparency	65
Why should charities have to submit reports and accounts?	65
Is the accounts and reporting system fit for purpose?	66
Charging for regulation.....	72
The principles surrounding charging	72
Practical implications.....	74
Recommendations.....	75
7. Complaints, appeals and redress	78
Complaints about charities.....	78
A role for a Charities Ombudsman?	78
A role for the sector?.....	79
A role for the Charity Commission?.....	80
Complaints about the Commission.....	80
Is the Tribunal a low-cost, accessible forum for delivering justice?.....	80
Does the Tribunal provide a forum for the clarification and development of charity law?.....	83
Recommendations.....	85
8. Fundraising	87
Introduction	87
What happens now?.....	88
What is self-regulation?.....	88
Has self-regulation worked?.....	89
What are the issues for self-regulation?	90
Public charitable collections	94
What is a public charitable collection?.....	94
How are public charitable collections currently regulated?.....	94
What are the issues?	96
What does the collections regime require to be effective?	99

Recommendations	102
i) Sector self-regulation	102
ii) Public charitable collections	103
iii) Implementation and Monitoring.....	104
9. Social investment	105
What is it?	105
What are the challenges?	105
What can be done?	109
Recommendations	111
10. Technical issues	114
Mergers and winding up	114
Shell Charities	114
Recommendations.....	115
Disposals of land	116
The regulation of land disposals.....	116
The regulation of mortgages	118
Recommendations.....	119
Organisational forms	119
Charitable Incorporated Organisations	120
Industrial and Provident Societies	121
Charitable companies	121
Royal Charter Charities and Statutory Corporations	121
Recommendations.....	122
Summary of recommendations.....	123
Appendices	137
Appendix A: Technical issues	137
i) Issues for the Law Commission	137
ii) Issues for other bodies	141
Appendix B: Executive summary of Ipsos MORI research	145
Appendix C: Terms of reference of the Review	148
Appendix D: Tables summarising existing charity reporting and accounting requirements.....	151
Appendix E: Measuring the success of the proposed self-regulatory regime	153
Appendix F: List of contributors.....	154
Appendix G: List of meetings	158

Foreword

I was appointed the Reviewer of the Charities Act 2006 on 8 November 2011. My Terms of Reference are set out at Appendix C. As will be seen, they are extensive. In addition to reviewing specific aspects of the 2006 Act they also require me to peer into the fog of the future to try and anticipate changes in the charitable sector.



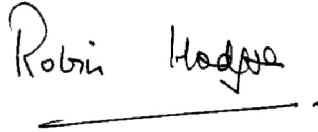
As part of the Review I have held six public meetings in different parts of England and Wales; two questionnaires (one for the general public and one for the sector) were published on the Cabinet Office website, which also carried thirteen Calls for Evidence on specific issues. A list of other meetings held is shown at Appendix G. I would like to take this opportunity to thank all those who took the trouble to contribute to the debate, whether by attending a meeting or responding to one of the questionnaires – they provided the evidence which guided the Review.

I am told that the Charities Act was the first with an automatic review procedure built into it. It has provided an opportunity to look at what the Act has achieved set against the objectives of 2006. So some of my recommendations are, I believe, uncontroversial, arising from a combination of the legal drafting not giving full effect to Parliament's wishes, that familiar law of "unintended consequences" and opportunities that were then missed. Others, for example about the creation of a new regime for social investment, break new ground.

It would be a great pity if some way could not be found to bring forward reasonably quickly the changes needed to give effect to the first part, at least, of my recommendations. Failure to do so would not only undermine the value of the Review, it would also greatly disappoint the sector. Accordingly, the recommendations summarised at the end of the main body of the report are listed with the prime mover responsible for implementation shown against each.

That the Review aroused a great deal of interest is evidenced by the fact that the report now runs to no fewer than 159 pages. I therefore owe a great deal to the Cabinet Office team who supported me – Ben Harrison, Becca Crosier, David Hale, Helen Morgan, Ryan Letheren and Ali Torabi. I also received invaluable assistance from Stephen Lloyd, senior partner of Bates, Wells and Braithwaite, and Antonia Cox. Without the help of all of them I would long since have sunk without trace in a sea of submissions.

However the unsung heroes of this Review are the men and women who work in and support the 350,000 or so charities in England and Wales. Their commitment, their enthusiasm and their entrepreneurial ambition consistently amazed me. This Review is intended to help them flourish and I dedicate it to them. I hope they will feel that I have kept the faith.

A handwritten signature in black ink that reads "Robin Hodgson". The signature is written in a cursive style. Below the signature is a horizontal line that starts under the first letter of "Robin" and extends to the right, ending under the last letter of "Hodgson".

Lord Hodgson of Astley Abbots

1. How we've got where we are – a potted history of charities

In the beginning

- 1.1. Charities have a long history in this country. The oldest charity in England is believed to be the King's School Canterbury, which was established in 597 and, despite some gaps in its history, still exists today.
- 1.2. There are many aspects of the sector which have stood the test of time; for example, the Hospital of St Cross in Winchester was set up in 1136 by William the Conqueror's grandson, Bishop Henry de Blois, and to this day provides accommodation for the elderly and bread and ale to passing travellers who ask for it. So the fundamental principles of charity and philanthropy are deeply ingrained in this country's culture. However, the way those principles established themselves, and how they have been given effect to since, is a story of change, reform and growth.

The Tudor Age

- 1.3. In medieval and early Tudor times, those who wished to give help to those less fortunate could leave their property to monasteries and other religious or public institutions for this purpose. This system was underpinned by the actions of both the aristocracy and the trade guilds to create an informal system for poverty relief, with the all-powerful Church at its heart. The first great upheaval in the world of charity came in 1538; Henry VIII's dissolution of the monasteries and the actions of the Reformation ended the power of the Catholic Church and confiscated its property, so putting an end to its charitable work. By the reign of Elizabeth I, the effects of the Reformation, combined with the triple impacts of urbanisation, rapid population growth and the dispossession of peasant land had created significant levels of poverty. The Poor Laws of 1597 and 1601 and the Statute of Charitable Uses of 1601 were the major reforms designed to tackle these problems by rationalising and clarifying the relative roles of the State and private charitable donations.
- 1.4. The preamble to the Statute of Charitable Uses (more commonly known as the Statute of Elizabeth or the Statute of 1601) set out the first definition of charity that existed in English law, one that remained unchanged until the Charities Act 2006, laying out the purposes for which charities could be established. It is by drawing on that definition, and applying its principles to the modern world, that the concept of 'charitable purposes' has developed since and continues to do so now.

Developments in charity regulation¹

- 1.5. As a result of a series of scandals in the mid 19th Century, the focus of charity law reform moved on from what charities ought to be doing to how they ought to be doing it. Although the growth in charity numbers during the 18th and 19th centuries had made it clear that a regulatory system was needed to marshal and monitor their work, attempts to create one met at first with limited success. Between 1818 and 1837, Commissioners appointed by Parliament had collected detailed information on the assets and activities of English charities (information which is still, in fact, admissible in court). Nothing more was done until 1853, when the Mortmain and Charitable Uses Act established a permanent Board of Charity Commissioners, supported by its own staff. An update of the original Commissioners' work was attempted in 1861, but by 1913 it had succeeded in covering only a limited number of counties. It was not until the Charities Act 1960 was passed that anything like a modern system emerged.
- 1.6. The early Commissioners did, though, enjoy some notable successes. Despite originally being somewhat limited in their powers, they set about their task with enthusiasm, pushing the Government for more powers (and, over time, very often getting them) as they found new issues to address. Gradually, they took over the former work of the courts, as well as adopting a social policy role by directing funds to be used in the way they thought would best meet social needs. Special legislation gave them particularly wide powers to reform educational endowments and London parochial charities, both acknowledged as being desperately in need of reform.
- 1.7. In the first half of the 19th century, the income of City of London parochial charities was rapidly increasing, while numbers of beneficiaries fell equally fast. The population of the area dropped as people were forced out to the East End and charitable funds were essentially subsidising the wealthy. The task of reorganising the 1,000 parochial charities took nearly ten years but, by the end, the Commission had successfully set up a system that used funds to preserve and protect green spaces (such as Parliament Hill) and set up polytechnic institutions across London to provide technical education, and so a trade, to the poor. Both elements of this system flourished, and the Commission's contribution to the social improvements made should not be underestimated.

Developments in charity law

- 1.8 A major development in charity law came with the House of Lords' judgment in *Inland Revenue Commissioners v Pemsel* (better known as *Pemsel's case*) in 1891. The Law Lords, by a majority of

¹ For much of the content of this section, I am very grateful to Sir Stephen Bubb for sharing his knowledge and research.

three to two, decided that relief of poverty was not the only possible charitable purpose and that there were actually four possible charitable purposes, or ‘heads of charity’; relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community. In doing so, the Law Lords seized an opportunity to develop the law to reflect a modern reality, while still making clear the link to the original Statute of 1601. The balance they created between continuity and flexibility, with that fourth, open, category, remained unaltered until 2006, a testament to their shrewd judgment.

The Twentieth Century

1.9 Various further reforms of charity law proved necessary during the twentieth century. In 1952, the Nathan Commission² was established with purposes similar to this Review; to consider and report on proposed changes in the law and practice relating to charitable trusts, other than taxation, in England and Wales. However, that review arose from a concern that the rapid development of the welfare state in the post-war period required a rethink about the role of the charitable sector. With the creation of the welfare state and the growth in public services that came with it after World War II, many thought that charities could be a dying breed. The Nathan Commission’s report led to a number of far-reaching changes, such as the reforms to investment rules that became part of the Trustee Investments Act 1961, the reform of the Board of Charity Commissioners into a larger, more independent body than its then-membership of three, and improving the information on charitable trusts (at that stage, simply in order to identify them all!). It is notable that these are all subjects that this Review will also touch upon, demonstrating the need for cyclical reconsideration and reform as the sector evolves.

1.10 However, despite the significant changes wrought by the welfare state’s introduction, fears about the demise of charities proved groundless. The sector once again reinvented itself, expanding into new areas such as overseas aid and the environment and setting up new types of service such as the first hospices. With these developments it became clear that there were some services that charities simply could deliver better and where they could fill gaps in the services provided by the State. Charities took up roles dealing with the most challenging, hardest to reach groups and issues within society, tackling the causes and effects of homelessness, drug addiction and other deep-rooted social problems. To this day, many of these services continue to be delivered primarily by charities expert in the field.

² The Committee on the Law and Practice relating to charitable trusts (the Nathan Committee), established 1949, reported 1952

- 1.11 To help marshal this process and bring more effective oversight to the sector, the Charities Act 1960 introduced the first register of charities, extended the jurisdiction of the Charity Commission over charities that were not trusts and gave the Commission powers to investigate charities. The Act made a number of significant modernisations to laws as to how charities should be run and supervised, repealing a great deal of 19th century legislation. Over time, the Charity Commission's role and remit has been further strengthened, for example being given jurisdiction over education charities in 1972. In parallel, regulation was also rationalised in some respects, with changes being made by the Charities Act 1985 to allow very small charities to transfer assets, change administrative provisions and spend permanent endowment more easily.
- 1.12 A further concerted attempt to modernise the regulatory system was made in 1987 through the "Efficiency Scrutiny of the Supervision of Charities" report, led by Sir Philip Woodfield, which recommended greater powers for Charity Commission. The result was another piece of legislation, the Charities Act 1992, which revised the Commission's powers again and essentially modernised the provisions of the 1960 Act. The Charities Act 1993 consolidated the 1992 Act with what remained of the 1960 Act and some other vestiges of 19th century regulatory rules.
- 1.13 The passing of the Charities Acts of 1992 and 1993 brings us almost to the end of the story so far. It is clear from their survival over the last 1400 years that charities and their role have always been able to adapt to the changes in society around them. It is similarly clear that, in order to support that process of adaptation and allow it to continue, the law surrounding charities has been through its own process of revision and renewal. The next section considers the most recent phase in the evolution of charity law, with the report of the Prime Minister's Strategy Unit, called *Private Action, Public Benefit*, and its subsequent implementation as the Charities Act 2006.

2. Private Action, Public Benefit and the Charities Act 2006

Private Action, Public Benefit

2.1 On 3 July 2001, the then-Prime Minister, Tony Blair, announced a review of charities and the not-for-profit sector, which was to be undertaken by the Cabinet Office's Strategy Unit in conjunction with the Home Office. The project's remit was to:

- Comprehensively map the wider not-for-profit sector;
- Clarify the Government's strategy towards the sector;
- Set out the principles which should underpin a reformed legal and regulatory framework;
- Against this background, review the legal and regulatory framework for the sector in order to assess how it can better enable existing organisations to thrive and grow, encourage the development of new types of organisations, and ensure public confidence;
- Review which types of organisations should have special status;
- Make recommendations for the removal of any unnecessary legal restrictions on investment, entrepreneurial activities, mergers and acquisitions; and
- Make recommendations on modernising the regulatory framework for charity and the not-for-profit sector.³

2.2 The final report of the project, entitled *Private Action, Public Benefit*, was published in September 2002. The report was intended to modernise the law and make it easier for charities to operate more effectively while maintaining public trust and confidence. In line with that ambition, it was designed to be a comprehensive package of reform measures. Although the review had taken evidence from a wide range of contributors during its development, its report was explicitly a consultation paper, designed to open up a wider debate in the sector and elsewhere about its recommendations.

The Charities Bill 2004

2.3 The report and the results of the consultation that followed it became the basis of the Charities Bill 2004. Like the report it was based on, the Bill was intended to be a comprehensive package of reform and, even in light of the consultation process, largely reflected the recommendations of the Strategy Unit. The then-Minister for the Cabinet Office, Hilary Armstrong, emphasised that,

³ The Strategy Unit, *Private Action, Public Benefit* (2002), at page 11

“We have three clear aims for this Bill. First, we wish to provide a legal and regulatory environment that enables all charities, however they work, to realise their potential. Secondly, we wish to encourage a vibrant and diverse sector, independent of Government and, thirdly, we wish to sustain high levels of public confidence in charities through effective regulation.”⁴

2.4 The history of that Bill has been well-rehearsed on many occasions. First published as a draft Bill in May 2004 and then subject to scrutiny by a Joint Committee of Parliament, the Bill itself was introduced in the House of Lords in December 2004 but was then lost in the pre-election wash-up period. Following the General Election of 2005, the Bill was re-introduced immediately and completed its passage through the House of Lords in December 2005. However, it then took until November 2006 to make its way through the House of Commons and finally become what we know as the Charities Act 2006. That its progress through Parliament took so long is testament not only to the challenge of Parliamentary timetabling, but more to the length and depth of the debate involved – clear evidence of the importance, and complexity, of the issues. The most salient event in the process for the purposes of this Review is that, at a late stage of the Bill’s progress through the House of Lords, Lord Phillips of Sudbury laid an amendment requiring an assessment of the impact of the Act, the assessor to be appointed no later than five years after the Act was passed. That amendment, which eventually became section 73 of the Act, has resulted in this report.

The Charities Act 2006 and its impact

2.5 The Charities Act 2006 was finally passed on 8 November 2006. The five years that have passed since will not have felt like a long time to many. However, it would be hard to argue that there has not been a great deal of change in that comparatively short period – politically, economically, socially and technologically. This Review is therefore a timely opportunity not just to assess what the effect of the 2006 Act has been to date, but to look forward to see if the framework it created will be fit for purpose in future.

2.6 Much of this report is dedicated to examining the effect of the legal changes introduced by the 2006 Act in practice. The rest of this chapter, however, will look back at what has happened since the passing of the 2006 Act in three specific areas: public confidence in the charity sector, willingness to volunteer and the level of charitable donations. Section 73 of the 2006 stipulates that this Review must consider the impact of the 2006 Act on these issues; while the report discharges this obligation as far as possible, it is impossible to separate out the impact of the 2006 Act from the myriad other

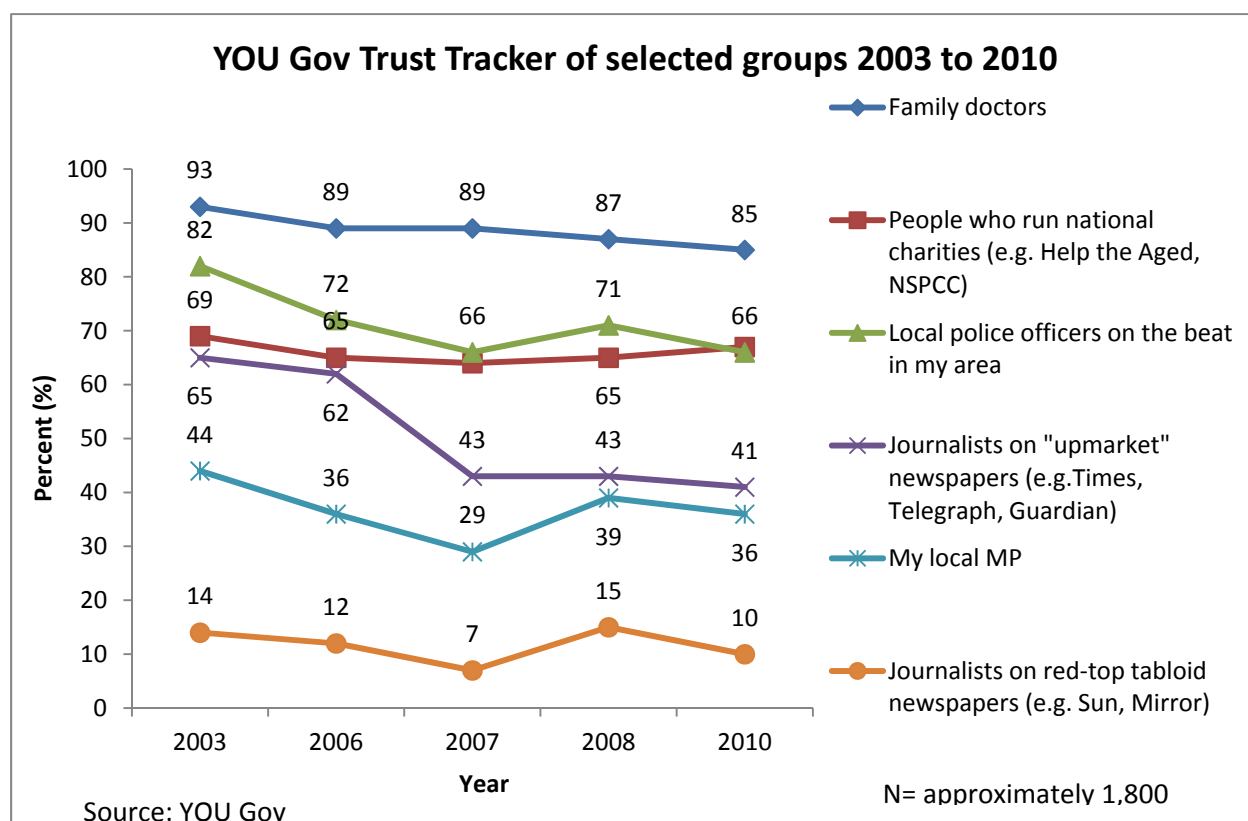
⁴ *Hansard*, 26 June 2006, col. 21

changes that can and will have had an effect on these issues – to prove a direct causal link between the 2006 Act and any given change has not been possible.

Public confidence in the charity sector

2.7 Public confidence is, as will be examined in more detail in later chapters, essential to the charity sector. It is the belief that charities operate in the best interest of the public that allows them to continue to operate.

2.8 The charity sector has, for many years, enjoyed relatively high levels of public trust. Data from YouGov⁵ found that those running large charities are currently the second most-trusted group of people of those listed, behind family doctors and equal with local police officers. Trust in this group has increased in recent years; there are many possible reasons for this, one of which may be the impact of the 2006 Act. It does at least seem possible to conclude that the Act has not done significant damage to public trust and confidence.



2.9 This is backed up by the research conducted by Ipsos Mori for this Review, the executive summary of which is reproduced at Appendix B (the full report is available separately⁶ due to its length) and which

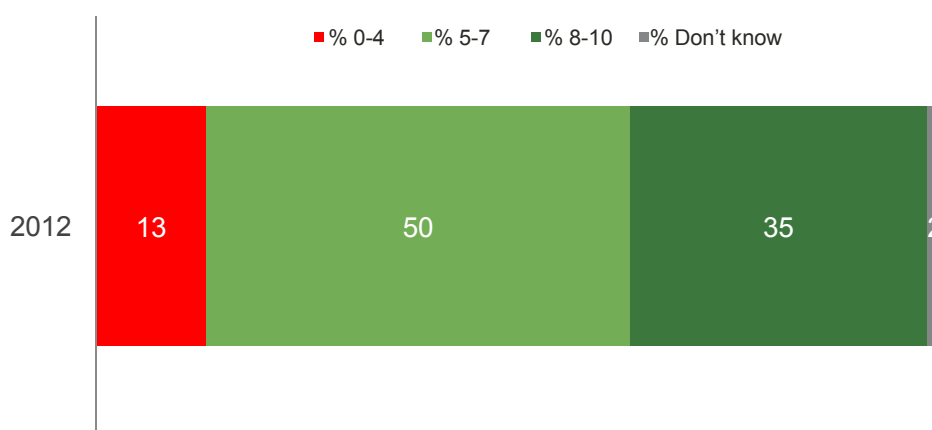
⁵ Source: http://cdn.yougov.com/today_uk_import/PKPublicTrustAug2010.pdf

⁶ <http://www.cabinetoffice.gov.uk/content/charities-act-review>

is referred to throughout this report, as either ‘the public perceptions research’ or ‘Ipsos Mori’s research’. The research found that, where people were asked to rate their trust in charities out of ten (where 0 is no trust at all and 10 is complete trust), the average score was 6.45, with 35% giving a rating of between 8 and 10.

Trust and confidence in charities

Q Firstly, thinking about how much trust and confidence you have in charities overall, on a scale of 0-10 where 10 means you trust them completely and 0 means you don’t trust them at all, how much trust and confidence do you have in charities?



Base: All respondents (1,004). Fieldwork: 20th – 22nd April 2012.

Source: Ipsos MORI

Ipsos MORI
Social Research Institute
© Ipsos MORI Version 1 | Public



2.10 Comparing this result to the findings of the Charity Commission’s previous research on public trust and confidence, from 2008,⁷ 2010⁸ and 2012,⁹ reveals that this level of trust has stayed remarkably constant over the years, though the proportion of people giving the higher ratings (8-10) has fallen slightly. Although, again, it is not possible to prove a causal link between the Charities Act 2006 and subsequent events, it seems that the Act can have done little to either radically increase or decrease confidence in the sector. This is backed up by baseline research undertaken by the Charity Commission in 2005,¹⁰ which found a mean score of 6.3 (though, as the question was differently phrased, it may not be directly comparable to all the subsequent research).

⁷ The Charity Commission and Ipsos Mori, *Public trust and confidence in charities* (2008) at page 7

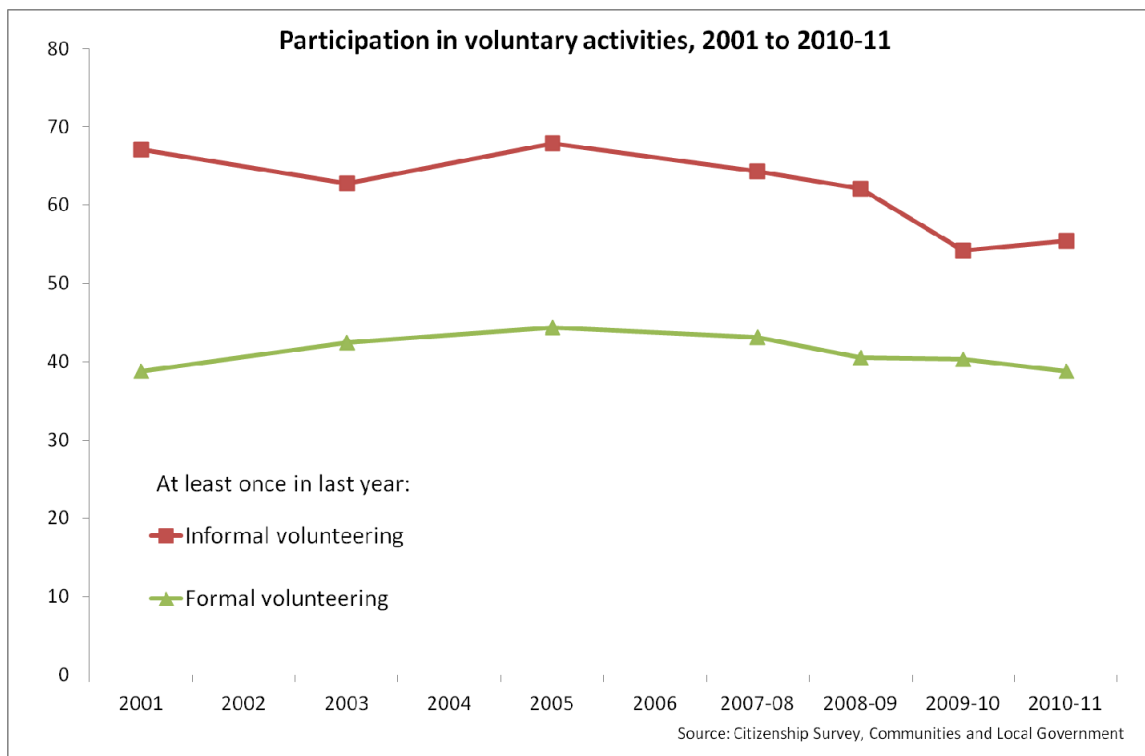
⁸ The Charity Commission and Ipsos Mori, *Public trust and confidence in charities* (2010) at page 7

⁹ The Charity Commission and Ipsos Mori, *Public trust and confidence in charities* (2012) at page 13

¹⁰ The Charity Commission and Opinion Leader, *Report of findings of a survey of public trust and confidence in charities* (2005) at page 7

Willingness to volunteer

2.11 The voluntary principle is at the heart of the notion of charity. However, as can be seen from the graph below, volunteering rates¹¹ have largely been in decline since 2005, though there has been a minor recovery in formal volunteering since 2009-10.



2.12 Decisions to volunteer are generally made for personal reasons – previous work by the Institute for Volunteering Research¹² found that reasons included a desire to improve things or help people (53%), the particular cause (41%), having time to spare (41%), meeting people and making friends (30%) and connecting to family and friends’ interests (29%). In line with this, and in view of the fact that charity law actually bears very little on the average volunteer, whose role is more affected by regulation such as health and safety rules, it seems unlikely this data reflects the impact of the 2006 Act.

2.13 Trustees, however, are not highlighted as separate group in any of the data above. It is trustees who are most affected by charity law, and who work with it and so require an understanding of it as part of their volunteering role. Ipsos Mori’s research for this Review considered the barriers to trusteeship, and it is notable that only 2% of respondents cited a legal reason (potential liability) as a barrier to volunteering as a trustee. It is arguable that, as this was unprompted, ignorance was the cause of this,

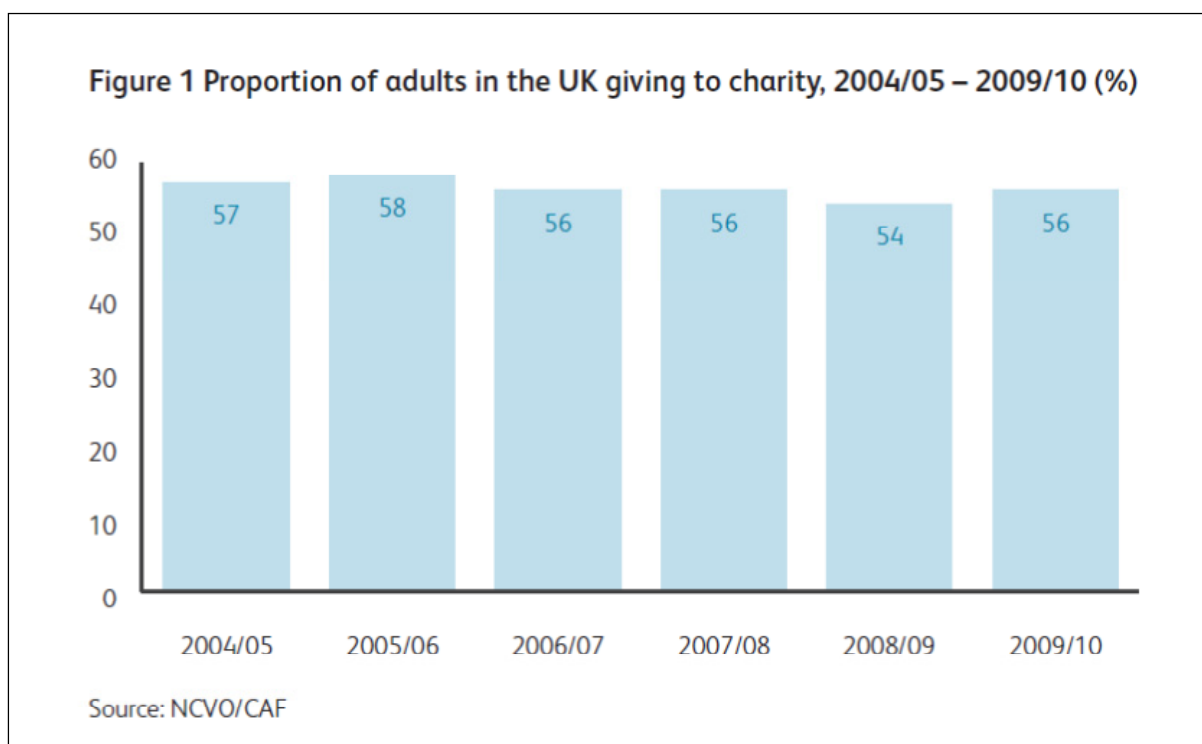
¹¹ Note that formal volunteering is defined as unpaid help given as part of a group, club or organisation to benefit others or the environment; informal volunteering is defined as unpaid help given as an individual to someone who is not a relative (2008-09 Citizenship Survey: Volunteering and Charitable Giving Topic Report (2010) at page 10)

¹² Institute for Volunteering Research, *Who gives time now? Patterns of participation in volunteering* (2007)

not genuine lack of concern. However, when allied to the finding in the wider evidence-gathering of the Review that the provisions of the 2006 Act relating to trustees were generally seen as helpful (see Chapter 4) and the current overall burden of charity law is about right, it seems likely that the overall effect of the 2006 Act has been to slightly improve the lot of trustees. Whether it could have done more is a matter addressed later in this report.

Level of charitable donations

2.14 The majority of adults in the UK give to charity; in 2009/10, 56% donated in a typical month, equivalent to 28.4 million adults and, as the chart below shows, numbers have been over 50% for a several years.



2.15 There appears to have been a slight fall in giving in 2006/07, compared to the previous year, and giving has not returned to the pre-2006/07 level in the time since. Whether this is an impact of the 2006 Act is impossible to tell from the data available though, given that trust and confidence in charities has remained both stable and relatively high, it seems unlikely that the legal and regulatory changes have altered the belief that donating to charity is worthwhile. Causation in these areas is very difficult to prove; the recession was thought to have led to the decrease in giving in 2008/09 but, if the fall was entirely due to the recession, it would perhaps be surprising for giving to return to its previous level within a year, when the impact of the recession is still being felt in many other areas. Given the

lack of specific provisions relating to donating to charity in the 2006 Act, trust is the best proxy available and, on this measure, the 2006 Act has had relatively little overall impact.

- 2.16 It is worth noting, however, that the research by Ipsos Mori found that the public views information about what a charity does, and the impact it has, as two of the three most important pieces of information in their decision to support a charity (the other is how it spends its money). In that respect, the emphasis on delivering public benefit (and the reporting of it) in the 2006 Act should have been helpful in encouraging support. However, it is again not possible to prove whether or not this has been the case due to the impossibility of eliminating the impact of many other factors.

Looking back on the Charities Act 2006

- 2.17 This chapter also presents the opportunity to offer the Review's overall judgment on the Charities Act 2006. It is clear that reform was, at the time, much needed, and the evidence I have gathered indicates that, broadly speaking, the 2006 Act has been well received and had a positive effect on the sector, achieving many of the aims of *Private Action, Public Benefit*. However, it has been, in some ways, an opportunity missed. There are areas in which the Act could have gone further in deregulating and freeing up charities – these are set out in detail over the course of the following chapters. The rules around land disposal are a good example of a case in point.
- 2.18 There was also arguably too much emphasis placed on the Charity Commission, for example in overseeing the new licensing regime for public charitable collections (which has never been implemented, due to resource implications as much as anything else). But the reforms to the Commission itself have generally been positive, putting it on a firmer, more effective and more comprehensible footing. That said, there is again room to go further in placing more control and responsibility in the hands of trustees.
- 2.19 The Charity Law Association (CLA), in their submission to the Review, highlighted that, *“Five years after the Charities Act 2006 was passed, there remained quite a number of areas which had yet to be implemented at all and, while the review of that Act was ongoing, much of it was moved (and chopped around) into the Charities Act 2011. Charity legislation has tended to be fitted in as and when there is time, and tends to be dealt with piecemeal when it comes to implementation; or is simply left to gather dust on the legislative shelf. This is not a happy state.*

We trust that this review marks the beginning of what will become a comprehensive review of the state of charity law, with a view to achieving sensible, measured and genuine reform.”

2.20 This may be a slightly unfair characterisation of the motivation for and treatment of the Charities Act 2006 but it brings into focus the reasons this Review has looked forwards as well as back. The 2006 Act was clearly intended to be an overhaul of the law that would last for many years, and, in many ways, it has succeeded in modernising a rather arcane and certainly very complex branch of law. However, implementation has been challenging and therefore disjointed, and much has changed in the wider world since the process began. The recommendations of this Review for the most part represent evolution not revolution (social investment regulation being perhaps the exception) – pushing the ideas and principles underpinning the 2006 Act further to free up the field for what remains a vitally-important sector to work. I too hope this Review will result in sensible, measured and genuine reform.

3. Principles underpinning the Review

- 3.1 The preceding chapters have shown how deeply rooted charities are in our society. It is no exaggeration to say that probably every person in the country has at some point in their lives been touched by charitable endeavour, whether as a volunteer working for a charity, a donor supporting a charity, a receiver of services provided by a charity, or all three at different times. A further dimension, not unexpected in view of the sector's history, is that charities do not just operate in a secular environment; many are faith organisations.
- 3.2 The word "diverse" hardly does justice to the breadth of the sector. Some charities raise money from the public, others depend on contracts or grants from central or local government; some charities rely on a network of volunteers, others depend largely or wholly on paid professional staff. Some are well funded charities whose purpose is to help other charities, others are charities that live hand to mouth; most charities come under the direct regulation of the Charity Commission but a significant number have other Government Departments or agencies, the Financial Services Authority, the Privy Council or Parliament itself, as their primary supervisor (the "exempt charities"); some charities are trusts, some are companies limited by guarantee, some are unincorporated associations, some will shortly be able to be charitable incorporated organisations.
- 3.3 At the heart of this diverse, dynamic, ever changing Kaleidoscope is the interface between charities and individual members of the public.
- 3.4 Individual members of the public do not relate to charities in a purely practical way. Charities arouse a strong emotional reaction – people give money to charities whose purposes they support at an emotional level (consider the level of donations to disasters overseas or the huge public response to the "Help for Heroes" campaign). For an individual this may be because their own friends or family have suffered, because of a wish to help others less well placed than themselves or because their own lives were transformed by the efforts of a charity. An individual choosing to make a personal contribution is undertaking a conscious, voluntary act of altruism, not the passive fulfilment of an obligation – they use their own judgement about the need. It follows that, in the long term, for those charities that depend on public fund raising, only those that can convince their supporters they are addressing the needs of a worthwhile cause will survive. However, the individual donor also relies in part on the charity "brand" as an assurance that the charity is *bona fide* and runs reasonably efficiently. One challenge is how far the individual supporter should be encouraged to question the

performance of an individual charity directly and how far they should rely on the “brand” which depends on the inherently limited powers of the regulator.

- 3.5 Our research suggests that people feel strongly about the overall charity “brand” – what it stands for, how it should be regulated, what its purposes should be etc. Sadly (at least sadly for any Charities Act Reviewer!), these strongly held views do not all flow in the same direction. During the evidence collecting phase of this Review it became clear that views on many key issues (for example whether trustees should be paid) were well thought out, passionately held but diametrically opposed.
- 3.6 So it was felt it might be helpful if the set of principles which had guided the Review were explained at the beginning. Even these principles collide with one another and at some point priorities have had to be chosen. Nevertheless, the principles and their explanation are intended to give a sense of tone and of direction of travel. I hope that those who may disagree with some of the specific conclusions of the Review will at least be able to see the overarching framework with which they may find themselves less at odds.

Judgment not process

- 3.7 A key objective has been to create conditions in which people are encouraged to use their own judgment in the course of their work with charities, whether as a donor, supporter, trustee or worker, and not seek to rely too much on the judgment of others. Much has been written about the ever-increasing burden of red tape. This burden on charities can only be reduced if individuals are prepared to shoulder a greater degree of responsibility whether they are trustees, donors or volunteers.
- 3.8 Of course there has to be a regulatory framework (a free-for-all would almost certainly result in irreparable damage to the charity “brand”) but, whenever possible, the Review has sought to provide conditions in which a reliance on trust and on individual common sense is emphasised rather than expensive, administratively cumbersome and often ineffective box ticking.
- 3.9 Nowhere will this be more important than for small, newly formed charities many of which are set up to tackle some of the most challenging problems of our societies. By setting up as a charity, any new enterprise automatically inherits its own share of the public trust and confidence built up over centuries which has become implicit in the word “charity”. For any new undertaking, however, the future has to be uncertain and failure cannot be ruled out. Failure may take many forms, including an inability to raise the necessary funds, discovery that the proposed operational plans are not effective

and personal disagreements between the key individuals. Individual donors need to recognise this, and form their own judgement, based on whatever information they consider relevant; a combination of personal contact with those involved in running the charity, of their view of public figures they know to be associated with the charity or of some examination of publicly available information. It follows that the role of regulator should be focused on investigating malfeasance not the prosecution of operational inefficiencies.

- 3.10 However, the necessary corollary of an emphasis on judgment is an increase in transparency – effective judgment must be based on reliable information. The research by Ipsos Mori for this Review suggests the public regards basic information about salaries, expenses, fundraising and administration costs as important when deciding whether to give. Making this information readily available in an easily assimilable form is an important aspect of maintaining public trust and confidence in the charity “brand” whether by established charities or new ones. The Review has therefore also placed a heavy emphasis on the need for transparency.

Charitable status is a privilege not a right

- 3.11 Charities benefit from the actions of society – whether it be access to a registered charity number, which facilitates the winning of contracts or grants (statutory sources of funding to the sector were worth £13.9bn in 2009-10¹³), registration with HMRC, which opens the way to Gift Aid (worth £962m in 2010-11¹⁴) and other tax reliefs and exemptions, or reductions in the level of Council Tax payable. Simply being able to call oneself a charity opens the door to public support, thanks to the long history of charitable activity in Britain.
- 3.12 What should society demand in return? Clearly, charities must comply with the law. They should also provide enough information for the public to be able to decide whether to support them. But perhaps the privilege of being a charity involves a more demanding and less easily defined duty – as the recipients of public trust, confidence and donations, charity trustees have a moral responsibility to put the assets and income raised to pursue their objectives to the best use that is reasonably possible rather than settling for minimum compliance. Hard evidence is difficult to obtain but anecdotal evidence suggests that there are a considerable number of moribund and semi moribund charities whose assets could be more productively deployed.

¹³ Source: NCVO Civil Society Almanac 2012. Available at <http://data.ncvo-vol.org.uk/almanac/databank/income/>

¹⁴ Source: HMRC (£962m includes £119m of transitional relief following the reduction in the basic rate of income tax in 2008). Available at <http://www.hmrc.gov.uk/stats/charities/table10-1.pdf>

3.13 So the Review works from an assumption that not every charity is necessarily sufficiently well run and effective – and that charities should not be permitted simply to rest on their laurels but should continue to meet their legal and moral obligations throughout their lifespan.

Independence of the Sector and the Regulator

3.14 Charities attract people of all political persuasions and of none – this is a great strength of the sector. This does not mean that charities are above politics - charitable activities can give rise to sharp issues of public policy about which Parliament alone can decide.

3.15 However it would be damaging to the sector for it to become politically micro-managed. Such micro-management might not just take the form of direct intervention but could also be through the more subtle influence of contracts for delivering services - if charities are ‘following the money,’ there is a risk they can become diverted from their original mission. While undoubtedly there is a place for the expertise of charities in delivering services, both Government and charities themselves must guard against allowing charities to inadvertently fall under the influence of the State, or the sector will lose that which makes it distinctive and valuable to begin with. This Review has, therefore, sought to emphasise the principle of charities’ independence.

3.16 If the independence of the sector needs to be safeguarded so does the independence of the regulator. The Charity Commission has delegated judicial and executive powers so it is only right that Parliament should decide the extent of that delegation. But once decided, the Commission must be free to exercise its judgment; a regulator that is not, and is not seen to be, impartial can never be effective. However, this independence also implies the need to maintain a certain distance between the regulator and those it regulates. Of course, regulation should be carried out in as positive a way as possible but the Commission’s fundamental *raison d’être* is to be a regulator. It must resist the temptation to act as an advocate for its constituency too.

3.17 It is to be hoped that the appropriate Parliamentary Committees will take a continuing interest in ensuring that these delicate balances are maintained.

Regulation needs to be proportionate, transparent and comprehensible

3.18 As noted above, if people are to be encouraged to use their own judgment they need information on which to base their decisions. This information needs to be presented in a focused way and in a form which makes it readily understood by the intended target audience. “Less” may often be “more”.

- 3.19 For charities, in particular the smaller ones, there is a trade off to be struck between the administrative costs of regulatory compliance and the risk of a loss of public confidence from a lack of transparency or regulatory failure – either in individual charities or in the sector as a whole. So the provision of essential information is required, even though there is a cost involved for the charity, as a consequence of the right to use the charity “brand”.
- 3.20 However, at the same time, the regulatory system that applies to charities themselves should be as straightforward as possible. If trustees are to exercise greater judgment in running their organisations, the rules they have to apply must be clear, comprehensible, and supported by effective guidance. Therefore, as well as an emphasis on reducing red tape, this Review has also focused on the need for clarity in regulation.

The regulatory structure needs to be focussed, practical and affordable

- 3.21 As noted above the charity sector is very diverse – and has become more diverse over the past decade. In addition to the 162,000 registered charities there are estimated to be 80,000 further charities below the registration threshold, 110,000 excepted and exempt charities and 800 charitable Industrial and Provident Societies – making a total of over 350,000 charities in all.
- 3.22 It will never be possible – no matter what the economic background – for any regulator to supervise closely a group of this size and variation. On the basis of a normal working year, such an approach would require the regulator to examine around 1,400 sets of accounts every working day. So the Review accepts that priorities have to be established, the regulatory work has to be carefully targeted and a regulatory framework that seeks to be failure-free is neither practically attainable, economically affordable nor, probably, operationally desirable.

The regulatory structure needs to be flexible

- 3.23 As noted in the previous chapters, over the past few years the sector has expanded dramatically in ways it would have been hard to have foreseen. The future will surely see some equally dramatic developments. If, for example, the social investment movement gathers momentum the impact on the charity sector could be far-reaching.
- 3.24 The regulatory structure should therefore be as flexible as possible to encourage and encompass these dynamic developments. While some may argue that this results in a loss of neatness in the structure this is an inevitable, and perfectly acceptable, result of an approach to regulation which allows for innovation.

The voluntary principle is at the heart of the charity sector

- 3.25 Charities result from an impulse to do good – for a cause, for a locality, for a condition. Most charities begin as the result of a small group of men and women gathering together and by their efforts taking steps to improve the lot of others. Volunteer activity is central, whether in the form of money, or time, or both.
- 3.26 The very largest charities include what are now substantial and highly successful businesses, often with a reasonably large number of paid employees. Furthermore, the reliance on charities as an effective, perhaps in some cases the only, way of delivering particular services, at both local and national level, has understandably led to the professionalisation of many charitable activities. There is nothing wrong with this – professionals and volunteers can and should co-exist. The skills, experience and qualifications of paid employees are what allow many charities to continue their activities.
- 3.27 But if charities lose touch with their volunteer roots, if they cease to be responsive to specific local needs or conditions and if they become seen by the public merely as an extension of a Government department or no different to any private business, a precious aspect of the charity movement – one which has often motivated people to go the extra mile - will be lost. The challenge is both one of trust – public trust will be greater if at least some individuals are involved in the particular charity out of concern for the cause rather than to earn a living – and of independence – because charities seen as arms of Government may come to be viewed as politically partisan. The Review has therefore tried to ensure that wherever possible the role of the volunteer and the voluntary principle that underpins it are not overlooked.

4. Fundamentals of charity

What is a charity?

- 4.1 As was explained in Chapter 1, there was no statutory definition of charitable purposes until 2006. Instead, the definition was set out in case law, built up since the preamble to the Statute of Elizabeth I (1601) which contained the first list of charitable purposes. In the 19th Century, the courts refined that list into four heads of charity:
- The relief of poverty;
 - The advancement of education;
 - The advancement of religion; and
 - Other purposes beneficial to the community.
- 4.2 To qualify as a charity, an organisation has always had to exist for wholly charitable purposes, and those purposes have to be for the benefit of the public. The Charities Act 2006 did nothing to change this. However, it did aim to clarify what constitutes a charity in the 21st Century, with a clearer and more explicit list of charitable purposes and an emphasis on the public nature of charity. Further to this, it contains a list of thirteen 'descriptions of charitable purposes', including the catch-all 'other purposes' category.
- 4.3 The 2006 Act also gave the Charity Commission a new statutory objective of promoting awareness and understanding of the public benefit requirement, along with a specific duty to publish guidance on public benefit. The Commission published its final public benefit guidance in January 2008 and followed that with more detailed guidance and specific consultation for groups of charities likely to be most affected. However, an Upper Tribunal ruling in 2011 has meant that the Commission has had to withdraw some specific parts of its guidance, pending revision during 2012.
- 4.4 This definition of charity (pursuing a charitable purpose and meeting the public benefit requirement) generally applies only in England and Wales, although it applies throughout the United Kingdom in relation to access to charity tax exemptions and reliefs. Charity law and regulation is a devolved matter in Scotland and Northern Ireland and so there are different definitions that apply in those jurisdictions, particularly as regards the issues to be taken into account in defining public benefit. In

2009, the report of the Calman Commission¹⁵ recommended that there should be a single, UK-wide, definition of charity, to address concerns about differences in the definitions of charity arising between different parts of the UK. However, to date there have been no moves to implement this.

A statutory test for public benefit?

- 4.5 The two-limbed definition of charity has been the cornerstone of the sector for a number of centuries now and it is this idea of focusing solely on public not private benefit that sets charities apart from any other type of organisation.
- 4.6 As noted above, the Charities Act 2006 did not change the fundamental elements of charity, nor does there appear to be any obvious reason to do so now. While it is true that the rules governing the definition of charity represent a series of tests for organisations to meet, that is as it should be. Charities enjoy many significant privileges not afforded to any other type of organisation; quite apart from the generous tax reliefs they are entitled to, the charity ‘brand’ continues to enjoy a very high level of public trust and confidence, which in turn helps individual charities to access the public’s continued financial and emotional support. To relax the rules on the type of organisation that is entitled to access this special status risks compromising the role and position of the sector as a whole. Charitable status is therefore a privilege, a privilege based on the fact that charities exist for the benefit of the public as a whole.
- 4.7 The question, however, is whether the underpinnings of this definition remain sound: how are they enforced and how well are they understood by the general public? There has been much technical debate in the charity sector itself over many years, and the definition of public benefit in particular has been highly controversial.
- 4.8 The intention of the 2006 Act was always to re-emphasise the importance of public benefit and encourage charities to consider how they deliver that benefit. This emphasis seems to have been welcomed by the sector in general, and many organisations have reported that it has been helpful in focusing them on their charitable purposes. Similarly, the requirement introduced following the 2006 Act for trustees to report on the public benefit delivered by their charity as part of their Annual Report is seen as important for transparency and building public trust and confidence, although a minority view is that it merely provides yet another regulatory burden and disincentive.

¹⁵ The Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century (Final Report)*, June 2009 at page 169

- 4.9 That said, the ability, or perhaps in some cases the willingness, of the sector to fulfil the reporting requirement is far from certain; compliance is very low. Research conducted by Sheffield Hallam University for the Charity Commission found that, among charities with income of over £500,000, only 25% fully met the requirement in their 2009/10 report (the first full year in which it was required)¹⁶. Among smaller organisations, that fell to 10% and in the smallest (£5,000-£25,000), 2%.¹⁷ The research found that the real weakness was not in reporting what the charity had done or whom it intended to benefit, but rather how its action had benefitted the intended beneficiaries, with only 36% of even large charities fulfilling this requirement.¹⁸ It should also be noted, though, that the number of charities nearly achieving compliance, but lacking some detail, was significantly higher, raising the overall figures to 67% for those with an income over £500,000, 36% for those with £500,000-£100,000, 15% for those with £100,000-£25,000, and 13% for the £5,000-£25,000 bracket.¹⁹
- 4.10 Both the above research and the evidence collected by this Review indicate that those who engage with the reporting requirements find them to be of most benefit. Subsequent research by the Institute of Voluntary Action Research, with Sheffield Hallam University, has also found that charities see the renewed emphasis on public benefit as part of the modernisation of the sector.²⁰
- 4.11 Results of the public perceptions research delivered by Ipsos Mori for this Review underline the importance attached to public benefit and impact reporting: 74% of respondents said evidence of impact was very important to them in deciding whether to support a charity (the third most important piece of information behind what the charity does and how it spends money, both on 84%). However, some charities perceive that the public benefit requirement is a distraction in difficult financial times, or feel angry or pressured that they are under scrutiny.²¹ It is clear that an important educational role remains for the Charity Commission to make organisations aware of their responsibilities in this field and to focus them on reporting the impact of their activities, not merely describing the process by which they were undertaken.

¹⁶ The Charity Commission/Sheffield Hallam University, *Public Benefit Reporting by Charities: Report of a study undertaken by Sheffield Hallam University on behalf of the Charity Commission for England and Wales*, June 2011 at page 39

¹⁷ *Ibid*, at page 39

¹⁸ *Ibid*, at page 33

¹⁹ *Ibid*, at page 40

²⁰ Institute for Voluntary Action Research and Sheffield Hallam University, *The impact of the public benefit requirement in the Charities Act 2006: perceptions, knowledge and experience: a research report for the Charity Commission* (June 2012) at page 3

²¹ *Ibid*

- 4.12 The Review has also considered whether there is a need for a statutory definition of public benefit. It is certainly possible to see arguments on both sides. The flexibility of the case law basis of the existing definition has undoubtedly had its benefits over the years, allowing the definition of what is charitable to change and develop along with society. This has permitted the evolution of the sector in a way that a statutory definition would most likely have been unable to. The contrary view is that the uncertainty of a case law approach is unhelpful. It can be difficult for both new and existing charities to understand the complexities of the law as it has developed and what it means for their organisation today. The clarity of a statutory definition would help charities to focus their energies and give trustees more confidence in discharging their responsibilities.
- 4.13 This question was also considered by the Strategy Unit in the development of their report, *Private Action, Public Benefit*. Their conclusion was that the flexibility of case law was to be preferred. I agree. Further, the overwhelming majority of views gathered in the course of the Review's consultation took the view that a statutory definition would be too inflexible to cope with the diversity of the sector and the need for change and adaptation over time. Given that the Upper Tribunal has only recently delivered its ruling on the meaning of public benefit and new guidance on the point has recently been published for consultation by the Charity Commission, it seems only sensible to wait and see how these developments play out. On the subject of the new guidance, feedback from the sector to the Review was that the new guidance should draw a very clear distinction between legal requirements and what the Charity Commission considers good practice. This would help trustees understand the nature of their obligations and apply them in their organisation.
- 4.14 If developments in case law are a key argument against creating any statutory definition - being the means by which flexibility is maintained - this places a considerable responsibility on the Upper Tribunal in its objective of clarifying and developing the law. Some evidence to the Review expressed disappointment that, though it is still early days in the Tribunal's development, the Tribunal has in its rulings placed relatively heavy emphasis on maintaining the status quo. While charity law is heavily based on precedent and is therefore by its nature backward-looking, there is a tension here between the role of precedent and the more purposive approach of the Charity Commission in allowing the evolution of the law to keep pace with social and economic circumstances. This tension is addressed further in Chapter 7.

Enlarging the list of charitable purposes?

- 4.15 Submitted views were almost unanimously against expanding the list of charitable purposes any further; most felt that the expansion of the list in the 2006 Act had been a helpful clarification and no-one felt it had made the situation any less clear or the list harder to apply. I share this view and there appears to be no need to revisit the list of charitable purposes again at the juncture. However, there are three areas for future consideration:
- 4.15.1 Some definitions and descriptions of the purposes in the list could benefit from further expansion or clarification as not all are fully defined in the Act or supported by case law. This leads to uncertainty.
- 4.15.2 The Charity Commission's interpretation of the "descriptions of purposes" listed in what has now become sub-sections 3(1)(a) to (m) of the Charities Act 2011 is that these were not intended to be freestanding purposes. This means that the Commission will not always accept that organisations with objects which track wording used in sub-section 3(1) have charitable purposes within the meaning of the Charities Act 2011. The Commission's argument is not universally accepted. It seems strange that a list of "charitable purposes" may include purposes which are not, in fact, charitable, and in practice this approach can give rise to anomalies: an organisation with the express object of "relieving poverty" may be regarded by the Commission as having charitable purposes within the meaning of the Charities Act 2011, but an organisation with the express object of "advancing amateur sport" may not. It is difficult to see how the Charity Commission's position helps organisations with legitimately charitable aims which are seeking to draft their formal legal objects in a way which is acceptable to the Commission.
- 4.15.3 Further, it is important that the Charity Commission should take care to maintain consistency in its understanding and application of each of the purposes listed, both as a matter of principle, as well as to help charities define their purposes effectively and smooth the registration process.
- 4.16 The Commission should, therefore, give thought to its work in communicating and applying the different charitable purposes; further guidance explaining its approach, and possibly model objects to supplement this, may be of benefit and is worth investigating.

Establishing a UK-wide definition of charity?

- 4.17 The Review was asked to consider whether a UK-wide definition of charity should be introduced. It is worth noting at the outset that any difference in definitions across the UK will only affect those

charities operating across more than one jurisdiction. However, for those charities, there are some resulting challenges and administrative burdens. The views of charities affected on whether change should actually be attempted are, however, mixed. Many would welcome a UK-wide definition as simpler to administer. However, the significant minority were of the view that some administrative irritation was a small price to pay for diversity, flexibility, and the upholding of principles of devolution (one respondent also added that the sector was already so complex and diverse anyway that a bit more complication mattered little!).

4.18 From a logical point of view, in terms of administrative efficiency and consistency, and of minimising confusion and difficulty for charities across the UK, a single definition of charity would be desirable. In this regard, it is worth noting that Northern Ireland is currently reconsidering its test of public benefit and it is to be hoped, in view of these considerations, that they will choose to adopt one of the two existing approaches. However, even among those in favour of change, the difficulty of agreeing a shared definition and the challenge and disruption of implementation were highlighted. Bearing in mind these challenges, together with the lack of appetite in the devolved administrations for any change and the state of legal flux in Northern Ireland, the least worst option must be to maintain the status quo, at least for the time being.

Public concern about charitable status

4.19 Concerns have also been raised that there may be a mismatch between the public's perception of which organisations can fall within the definition of charitable, and the reality. The mismatch may in large part be due to the diversity of the charity sector. Many charities are no longer the small, local, volunteer-led groups that many people associate with the term 'charity'; some are highly professionalised and specialist service delivery bodies, and some increasingly prioritise campaigning activities rather than delivering services.

4.20 That is not to say that the activities of charities who do not fit the traditional model should not be able to be included within the sphere of 'charity.' But it does point to the need for an important wider debate between and among Parliament, the public and the sector, around whether charities should be limited in their activities or where the boundaries of the definition should lie. Is a charity with no volunteers at all still a charity? How about one where all its funding comes from the State through delivery of public services? Or one where the primary regulator is a Government department, directly or via an agency? Lastly, how do fee-charging institutions fit within the popular conception of a 'charity' regime?

- 4.21 Further, as set out in the principles underpinning this Review (see Chapter 3), the independence of the sector must remain paramount. Although it is part of the existing common law that charities must be, and be seen to be, free from the influence of Government or any other group, no more formal protection of that status exists. The sector must continue to be seen as more than an outlier to local or national government. How independence can best be promoted and safeguarded must be an important feature of any debate on the future of the sector.
- 4.22 Finally, charities must also recognise the sense of trust that charitable status engenders. This is of particular importance where a charity is offering a commercial service. This may technically be through a profit-making subsidiary but, crucially, is one that operates under the parent charity's name. The challenge is that a charity's supporter may be less commercially-questioning about such a service (e.g. insurance) and make an unspoken assumption that the service is bound to be the 'best' – because the charity is offering it and they trust the charity. So charities need to be aware of and respect the influence their brand can have and ensure that they are sufficiently transparent in any commercial services for their supporters.
- 4.23 These are issues which have become more important, given the growth and development of the charity sector in the last decade. Public perception is only now beginning to catch up with the new reality. I hope that this report will encourage a debate which engages the public and helps them to work with the sector to shape its future.

Practical implications

Ensuring the charity tests are met

- 4.24 The first challenge is to ensure that all charities are delivering, and continue to deliver, public benefit. The view that charitable status is not a right but a privilege is an underpinning principle of this Review. A logical consequence of this is that charities must be able to demonstrate that they deserve this privilege, in that they are meeting the requirements of charitable status.
- 4.25 Over the course of the Review, concerns have been expressed from inside and outside the charity sector on a number of issues of sustainability:
- 4.25.1 Anecdotal evidence, particularly from regional events, indicates that the amount of charitable activity undertaken, and so public benefit delivered, relative to size, asset based and so forth, can be variable across different charities, to the point that some can find meeting their

responsibilities in this area challenging. There is no single cause of this but examples can include disagreements on boards leading to stagnation and charities being unable to generate sufficient income to reach a truly effective operating level;

4.25.2 Evidence gathered around mergers, both from meetings and more formal consultation, found that the processes underpinning merger, formal collaboration and winding up are complex and time-consuming, and there is little to motivate organisations that are struggling to operate effectively to try to overcome this and make use of them – it can often seem easier to struggle on alone. While no charity should be forced to merge, or be wound up unnecessarily, it is important that organisations are willing and able to take such action if it is the best way to achieve their purposes;

4.25.3 Some of those involved in smaller, particularly regional, organisations reported anecdotally that large numbers of charities can often operate in very similar areas (in terms of issues rather than geography). Contributors were concerned that this could mean that resources were being wasted through duplication and competition between charities trying to address the same issues. However, they also rightly recognised that this concern must be balanced against the benefits of encouraging a diverse sector and the passionate and often personal motivations that encourage people to set up charities.

4.26 Whether these perceptions are valid is, in reality, inevitably a matter of personal opinion (though the complexity of merger law is borne out by the experience of many in the sector - issues around merger rules are considered in Chapter 10). While they are grounded in experience, those expressing them were equally clear that the vast majority of charities are hard working, committed organisations doing their best to achieve their charitable aims and in most cases are doing so well. The issues reported above are marginal. However, the fact that they exist even as marginal issues should be taken seriously by the sector, as there are important issues of trust and confidence at stake and all charities should aspire to the highest standards to maintain the sector's status and credibility with the public.

4.27 Ensuring that the public benefit reporting requirements are properly met would be a good start. However, again referring back to the privileges attached to charitable status, there is an argument for going further, and setting up a process to identify and manage any organisations that do fall below the line. The concern is not those organisations whose purposes have expired or who are clearly inactive; the Charity Commission already has a mechanism for dealing with these organisations. The concern is organisations where a flicker of activity continues but the required standards may not be being met.

- 4.28 Greater transparency will provide a large part of the answer to this issue, in parallel with greater public awareness linked to a readiness to act on the information provided. The public must take some responsibility by exercising their judgment in relation to their support for charities. Transparency and judgment will be particularly important in relation to smaller organisations, in line with the general principle of proportionality in regulation.
- 4.29 However, there is an opportunity to strengthen the system by taking a more robust approach to potentially failing organisations, through building on the Charity Commission's existing risk and proportionality framework. What is envisaged is a system of simple key indicators (say, perhaps eight or ten) that charities can be judged against. Where these indicators reveal potential problems, the Charity Commission should be encouraged to undertake further investigation. A 'traffic light' system of this type has proved useful in other areas. This mechanism is set out in more detail in relation to accounting and reporting requirements (Chapter 6) but its relevance here is that charities who are struggling to meet their responsibilities can be identified and the Commission can work, perhaps through proactive advice followed up by further regulatory action where appropriate, to address these issues.

Supporting the essential contribution of trustees

Role

- 4.30 All charities are run by groups of trustees (though in charitable companies the trustees will also be company directors), who have overall responsibility for making sure that the charity is properly run and achieving its charitable aims. They are generally volunteers and normally paid only expenses. However, they are supported in fulfilling their duties by guidance and advice from the Charity Commission.
- 4.31 Trustees' primary, overarching duty is to act in the best interests of the charity (and its beneficiaries), and their particular legal duties broadly cover:
- 4.31.1 Ensuring the charity complies with charity law, the charity's own governing document, and other relevant legislation (e.g. employment law, health and safety etc);
 - 4.31.2 Acting with integrity, avoiding conflicts of interest and misuse of funds;
 - 4.31.3 Ensuring the charity remains solvent, and exercising prudence when investing the charity's money or borrowing on its behalf;
 - 4.31.4 Using the charity's funds and assets responsibly to further the charity's aims, without exposing them to undue risk;

- 4.31.5 Using reasonable care and skill in their work, seeking professional advice where appropriate.
- 4.32 Where a charity is unincorporated (e.g. a trust or unincorporated association), charity trustees will also be responsible for holding the charity's assets and can, where the charity has insufficient funds to pay its debts, be held personally liable for debts or losses. For all charities, a trustee may be personally liable if he/she has breached his or her duties to the charity, causing loss. Trustee indemnity insurance can provide cover to trustees in relation to breach of duty but not in relation to liabilities to third party creditors.
- 4.33 The Charities Act 2006 made several changes to the law which were intended to support charity trustees and address concerns about potential personal liability:
- 4.33.1 It provided a new general power for charities to purchase trustee indemnity insurance with the charity's funds, subject to certain safeguards.
- 4.33.2 It gave the Charity Commission the same power as the High Court to relieve a charity trustee of personal liability for breach of trust or duty where the trustee had acted honestly and reasonably and ought to be excused.
- 4.33.3 It made provision for the Charitable Incorporated Organisation (CIO), which although not yet in force, is designed to offer a limited liability structure designed specifically for charities.
- 4.33.4 For charities with no prohibition in their constitution on paying trustees, it provided a new power to pay trustees for the provision of services to the charity, subject to certain safeguards. This power does not extend to payment of a trustee for the services of acting as a trustee or as an employee of the charity.
- 4.34 The changes made in the 2006 Act have largely been seen as being helpful to charities, according to the evidence submitted to the Review. The ability to pay trustees for providing services appears, anecdotally, to be particularly helpful to smaller organisations and those just starting out. However, it is not clear, as a matter of logic, why this power does not extend to the provision of goods (e.g. stationery); this suggestion is included in the list of technical matters in Appendix A.

Insurance

- 4.35 The one area of concern with the 2006 Act powers was around indemnity insurance; while many organisations seem to have found this gives comfort to trustees, there were also many who felt the terms and exclusions of the policies were so limiting they rendered the policy useless. All of this is linked to the wider issue of personal liability of the trustees of unincorporated charities. There is a clear feeling in the sector that perceptions of risk around personal liability are a significant barrier to

trustee recruitment. One person made the interesting point that this is a particular issue for mid-size charities, for whom company status is not yet quite appropriate but who have some staff and contracts and therefore greater levels of potential liability.

4.36 However, the experience is also that people generally thought that the risks were far higher than they are in reality; once the true nature of the risk was explained, most but not all people were comforted sufficiently to take on a trustee role. It should also be noted that only 2% of respondents in Ipsos Mori's research mentioned the risk of liability as a reason why they were not trustees.

4.37 In response to these concerns, the Review has considered whether to recommend that limited liability be made available to the trustees of unincorporated charities, particularly in light of moves to introduce this in Scotland. However, on balance, I have decided against. In the first place, on the level of principle, limited liability of incorporated organisations (e.g. companies) is a trade-off against the increased rights that accrue to third parties in their dealings with them, none of which would apply in the context of unincorporated organisations. Secondly, the Charity Commission and High Court already have the power to excuse from liability trustees who have fallen foul of the rules on breach of trust but who have acted reasonably and in good faith, which can address any unfair cases that arise; and thirdly, the forthcoming introduction of the CIO will allow unincorporated organisations to adopt a form that limits the liability of trustees. However, there should be better promotion of user-friendly, practical guidance on the legal position and of the Commission's power to intervene, to help trustees understand their position and the protections available.

Recruitment

4.38 In terms of the general barriers to individuals becoming trustees, the evidence from trustees and charities is extremely consistent. Lack of time was the most commonly-cited barrier (39%) to trusteeship in the research undertaken for the Review. This can be both in terms of a general feeling on the part of an individual that they lack the time to take on any kind of trustee role and a decision not to take a particular trustee position because, while the individual understands the requirements of that role, he or she cannot meet them.

4.39 Clarity over what is required of a trustee is also important in its own right, in terms of both a lack of understanding on the part of the general public as to what trusteeship is and what the role generally entails, matched by a lack of clarity on the part of many charities as to what is expected of potential trustees in their organisation. A number of charities who contributed their views had experienced people expressing an interest in trustee roles then losing interest when they understood more about

the role. Accordingly, those charities which did not have clear role descriptions and requirements for trustees generally experienced more problems recruiting and higher subsequent attrition rates.

- 4.40 There is evidence from the Charity Commission that, as a whole, the charity sector can have trouble filling trustee vacancies; in a study in 2005, the Commission found that 39% of charities at least sometimes have trouble filling vacancies.²² This is borne out by the anecdotal evidence to this Review, with some organisations having no trouble recruiting and others experiencing significant difficulties. As noted above, charities who advertise more widely and have clear and transparent processes for recruitment seem to recruit more easily. More specifically, some find little difficulty with general recruitment but can struggle to find trustees with specialist skills (such as legal or financial skills), and others reported difficulties with recruiting a diverse board.
- 4.41 There are also wider issues around the promotion of vacancies. The Charity Commission research in 2005 found that “word of mouth” was used by 81% of charities to recruit trustees²³ and anecdotal evidence submitted to this Review indicates little has changed.
- 4.42 One further issue that was mentioned, particularly by smaller organisations and those outside London, was a lack of turnover in trustee roles. Trustee boards can appear as ‘cliques’ to the outsider and make people reluctant to put themselves forward to join (or feel they cannot do so), especially where there are particularly dominant members who are unwilling to consider change.
- 4.43 So charities do need to consider how they are presenting themselves to the outside world. For example, if trustee meetings take place during the working day, it will be difficult to attract people who are in work. Clearing away these ‘non-tariff barriers’ may be challenging but our research suggests that the results will justify the efforts made.

Retention

- 4.44 Once trustees are in post, retention does not seem to be an issue; this seems likely to be a reflection of the commitment that brings people to the roles. However, support for serving trustees could be improved. Firstly, a statutory ‘right to know’ was suggested – the idea that trustees should be able to access any and all information they need to fulfil their role, with small exceptions like employee personal data etc. It is arguable that such a right already impliedly exists in law. However, a statutory

²² The Charity Commission, *Start as you mean to go on: Trustee recruitment and induction research report* (2005) at page 2.

²³ *Ibid*, at page 7

clarification would remove any doubt, and it is certainly right that, if trustees are expected to be responsible for all the decisions involved in running their organisation, they should be properly equipped for the job.

- 4.45 Guidance from the Charity Commission should be less legalistic, focused on practical issues and celebrate the benefits of trusteeship as well as highlighting the (still important) risks. Charities should also recognise that trustees need support and training in their roles and be mindful of their needs – the relationship is two-way. Additional guidance for employers, highlighting the role of trustees, promoting good practice in offering time off to undertake such roles, and explaining the benefits in terms of career development for the employee, is also recommended. I recommend that giving time off to work in a charity should remain a matter of best practice, rather than a statutory obligation, due to the potential burden placed on small businesses in particular.

Payment

- 4.46 Interestingly, very few organisations mentioned the inability to pay trustees as a barrier to recruitment. Where it was reported, the issue was more the uninitiated expecting payment and being discouraged when this was not forthcoming rather than otherwise strong candidates being unable to take roles due to lack of payment.
- 4.47 Payment of trustees nonetheless remains a hugely divisive issue in the charity sector. Those who are in favour of a general power to pay cite the need to reach those who are unable to take the role unpaid (those who need to work full time, say), to improve board diversity, and those with high levels of professional skill. They point to the illogicality of a policy which permits a charity to recompense a trustee for a specific professional service (e.g. chartered surveyor) but not for the no-less-important skills of general commercial management. Those against argue that payment fundamentally undermines the voluntary principle and, while it may motivate more people to become trustees, this may not be for the right reasons nor bring in the people with the characteristics and skills charities need. There are also risks of creating an unlevel playing-field between organisations that can and cannot afford to pay trustees; creating a 'market rate' for the role could lead to an expectation of payment where none existed before.
- 4.48 The public perceptions research found that, while awareness of whether trustees are paid is low (an even split between those who thought they were, those who thought they were not, and those who did not know), once the role of trustees was explained, 61% thought they should not be paid. However, there was considerable variation within that result, with 47% of younger people agreeing

that trustees should be paid, compared to 22% of over 65s. Views from the sector were relatively balanced but leaned marginally towards not permitting payment.

4.49 Considering the limited concrete evidence on this issue, there is no real indication from sectors that do have the general power to pay trustees that they have found this helpful in recruiting and retaining quality trustees. Universities submitting evidence to the Review could see no clear benefit, and many have actively decided not to use the power they have, with one citing a wider survey they had conducted among universities that supported this conclusion. Similarly, evidence from housing associations is that paid boards cannot be shown to have delivered an increase in quality (though arguably in quantity) of applicants.

4.50 There is also the danger of abuse of any freedom to pay trustees. This is likely to be particularly pertinent in smaller charities which are largely below the regulatory and public ‘radar.’ Against this, one has to realise that the larger charities are truly huge organisations handling substantial amounts of public and private money.

4.51 On balance, therefore, taking into account the importance of the voluntary principle as a fundamental tenet of this review, I believe that, in respect of what will become ‘small’ and ‘intermediate’ charities (see Chapter 6), the best solution may be to maintain the status quo (the ability to pay trustees with the permission of the Charity Commission), but that charities in the ‘large’ category should be permitted to pay their trustees. This recommendation depends on there being clear disclosure requirements on the quantum and terms of any remuneration in the individual charity’s annual return.

4.52 But in order to encourage people to come forward to serve as trustees and to encourage the appropriate diversity of age, gender and ethnicity, all charities should remain able to, and be encouraged to, reimburse legitimate expenses. Travel costs are obvious but reimbursing the cost of care might encourage more people looking after young families or elderly relatives to come forward. It will be another area where trustees’ judgment will play the key role.

Disqualification

4.53 The disqualification rules for charity trustees already encompass most situations one would expect, including disqualification as a company director, bankruptcy and conviction for certain criminal offences. However, it is notable that the only criminal offences that will automatically result in disqualification as a trustee (without intervention from the Charity Commission) are those involving an

element of dishonesty or deception. In particular, it may be worth considering whether conviction of a terrorism offence should have the same effect.

- 4.54 However, it is important that any such change does not interfere with the rehabilitation through charitable work of those who have a past conviction, though current provisions allowing the Commission to waive disqualification should be sufficient to address this.

Recommended term of office for trustees

- 4.56 To address the issue of lack of rotation of board membership, the terms of trustees should be limited (in a similar way to the existing rules for company directors, for whom a nine year maximum term is recommended), with a 'comply or explain' approach to the inclusion of this measure. While checking this may be an extra burden for the Charity Commission, it could relatively easily be built into the assessment process that already applies during registration of a new charity, and subsequent monitoring processes.

General support

- 4.57 More emphasis being placed on the promotion of trusteeship, both as a concept and in terms of individual vacancies is a good starting point in improving recruitment processes. While many people acknowledged that the Charity Commission's 'Trustee Week' was a good start, more could be done by the Commission, by Government as part of its wider work on volunteering and by the sector itself to promote the value of becoming a trustee. A particular suggestion was creating links with schools, universities and youth programmes (e.g. Duke of Edinburgh Award, National Citizen Service) to encourage younger people to consider trusteeship and help encourage diversity.
- 4.58 Many organisations, particularly umbrella bodies and charities that successfully recruit trustees, recommended that more be done to help charities develop and implement robust, fair and transparent processes for recruiting trustees. Although the Charity Commission has updated its guidance on this issue as recently as March this year,²⁴ awareness of the guidance does not seem to be high - more needs to be done to promote the guidance and the principles contained in it rather than beginning again from scratch. However, promoting good practice in recruitment should also be supported from within the sector itself, given the importance of good trustees to organisations.
- 4.59 It is sensible, though, to consider the idea that, in order to give those interested in trusteeship an interim or apprenticeship period, charities should consider co-opting potential trustees onto relevant

²⁴ The Charity Commission, *Finding new trustees: What charities need to know (CC30)*, (2012)

sub-committees of boards for an initial period. Equally, giving them observer status at trustee meetings is a sensible idea, easy for organisations to implement.

4.60 There is also a role here for the business community. I have been impressed by the evidence from several organisations that working in the charitable sector has improved the employee's commitment and performance at their commercial place of work. While charities need funding, many also need the managerial skills business can provide. As one manager put it, "building a partnership with a charity is more than giving money." Of course, the charity has to have the ability and desire to absorb these skills – the corporate cloak can suffocate the charity. Overall, though, this is an avenue worth exploring.

4.61 The point was also made that the regulatory burden on trustees should be considered as a whole, not just the charity law elements - most of the burden on trustees is actually seen as coming from other legislation, such as employment or health and safety law. However, to do so is far beyond the scope of this Review; the Government's Red Tape Challenge for Civil Society²⁵, is considering the elements of regulation that go beyond charity law, and their attention could usefully be drawn to the particular challenges of the charity sector.

Recommendations

- 1. The Charity Commission should consider providing a single piece of guidance setting out how it defines each of the charitable purposes and the factors it will consider when applying those definitions to decide whether an organisation qualifies as charitable. It should also give thought to producing more model objects to supplement this guidance and assist new charities to comply with the law.**
- 2. No statutory definition of 'public benefit' should be introduced, in order to retain the flexibility attached to the common law definition. However, the attention of the Tribunal should be drawn to the important role it has to play in ensuring case law precedents reflect emerging social mores (see Chapter 7).**
- 3. No change should be made to the list of charitable purposes.**

²⁵ <http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/civil-society/>

4. The Charity Commission, in its drafting of new guidance on public benefit and more widely, should take on board the comments made by the sector regarding the need for a clear distinction between legal requirements and best practice in the text.
5. In order to address future public concerns about ‘what constitutes a charity,’ in practical as opposed to historical-legal terms, the Government should stimulate a widespread sector and public debate on the question.
6. For the time being, the recommendation of the Calman report that a UK-wide definition of charity be introduced should not be implemented. However, the harmonisation of the definition across the UK remains desirable in the longer term, and this issue should be revisited at a later date.
7. The Charity Commission, as part of its information strategy review, should identify and implement ways of drawing public attention to the public benefit reports of individual charities.
8. Charities should recognise the importance of public benefit reporting both to public confidence and their own ability to attract supporters, and take responsibility for complying with reporting requirements, stressing the ‘impact’ rather than the ‘process’ of their activities.
9. The Charity Commission should instigate a set of key indicators to help identify charities which might be at higher risk of failing to meet their legal obligations and should then take steps to improve organisations’ performance or take the necessary action against them (see Chapter 6 for further detail).
10. Charities who fall into the ‘large’ category set out in Chapter 6 should have the power to pay their trustees, subject to clear disclosure requirements on the quantum and terms of any remuneration in the individual charity’s annual report and accounts.
11. Trustees of all charities should consider reimbursing trustees’ expenses, especially if they consider this would result in a wider range of individuals taking on the role.
12. The Government, through the Civil Society Red Tape Challenge, should consider the totality of the regulation facing charity trustees with a view to reducing it where possible.

- 13. The Charity Commission should work with umbrella bodies and other groups in the sector (e.g. infrastructure organisations) to promote their best practice guidance on trustee recruitment.**
- 14. a) The Government, working with business, should produce best practice guidance for employers on what trusteeship is, the benefits for employees and employers, and how to support effectively employees who are trustees to meet the commitments of their role.**
b) The Government should lead the way in demonstrating good practice by encouraging staff to consider trusteeship and enabling them to use volunteering days in this way.
- 15. Businesses should explore the potential for loaning or seconding staff to charities.**
- 16. Trusteeship should normally be limited in a charity's constitution to three terms of no more than three years' service each, and the Charity Commission and umbrella bodies should amend their model constitution documents to reflect this. Any charity which does not include this measure in its constitution should be required to explain the reasons for this in its annual report.**
- 17. Umbrella bodies should, working with the Charity Commission and Government, investigate ways to draw together and promote a centralised portal for trustee vacancies.**
- 18. The Government should introduce a 'right to know' for all charitable trustees i.e. a right confirming that they can access any information, within the confines of data protection law, held by the charity that they reasonably judge necessary to discharge their duties effectively.**
- 19. The Government should consider if and how to widen the types of criminal offences disqualifying individuals from charity trusteeship, taking into account the need to support rehabilitation of former offenders.**

5. The Charity Commission and charity registration

The Charity Commission

Role and structure

- 5.1 The Charity Commission is the independent registrar and regulator of charities in England and Wales. As has already been noted, it has, in one form or another, been in existence for over 150 years and there seems little reason to alter that basic state of affairs. The regulator is well-respected among the sector and there is little appetite to transfer its functions elsewhere. The need for its role has also been recently assessed by not only the Strategy Unit in *Private Action, Public Benefit*²⁶ but by the Government's own Public Bodies Review in 2010,²⁷ both of which concluded that the Commission remains necessary to the effective regulation of charities.
- 5.2 The Charity Commission is a Non-Ministerial (Government) Department (NMD) but, unlike some other regulatory NMDs, 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 without being seen to be part of it.
- 5.3 The Charity Commission's independence reflects its roots, in the mid nineteenth century, as a quasi-judicial body, created to have a parallel jurisdiction with that of the High Court in respect of charities – much of which it continues to have to this day (see Chapter 1). The Public Bodies Review also acknowledged that one of the reasons for the continued need for the Commission is that its functions require independence from the State.²⁸ This, too, is difficult to disagree with; indeed, the Commission's independence already has statutory protection. The question, then, is whether the Commission's current form (as an NMD) is the best way of providing that independence while allowing the Commission to discharge its functions effectively.
- 5.4 The Review has considered a number of alternative options for how the Commission might be structured and has concluded, as one contributor to the Review very aptly put it, that its current

²⁶ The Strategy Unit, *Private Action, Public Benefit* (2002) at page 72

²⁷ The Strategy Unit, *Public Bodies Reform: Proposals for Change* (December 2010), at page 4

²⁸ *Ibid*, at page 4

status as an NMD is “the least worst option.” To turn the Commission into an arm’s length body or non-departmental public body would most likely require it to become accountable to a Minister, which would reduce its level of independence. To make it accountable to Parliament, in a similar way to the National Audit Office, would increase its independence from Government but would be otherwise inappropriate as the Commission exercises some executive and judicial functions. On balance, therefore, the present situation remains the right answer.

Regulator or friend?

- 5.5 Although the Commission has for some time operated as both a regulator and a friend to the charity sector, providing advice and individual guidance as well as enforcing regulation, its role is focused on charities’ compliance with charity law. Contrary to popular belief and hope, it does not intervene in the internal running of a charity unless the situation is so serious as to amount to a possible breach of the law.
- 5.6 In recent years, the Commission’s approach to regulation has become more focused, though this is probably a function of its reducing budget as well as the impact of the 2006 Act. The Commission’s budget for the current financial year is £25.7m, down from £29.3m in 2010-11. It will further reduce to £21.3m by 2014-15. This reduction has encouraged the Commission to revise its overall approach to its work, a process which resulted in the publication of a new strategic plan in December 2011.²⁹ The Charity Commission now bases its regulatory oversight on a risk and proportionality framework. However, if the Commission’s budget comes under more pressure (along with the rest of Government) as spending cuts are implemented, careful thought will be needed to shape an effective and sustainable role for the Commission in future. The first question is whether the Commission’s role as both a friend and regulator can, or should, continue.
- 5.7 During the Review, a strong view has emerged from across the sector that the advisory work of the Charity Commission (its ‘friend’ aspect) is greatly valued. Many organisations have benefitted from both the small-scale, specific advice available via the telephone helpline, and the individual schemes developed by the Commission with a specific charity to allow it to make changes to its constitution and structure. There is an argument to be made that, in some ways, this advisory function has helped avoid some regulatory compliance problems further down the road, though it has also covered many issues not directly related to legal compliance.

²⁹ The Charity Commission, *Strategic Plan for 2012-2015* (2011)

- 5.8 That said, further anecdotal evidence suggests that the helpline has been used by professional firms on behalf of their clients. Could it be that this advice is then passed on as part of a remunerated relationship? If so, the Commission is indirectly subsidising professional firms.
- 5.9 However, for all the benefits this advisory work delivers, it cannot be seen as essential to the core work of the Charity Commission, which is to ensure that charities comply with charity law. In a time of significantly reduced resources, the ‘friend’ side of the Commission’s work can only be seen as an extra and its regulatory role must come to the fore. The Commission itself recognises the need to focus more narrowly on its regulatory role, stating that,
*“A key message that emerged [during consultation on the Commission’s strategic plan] was that the Commission, taking into account its reduced resources, needs to focus on what only the regulator can do... Focus on these areas of activity has led us to identify two clear priorities for 2012-15: developing the compliance and accountability of the sector; and developing the self-reliance of the sector.”*³⁰
- 5.10 That is not to say that the Commission should not continue to produce generic guidance to aid charities in complying with the law. It is important for organisations to understand how the legal framework is interpreted by the regulator and how that will apply in relation to their type of organisation. In this regard, it is worth noting that the Commission’s guidance is generally welcomed as helpful and constructive by the sector, although it was again felt that the Commission should always ensure it is clear on what is a legal requirement, and what is recommended as best practice – ‘guidance’ morphing into ‘regulation.’
- 5.11 However, situations where charities require individual, specialist support to make schemes or other changes should not be the responsibility of the Commission, but of professional advisers such as lawyers and accountants with the Commission approving the result. It seems an inappropriate use of scarce resources for the Commission to spend not-insignificant sums (on occasions, amounting to thousands of pounds) on work that will in most cases only benefit single, or at best a handful of, charities. If the Commission is to continue to undertake such work, there is a strong argument that it should do so for a fee, based on cost recovery.
- 5.12 As regards the Commission’s telephone advice line, the issues are a little more complex. While providing advice still remains outside the Commission’s core regulatory role, the service it provides in giving advice on minor technical matters (often to small organisations) is undoubtedly valuable and in

³⁰ Ibid, at page 1

many ways harder to replace than the specialist legal advice provided in relation to complex schemes, discussed above. For a small organisation to seek formal legal advice on a small process point will most likely be costly and time-consuming and may therefore be disproportionate to the benefits gained. A possible solution could be for the sector umbrella bodies to take on this advisory work (maybe working with the Commission as “midwife”) as part of the services they deliver to their members or even on a commercial basis.

- 5.13 However, the important work of Councils for Voluntary Service (CVS) and other sector infrastructure bodies in supporting charities in their area should not go overlooked. There are many organisations at work in the charity sector that exist solely to support other charities, and better signposting to such sources of help is essential.

Objectives, functions, duties and title

- 5.14 The Charities Act 2006 established the Charity Commission as a body corporate (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. If the Commission is to focus on its regulatory role, its objectives, functions and duties must remain fit for purpose. One of the outcomes of the Commission’s Strategic Review was finding general agreement that the current arrangements are appropriate for the task of regulating charities. That view has largely been supported by submissions to this Review.
- 5.15 The Commission’s five objectives are:
- 5.15.1 The public confidence objective – to increase public trust and confidence in charities.
 - 5.15.2 The public benefit objective – to promote awareness and understanding of the operation of the public benefit requirement.
 - 5.15.3 The compliance objective – to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
 - 5.15.4 The charitable resources objective – to promote the effective use of charitable resources.
 - 5.15.5 The accountability objective – to enhance the accountability of charities to donors, beneficiaries and the general public.
- 5.16 Even in a world where the focus is on regulation alone, the Commission’s objectives continue to make sense. That the promotion of public confidence and the delivery of public benefit are crucial to the operation of the sector has already been emphasised in this report (Chapter 4). That a regulator should promote and ensure accountability and regulatory compliance is entirely uncontroversial. The

effective use of resources is appropriate to a sector which exists for public benefit, which to a large extent depends on the generosity of the public for that existence. Effective operation also forms an essential part of the principle that being a charity is a privilege not a right. While it is the compliance and accountability objectives that should be prioritised in future, the other three objectives are, in many ways, necessary and ancillary to those two goals.

5.17 It is how the Commission chooses to fulfil these objectives that will have most impact on its practical interaction with the sector. The Commission's six general functions are:

5.17.1 Determining whether institutions are or are not charities.

5.17.2 Encouraging and facilitating the better administration of charities.

5.17.3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.

5.17.4 Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.

5.17.5 Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives. This includes the maintenance of an accurate and up-to-date register of charities.

5.17.6 Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives. This includes complying, as far as reasonably practicable, with any request from a Minister of the Crown for information or advice relating to any of its functions.

5.18 It is welcome that its list of functions is already focused on regulatory compliance work (with the exception of the fourth function, which refers to the 2006 Act's system for licensing public charitable collections that has never been brought into force. The licensing of public charitable collections is discussed further in Chapter 8). As such, the list provides a good focus point for the Commission in future; these are the activities that should be at the core of their work.

5.19 Finally, the Commission's six general duties are:

5.19.1 So far as is reasonably practicable the Commission must, in performing its functions, act in a way:

- which is compatible with its objectives; and
- which it considers most appropriate for the purpose of meeting those objectives.

- 5.19.2 So far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of:
- all forms of charitable giving; and
 - voluntary participation in charity work.
- 5.19.3 In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.
- 5.19.4 In performing its functions the Commission must, so far as is relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).
- 5.19.5 In performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities.
- 5.19.6 In managing its affairs the Commission must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it.
- 5.20 One of the aims of the system introduced by the 2006 Act was to make it easier to assess the Charity Commission's performance – the duties provide a framework against which to judge the Commission's performance in terms of not just what it has done, but the way in which it has done it. They serve as a restatement and reminder of good practice.
- 5.21 In summary, then, there seems little need to revisit the system put in place in the 2006 Act at this time. Two developments could result in a need to re-examine; firstly, if there were to be a substantial re-drawing of the sector's boundaries as a result of public debate (see Chapter 4) or, secondly, if there has to be a further reduction in the resources available to the Charity Commission.
- 5.22 It has not been possible in the time available to me to reach any considered conclusion on the financial efficiency of the Commission. The major pinch point, suggested in anecdotal evidence, is the challenge of recruiting and retaining staff with the necessary expertise and experience in charity law – a very specialist area. I suggest that some further analysis of this issue be undertaken as the current reductions take effect and certainly before the next Spending Review.
- 5.23 However, to assist the sector, public and Commission itself with understanding and acknowledging the change in focus in the Commission's role, it may also be worth considering a change to the Charity Commission's name. The term 'Commission' normally refers to a temporary body set up to discharge a

particular role and then disbanded – its continued use in this context is something of a historical anomaly as that is in fact how the Charity Commission started life (Chapter 1). However, the Commission has become a permanent part of the landscape and, with its focus on regulation, it should perhaps consider a change in its name to aid understanding. A title such as “Charity Authority” may be more appropriate. The time and cost involved in making such a change would, however, need to be taken into account. There is also the argument that such a change may reduce the (admittedly rather low) level of recognition the existing Commission has now achieved!

Performance

5.24 The prevailing view of the Commission’s performance is that it has generally discharged its functions well. It is popular with the sector it regulates and, in more concrete terms, met all its Key Performance Indicators for the last year (2010/11).

5.25 In its evidence to this Review, the Commission noted that, within the framework of the broadly stable number of registered charities of around 162,000, the Commission each year registers around 6,000 new charities, while approximately the same number drop off the register for a range of reasons. The Commission deals on a substantive basis (excluding routine contact such as filing of accounts and annual reports) with charities whose combined income totals around 55% of the total income of the sector every year. It handles around 30,000 enquiries about charities and protects over £20m of charity assets through its investigative work. This Review has not sought to conduct an extensive analysis of the Commission’s operational efficiency, but none of the evidence gathered during the Review process has given reason to doubt that it is largely effective as a regulator in a complex and disparate field. However, some issues have been highlighted.

5.26 The first issue is a general point about public awareness. Only 47% of the public are aware of the Charity Commission, according to the research conducted by Ipsos Mori for this Review. Although this does not relate to performance in the strict sense, awareness of who the regulator is and what it does must surely be important in maintaining public trust and confidence.

5.27 Linked to this, Ipsos Mori’s research also found that a large proportion of the public (91%) believe that the Commission is likely to be responsible for handling complaints about charities’ work (as opposed to their compliance with their legal obligations). This is borne out by the fact that the Commission received some 2,000 complaints a year concerning the operation of charities (such as disagreements between trustees etc). As noted above, complaints of this type do not fall within the Commission’s remit, which is to regulate compliance with the law; while alternative ways of handling such

complaints are discussed further in Chapter 7, it is clear that there is more work for the Commission to do in terms of explaining its role to the public.

- 5.28 More fundamentally, some evidence received by the Review raised concerns about the Commission's approach to investigating and dealing with serious financial irregularities or fraud. This is distinct from complaints that the Commission will not investigate matters which are either outside its scope or would fall outside its proportionality criteria; this evidence concerns genuine and serious legal issues that have the potential to undermine public confidence and the integrity of the sector. Proactively identifying and tackling fraud and abuse should be a key part of the Commission's work and it is unsurprising that there is an expectation of high performance in this field. While it seems likely that the increased focus on risk will help to address this, the Commission should ensure that it takes a robust approach to fraud and abuse, taking proactive as well as reactive steps to identify and deal with such behaviour.
- 5.29 Finally, it has been highlighted (not least by the Commission itself) that the balance of regulation, in terms of oversight of low level decisions and granting of permissions to trustees, is not quite right. For example, the Commission is required to approve many changes to the constitutions of charitable companies – even non-substantive changes like cross-references. To help the Commission to focus more effectively on its core activities, and in line with the principle of reliance on judgment, a list of the areas in which such decisions and permissions could be delegated elsewhere (in particular to trustees) has been included in Appendix A.

Relationships with other regulators

HMRC

- 5.30 No assessment of the work of the Charity Commission can avoid considering its relationship with other regulators. One of the most important of those relationships is with HMRC, the body responsible for granting access to charitable tax reliefs and exemptions. HMRC and the Commission appear to work well together, with staff in regular contact, although systems for sharing information could be improved. It is vital that the flow of data in both directions is as swift as possible to ensure efficient and effective regulation – although data protection will always be important, solutions such as anonymisation should be used wherever possible.
- 5.31 The key challenge in the relationship between HMRC and the Charity Commission is actually one faced by charities themselves, who are required to register separately with both the Commission (when registering as a charity) and HMRC (for charitable tax reliefs and exemptions). The two similar but

nonetheless separate and in some ways different processes imposes an unnecessary burden on charities and should be addressed; it surely cannot be impossible for a joint registration form that meets both organisations' requirements to be devised. To do so would not only reduce the burden on charities but also streamline processes between the Commission and HMRC and help encourage information-sharing from the beginning, benefitting both parties.

Companies House

5.32 Every charitable company (some 30,000³¹) are required to produce two returns - one for the Charity Commission and one for Companies House. In my Red Tape Taskforce report, "Unshackling Good Neighbours,"³² published in May 2011, I recommended that strenuous efforts should be made to combine these two forms as part of a reduction in the regulatory burden. Now, fourteen months later, there does not appear to have been much progress. I therefore repeat and re-emphasise the proposal.

5.33 This joint working could possibly lead to other opportunities. Companies House has extensive experience of, and technical expertise in, handling company reports and accounts. Is there a way in which these could be put to use by the Charity Commission to reduce its costs and improve its efficiency?

Other regulators across the UK

5.34 The Charity Commission's other important relationships are with its opposite numbers elsewhere in the UK; the Charity Commission for Northern Ireland (CCNI) and the Office of the Scottish Charity Regulator (OSCR).

5.35 As with HMRC and Companies House, the major difficulty in this area is one of dual systems. As well as the difference in definition of charity discussed in Chapter 4, the regulation of charities in Scotland imposes different, and in some ways more stringent, reporting requirements to England and Wales. These rules apply not only to charities operating in Scotland alone, but also to those operating in Scotland but registered elsewhere in the UK, who are required to register in both jurisdictions and meet both sets of reporting and accounting requirements. This seems a needless waste of resources. By contrast, Scottish charities operating in England and Wales do not have any additional reporting or registration requirements placed on them.

³¹ Approximate figure obtained from Charity Commission

³² The Cabinet Office, *Unshackling Good Neighbours: Report of the Task Force established to consider how to cut red tape for small charities, voluntary organisations and social enterprises* (May 2011) at page 8

5.36 OSCR and the Charity Commission already endeavour to co-operate to reduce the burden where possible, and have a memorandum of understanding to aid this process. However, a system of home-state regulation and mutual recognition of reporting and accounting standards is desirable as a matter of logic and would simplify the situation of many charities operating across the different areas of the UK. While much could be done to streamline the existing dual regulation, this should ideally be delivered in parallel with a move to a UK-wide definition of ‘charity’, which is highly unlikely at this time (see Chapter 4).

The register of charities

5.37 The Charity Commission has responsibility (in England and Wales) for maintaining the register of charities. While inclusion on the register entitles organisations to a registered charity number, it is not necessary for an organisation to be registered in order to be a charity; there are a large number of unregistered but entirely legitimate charities.

Compulsory registration threshold

5.38 All charities with an annual income of £5,000 or more are legally obliged to register with the Charity Commission (apart from exempt charities and excepted charities). This threshold was set by the Charities Act 2006 to simplify the previous law. Failure to register does not mean that the organisation is not a charity, but that the charity is in breach of its legal obligations. Registered charities are generally subject to more onerous requirements in terms of reporting and accounting; these become more stringent as levels of income increase (see Chapter 6).

5.39 There are three types of charity that are not required to register with the Charity Commission;

5.39.1 Charities with an income of less than £5,000 per year (of which there are estimated to be 80,000);

5.39.2 Exempt charities (of which there are estimated to be just under 10,000). This type of charity is considered further in Chapter 6; and

5.39.3 Charities excepted from the requirement to register unless their income is £100,000 or more per year (“excepted charities”, of which there are estimated to be 100,000). These charities are regulated by, but not registered with, the Charity Commission.

5.40 It will be seen from the above that there are around 190,000 unregistered charities (though the total number is an estimate) for the charitable regulation of which the Charity Commission is legally responsible, even though in many cases it has limited information on or real oversight of the bodies involved.

- 5.41 Throughout the Review process, one key issue has been highlighted time and again in relation to the registration of charities; the value of having a registered charity number or, more accurately, the challenges associated with not having one. While a number of those who submitted evidence to the Review went on to make further comments about the existing approach to registration, most of them began from this fundamental point. The reason registration is so essential is an apparent lack of understanding in the wider world that an organisation can be a charity without being on the charity register. This has been reported as manifesting in a number of ways, including:
- 5.41.1 Reluctance on the part of the public and businesses to make donations;
 - 5.41.2 Inability to access discounted rates usually available to charities e.g. from utility companies;
 - 5.41.3 Inability to apply for funding from some grant-makers;
 - 5.41.4 Inability to access charity banking services (both in terms of accessing finance e.g. loans and accessing services e.g. charity bank accounts);
 - 5.41.5 Perception they are unable to access charitable tax reliefs (although this is not in fact the case);
 - 5.41.6 Inability to make use of some online fundraising sites.
- 5.42 These barriers have a number of important knock-on effects. In particular, there is evidence that inability to access grant funding without a registration number can lead to charities ‘sharing’ registration numbers or larger organisations applying for funds on behalf of smaller ones. These practices in turn lead to issues of ownership and management of resources and undermine the transparency of the sector. Quite apart from their dubious legality, practices such as this are damaging to accountability and pose serious risks to public trust and confidence; the regulatory system should not drive or encourage such behaviour.
- 5.43 What, then, is the solution? There is a balance to be struck here between imposing the burden of registration (and the reporting requirements that accompany it) on very small organisations and ensuring that unregistered organisations are not disadvantaged. A renewed emphasis on public education and understanding of the regulation of charities will be part of any solution. However, there are changes that could be made to the rules on registration to help address these issues.
- 5.44 The administrative burden that registration and its associated requirements imposes on small organisations was highlighted in many of the submissions made to the Review. A relatively small increase in the £5,000 income threshold for registration could relieve the very smallest from the

administrative burdens associated with registration but maintain the general principle of accountability. There is also a disconnect between the current registration threshold (£5,000) and the threshold at which accounts and a Trustees' Annual Report must be filed with the Commission. This adds to the general administrative complexity of charity administration and there would be merit in equalising the thresholds.

5.45 However, an increase to even £10,000 would result in over 50% of charities being unregistered, which is challenging for the Charity Commission as it reduces the amount of information it holds about the sector it regulates. More importantly, a higher threshold may act as a disincentive to starting new charities by putting a charity registration number even further out of reach. While raising the threshold may be desirable, it can therefore only be one element of the solution.

5.46 There is the obvious concern that, by reducing regulatory oversight through allowing more charities not to register/come off the register, the risk of fraud could increase. Some of this risk could, though, be addressed by also applying compulsory registration to any charity that wishes to claim tax relief from HMRC.

5.47 There remains, of course, the possibility that a group of organisations who are either unaware of, or unwilling to comply with, the requirement to register exists. The identification and registration of any such organisation is of course important to the integrity of the sector, though it is difficult to see how it could be achieved, particularly in relation to the unwilling. Education and awareness-raising, this time among charities and infrastructure bodies, will again be important.

Voluntary registration

5.48 A relatively simple way to address the disadvantages of being an unregistered charity would be to introduce a right to voluntary registration for those below the compulsory threshold; this could be done alongside any increase in that threshold. This would also reduce the risk that organisations will be motivated to use the Charitable Incorporated Organisation form when it may not be appropriate, simply to take advantage of the fact that (uniquely) all of these organisations must register with the Commission regardless of income.

5.49 Voluntary registration would allow small charities to exercise their own judgment as to whether the benefits of registration outweigh the work involved in complying with the requirements in their particular case. This could be easily implemented by bringing into force s30(3) of the Charities Act 2011 (which requires the Charity Commission to allow voluntary registration by any non-exempt

charity that wishes to register), though the impact on the Charity Commission of a flood of applications to register would need to be considered, taking account of resource constraints and the fact that the Commission will shortly be required to register new Charitable Incorporated Organisations (regardless of size) when the provisions creating them are brought into force. This could, though, be addressed in a number of ways, such as staging voluntary registration, levying a small charge to cover the Commission's costs, or similar. As a starting point, in every case, registration would have to be done online. Charging is discussed further in Chapter 6.

5.50 The issue of transparency and the need to give the public relevant information on which to base their decision whether or not to support a particular charity raises a challenge in the case of small, unregistered charities. As a corollary of introducing voluntary registration, it has also been suggested that unregistered charities should be required to label themselves as such, in the same way as registered charities are required to by s39 of the Charities Act 2011. This will draw a potential donor's attention to the fact that information about the charity is not available on the Charity Commission's website and that there is therefore a lower level of supervision. It would nevertheless be important that this proposal was implemented at the same time that voluntary registration was introduced for all charities.

Excepted charities

5.51 The main groups of excepted charities are religious charities from certain Christian religious denominations (including Parochial Church Councils), scouts and guides, and armed forces service non-public funds. These charities are excepted from the requirement to register with the Charity Commission either by legislation or by orders made by the Commission for various reasons, mainly because historically they had a relationship with an umbrella body that oversaw their activities to the same extent as the Charity Commission's then-remit as a registrar.

5.52 To rectify this anomaly, the Charities Act 2006 required all excepted charities with an annual income of over £100,000 to register with the Charity Commission, with the ultimate intention that it would reduce over time to the same level as the general registration threshold i.e. currently £5,000. However, the Act prohibits the Minister from reducing the excepted charities registration threshold further until the report of this Review has been laid in Parliament.

5.53 The position of excepted charities arguably creates an imbalance. The regulatory requirements they are subject to have not kept pace with those applied by the Charity Commission as its role has

developed from registrar to regulator; for example, for example, excepted charities are generally subject to less onerous reporting requirements than registered charities and this limits transparency and accountability.

- 5.54 Excepted charities are generally content with their situation and many are, by and large, similarly relaxed about the likely eventual lowering of the registration threshold to match the general level. Some positively welcomed registration and its benefits, in particular an increase in public trust and confidence and the helpful discipline of having to submit annual reports and accounts. A few had also experienced the problems of not having charity numbers, and felt registration would help in this respect. Others were unconcerned as they felt no need to look beyond their members or beneficiaries for support.
- 5.55 In resolving this issue, it is important to consider the experience of those excepted charities with an income over £100,000, who were required to register in 2009. The organisations who contributed to the Review had found registration to be generally unproblematic, though some pointed out that, as larger organisations, they had staff with financial and legal skills to guide the organisation through the process, which may not be the case for smaller bodies. Other groups highlighted the support they had received from the Charity Commission and support organisations within the sector as important to a smooth transition. Most recognised the benefits registration had brought, and there were no reports of a significant negative impact on organisations either at the time of registration or since.
- 5.56 It is my view that the process for lowering the registration threshold for what are currently excepted charities should continue until it matches the general compulsory registration threshold. The existence of the current exception adds confusion and complexity to the charity sector landscape and has long outlasted its original justification. That is not to say that there is reason to believe that excepted charities as a class are under-performing or are badly run as a result of their excepted status. Many involved in such charities may understandably feel that their organisations have operated well over the years without the requirement to register with the Charity Commission and to add to their administrative workload is unnecessary or even counter-productive. At the single organisational level, they may be right. However, the wider interests of transparency, accountability and equal treatment across the sector as a whole must also be considered; it is important that those who support charities are able to understand the structure of the sector and are equipped with the information to enable them to exercise their judgment in relation to it. Some minor administrative inconvenience seems an acceptable price to pay for strengthening accountability, and the trust that accompanies it –

particularly in view of the recommendations to reduce the burden on the very smallest organisations, recommended in this Chapter.

5.57 It is clear, however, that a period of notice would be needed for planning (by excepted charities and the Charity Commission), together with support from national bodies and the Charity Commission in making the change. The staggered approach to lowering the threshold envisaged by the 2006 Act seems a helpful solution to this. Concern was also expressed during the evidence-gathering phase of the Review that registration would be unmanageable for very small excepted charities; matching to the proposed higher general registration threshold should address this sensible point.

Recommendations

- 1. The Charity Commission should remain as a Non-Ministerial Department, with its independence protected in statute.**
- 2. The Commission should prioritise its core functions:**
 - 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.**
- 3. The Commission's statutory objectives are sound, but it should focus more tightly on regulation of the sector; not just reactive but proactive regulation, including checking random and risk-weighted samples of charity accounts. The Commission should be more proactive in deterring, identifying, disrupting and tackling abuse of charitable status.**
- 4. The Charity Commission's competence is in charity law. It should not be producing guidance on issues that are not concerned with that, unless it provides clarity on an issue that directly impacts on charity law and is published jointly with another organisation that can provide authoritative advice.**
- 5. The Commission needs to be adequately funded to properly regulate the sector. Some analysis of financial efficiency and requirements needs to be undertaken as reductions in the Charity Commission's budget take place.**

6. Consideration should be given to whether the name 'Charity Commission' is sufficiently well-matched to the Commission's role going forward to support public and sector understanding of its role. A change to "Charity Authority" is suggested.
7. The Charity Commission exercises a number of functions and grants a number of permissions that could be moved elsewhere, or removed altogether, to streamline regulation. A list of the functions that could be altered or removed is set out in Appendix A. Where this de-regulation enables charities themselves to make more decisions, there should be a "comply or explain" approach.
8. The general threshold for compulsory registration should be raised to £25,000 (to match the accounting threshold), with compulsory registration also applicable to all (non-exempt) charities that claim tax relief.
9. The process of lowering the registration threshold for excepted charities should continue, first to £50,000 and then to £25,000, over a period of three years. This three year period should commence once all existing organisations wishing to convert to a Charitable Incorporated Organisation (see Chapter 10) have had two years to do so, to manage the impact on the Charity Commission.
10. To minimise the impact on the Charity Commission, deregistration of those outside the new limits should be upon request only.
11. Voluntary registration should be introduced by bringing s30(3) of the Charities Act 2011 Act into force, once the process of registering excepted charities with an income over £25,000 has been completed and when all existing organisations wishing to convert to a Charitable Incorporated Organisation have had two years to do so. Applications for voluntary registration should only be available online.
12. The processes for registering an organisation with the Charity Commission and for tax relief with HMRC should be joined up into a single process. The Charity Commission and HMRC will need to work together to design and implement such a process.
13. All charities which are unregistered should be required to disclose this fact on their correspondence, fundraising materials and cheques.

14. Work by Companies House and the Charity Commission to create a single reporting system for charitable companies, as recommended in *Unshackling Good Neighbours*, should continue as a matter of urgency. The potential for joint accounting requirements should also be investigated.

6. Co-regulation, sub-regulation and exempt charities

Exempt charities and the Charities Act 2006

What are exempt charities?

- 6.1 Confusingly for the public, and seemingly also for charity funders, there is a group of charities, including universities, the boards of trustees of various museums and galleries, housing associations and charitable Industrial and Provident Societies (see also Chapter 10), that are called “exempt charities”.
- 6.2 The exempt charities are those institutions that are comprised in Schedule 3 of the Charities Act 2011 (formerly Schedule 2 of the Charities Act 1993). They are institutions that are charities but which are exempted from registration with the Charity Commission - before the Charities Act 2006, they were largely outside its regulatory jurisdiction. They were granted this exemption because they were considered to be adequately supervised by another body or authority. In practice, although exempt charities are bound by charity law and can access the tax breaks associated with charitable status, they are not required to – indeed, cannot - register and so are not subject to the same reporting requirements as other charities (e.g. submission of accounts). It follows that, though the Charity Commission has ultimate responsibility for the regulation of the entire charity sector, it has little visibility over this large group of about 10,000 charities, many of whom have very significant resources.
- 6.3 Changes to the position of exempt charities were proposed in the Strategy Unit Report, “*Private Action, Public Benefit*”.³³ The recommended changes, which were introduced in the 2006 Act, intended to ensure that all organisations with charitable status are subject to the same accountability requirements following evidence of public confusion and some high profile cases of mismanagement.
- 6.4 In essence, under the 2006 Act, exempt charities (or groups of exempt charities) are treated in one of two ways:
- 6.4.1 Wherever possible, existing bodies that have regulatory oversight of groups of exempt charities are identified and appointed (by the Minister for the Cabinet Office) as the “principal

³³ The Cabinet Office, *Private Action, Public Benefit* (2002) at page 87-88

regulator” (in the circumstances, a rather misleadingly all-encompassing title) for that group of exempt charities, and charged with promoting compliance with charity law in addition to their existing role. In these cases the “principal regulator” already has a regulatory relationship with the relevant group of charities, although not specifically in relation to their being charities.

- 6.4.2 Where it proves impossible to identify a suitable body to become “principal regulator” of a group of exempt charities, that group of exempt charities loses its exempt charity status. The group will become “excepted charities”. This means that they come under the Charity Commission's full regulatory jurisdiction, and if their income exceeds £100,000 they are required to register with the Commission (see also Chapter 5).

The role of the principal regulator

- 6.5 The role of the principal regulator is to promote compliance by the charity trustees with their charity law obligations. However, they do not have powers in charity law that enable them to, for example, investigate charities. So, if a principal regulator identifies a charity law issue with an organisation it is monitoring the only action it can take is to call on the Charity Commission to investigate (conversely, the Commission must consult a principal regulator before taking any action in relation to a body it regulates).
- 6.6 In many ways, principal regulators, and the notion of ‘exempt charities’ are an anomaly, and it is true that the structure can cause confusion as regards their status and role in the sector. However, against this must be balanced that many of the groups of charity falling within this system have a primary role that requires its own special form of regulation (e.g. as a school or university) and so single regulation by the Charity Commission would be highly inappropriate. The alternative, dual regulation, would place a heavy burden on the organisations involved and should only be undertaken if no alternatives remain.
- 6.7 While the appointment of principal regulators for every group of exempt charities remains a work in progress, the arrangements that are in place appear to have so far been in many ways successful. Exempt charities and the one principal regulator who provided evidence to the Review were content with their regulatory structure and consider that the system is generally working well. Concerns have been expressed about how seriously some principal regulators are taking their duty and how much emphasis they place on the charity element of their role, though some, by contrast, are doing an excellent job. There is perhaps a need for the Charity Commission to increase its focus on and communication with those principal regulators who may not be discharging their duty as fully as

others – on the evidence received, the challenges are not sufficiently serious to merit the removal of the system.

6.8 Maintaining the principal regulator system for the current list of charities therefore seems rational, although there are some issues around increasing transparency to which we shall return. However, there is a need to accelerate the implementation of the legislation for those exempt charities for which a decision has not yet been made either to appoint a principal regulator or to remove exempt status and so require registration with the Charity Commission. In particular, the Office for Civil Society and the Charity Commission should begin discussions with the Homes and Communities Agency about the possibility of it becoming the principal regulator for charitable social housing providers in England. It was originally proposed that the Housing Corporation would assume this role, but the decision has been delayed because of changes in the way that social housing providers are regulated.

Why ‘principal regulator?’

6.9 The term “principal regulator” creates an unhelpful sector or public perception of what the role entails. The legislation does not confer regulatory powers on principal regulators – it gives them a simple duty to promote charity law compliance alongside their existing role (all the regulatory compliance and enforcement powers rest with the Charity Commission).

6.10 An alternative term that more accurately explains the nature of the relationship is needed. ‘Co-regulator’ seems a more fitting expression, reflecting the co-operative nature of the relationship.

Co-regulation and partnership working

6.11 The next question is whether there are other groups of charity that would benefit from a more tailored approach to regulation by another existing regulator or umbrella body. Such an arrangement could lead to a more flexible form of co- (or sub-) regulation that might work particularly well for some groups of specialist charities. There are several encouraging examples of this sort of development in the private sector (e.g. the Advertising Standards Authority’s links to Ofcom in relation to broadcast media).

6.12 Co-regulation consists of a spectrum of possibilities, with simple signposting at one end, whereby an organisation would direct its constituent charities more actively towards the guidance and support of the Charity Commission, to full-blown delegation of powers by the Charity Commission at the other.

6.13 Evidence submitted to the Review took the clear view that full delegation of powers by the Charity Commission was potentially dangerous, on the grounds that it could fragment regulation and cause further confusion of the public. If it is to be attempted, it can only be where umbrella bodies have, or take, an oversight role upon which to 'hang' these extra responsibilities (the same also applies to the creation of further principal regulators). Not all organisations and structures are set up for oversight so many umbrella or national bodies will be ill-equipped to take on a regulatory role and there is a danger that the nature of relationships between umbrella bodies and their membership will change, which many groups understandably do not wish to happen. This point was supported more widely, particularly as organisations are often members of several networks and organisations, which could make regulatory constituencies hard to delineate.

6.14 However, there is evidence of a number of umbrella bodies already taking on a greater advisory or advocacy role as regards their membership, and helping to set good practice standards. The Charity Commission already runs a partnership programme, working with around 200 umbrella bodies to increase their level of engagement with their membership (e.g. through accredited good practice standards etc). Under such an arrangement, the Commission works with the umbrella body on issues such as the provision of guidance, the development of model governing documents and complaints handling. The individual charities still submit their Annual Returns and accounts, where required, to the Charity Commission and the Commission retains its compliance and enforcement powers. The key advantage for the Commission is that the umbrella body deals with a lot of the front-line queries about charity law and good practice, and can do so in a way that is likely to be more tailored to the needs of its members. This is an approach which the Commission is keen to develop, though it should be noted that not all bodies will want to take on the same level of responsibility.

6.15 This sort of partnership approach can be informal (which is largely how existing partnerships have developed in the past) or could be on a more formal footing, with for example the development of Memoranda of Understanding setting out roles and expectations.

6.16 My terms of reference suggest that efforts should be made to anticipate likely future changes in the shape and structure of the charity sector. In my view, it is highly likely that groups of charities engaged in similar functions will increasingly see the advantage of more focused forms of regulation. I therefore recommend that the Charity Commission should be able to delegate some or all of its functions to another body to exercise on its behalf, where it considers this to be in the interests of good regulation. This will require the Commission to satisfy itself that the overall standard of

regulation will be equivalent. In all cases the Commission must both retain its powers to investigate any individual charity and be able to withdraw a co-regulation authorisation at any time.

Accounting, Reporting and Transparency

Why should charities have to submit reports and accounts?

- 6.17 In the evidence submitted to this Review, a small minority of people argued that requiring charities to submit information, in particular annual reports and returns (as opposed to accounts), was a waste of resources that could be better used to promote charitable purposes. This section of the report therefore starts from this question of first principles; should we require charities to submit information to the regulator at all?
- 6.18 It is true that to require this information is to place an administrative burden on charities and therefore requires careful weighing of the costs and benefits of doing so. However, good regulation will always be a question of balance; creating a system that allows organisations to operate freely and effectively while maintaining the integrity of the sector as a whole.
- 6.19 It is my firm view that transparency, on the part of both charities themselves and the Charity Commission, is crucial to maintaining trust and confidence in the sector. Transparency has already been highlighted as a key issue underpinning this Review; it supports the use of judgment over process, underpins public trust and confidence, and reflects the fact that charitable status is a privilege, not a right. Reports and accounts are one of the major ways in which the transparency of the sector is achieved – it allows people to scrutinise the work and financial management of charities and allows the sector to demonstrate the value it adds and benefits it delivers.
- 6.20 The fact that over 1m sets of accounts are downloaded from the Charity Commission’s website every year is testament to the value of this information to the wider world. Ipsos Mori’s research for the Review supports this view, finding that the public, when making a decision whether to support a particular charity, places a high importance on being able to view information that tells them what a charity does, what it spends its money on, and what impact it has. Furthermore, for the regulator to do its job effectively it must have clear oversight of the sector it regulates; information is a basic tool in identifying and taking action against mismanagement and maladministration.
- 6.21 It is essential, therefore, that the system is set up to provide the right information to the right people, without bureaucracy stifling the system. There are a number of factors to consider.

Is the accounts and reporting system fit for purpose?

Current requirements

6.22 All charities, whether or not they are registered with the Charity Commission, must prepare accounts.

They must make their accounts available to anyone on request, and may charge to cover their costs of doing so (e.g. photocopying and postage). Whether these are receipts and payments or accruals accounts will depend on the structure and income level of the charity. Generally, only registered charities with an income of more than £25,000 must routinely submit their accounts to the Charity Commission. All charities preparing accruals accounts are expected to do so in compliance with the relevant sections of the appropriate Statement of Recommended Practice (SORP), usually the charities' SORP.

6.23 Those further up the income ladder must also have their accounts externally scrutinised. Again, the level of scrutiny (independent examination, audit) will depend on income level.

6.24 Outside the accounting processes, registered charities with an income of £10,000 or more must also complete an Annual Return (or, for the very smallest, a simplified Annual Update). This is a pre-populated form sent to them by the Commission that they must review, correct and return. It carries basic information such as names of trustees etc. For charities with an income over £1 million, the Annual Return includes an additional Part C "Summary Information Return" (SIR) with detailed questions about aspects of their operations and finances.

6.25 All charities must also compile a Trustees Annual Report (a similar idea to the annual reports produced by companies), setting out their performance over the year. This is where public benefit reporting, discussed in Chapter 4, fits into the picture. Trustees Annual Reports must only routinely be submitted to the Commission by those with an income over £25,000. A breakdown of all these requirements is shown in the chart at Appendix D.

6.26 Any information required to be submitted to the Charity Commission must generally be filed within ten months of the end of the charity's financial year. Failure to do this results in the charity being "named and shamed" on the Commission's website, with a red border around the charity's entry on the register.

6.27 Most registered charities submit reporting information to the Charity Commission electronically. The ease of access and presentation of summary information on the website has greatly improved in

recent years and is generally considered to be well presented and sufficiently detailed. However, several organisations below the £25,000 reporting threshold noted that, although they have been submitting their information to the Commission as a matter of good practice, the Commission will not publish the information on its website. In numbers, these small charities account for most of the Charity Commission's register; therefore, in the past, when these documents had to be submitted as paper documents and subsequently scanned it was understandable that the Commission was reluctant to devote resources to putting these accounts on its website. Now that these documents can be submitted online using minimal Commission resources it seems both inequitable and against the interest of transparency for the Commission not to put them on the website.

Is the balance of regulation right?

- 6.28 The existing reporting and accounting system already applies different levels of stringency in its requirements, related to the size of the organisation; the smaller the organisation, the less work required of them. Some evidence received by the Review stressed the need to minimise the burden of work on charities, particularly small ones, whilst others highlighted that the rigour of the requirements is good for charities in terms of governance. Overall, however, opinion was that the current thresholds are at broadly the right levels.
- 6.29 This seems generally appropriate – a general threshold of £25,000 income for submitting information seems a good balance. However, in the interests of transparency and to maintain alignment with the recommended criteria for compulsory registration, I consider that the requirement to submit information (rather than merely produce it for distribution by the charity itself) should be extended to all compulsorily registered charities i.e. under my proposals, those charities with an annual income in excess of £25,000 and those who wish to claim tax reliefs. Additionally, also for transparency, those who are voluntarily registered should also be required to submit accounts. However, they should be required to do so electronically to minimise the administrative burden on the Commission, as should those who are compulsorily registered below the £25,000 threshold. Subject to the one area discussed below, the other thresholds should remain unchanged.
- 6.30 The one threshold that does require attention is the audit threshold. A full audit is an expensive and time-consuming exercise and, although it is right that large organisations should submit to this level of scrutiny in the interests of good regulation and management, the current threshold of £500,000 income per year seems a low level at which to impose this requirement. A level of £1 million draws a better balance. On similar lines, the existing 'asset test' that requires organisations with assets worth

£3,260,000 to undergo an audit was criticised by some as unnecessary and hard to apply in practice. This is an additional element of complexity that should be removed.

- 6.31 The next issue, then, is whether, within the various thresholds, the requirements upon organisations should be simplified. It is not difficult to sympathise with those who find the current system overly complex. There is clear support for simplification of the charities' SORP and making it more useful, though it was felt that it should not be removed altogether as it provides the guidance needed to prepare a 'true and fair view' in line with Generally Accepted Accounting Principles (GAAP). This, then, is another question of balance. The Charity Commission recognises the need to simplify the SORP and is committed to doing so, making it modular so it is only necessary to refer to the sections that are relevant to the charity whose accounts are being prepared, and putting the needs of small charities first. This seems a sensible approach.
- 6.32 The SIR also came in for particular criticism, as it was seen as an unnecessary duplication of information provided elsewhere and thus of questionable value. Many suggested it should be abolished and I see no reason to disagree.
- 6.33 Finally, evidence indicated that the Trustees Annual Report is useful but also that it is often made pedestrian by some charities which provide a template basic report, which does not always provide a sufficiently detailed explanation of their work and its impact. This is borne out by the research conducted by Sheffield Hallam University into compliance with public benefit reporting requirements,³⁴ discussed in Chapter 4. Given that the information to be provided in such reports is closely allied to public desire to understand charitable activity and impact, and that evidence supports the view that the report is useful when done well, this seems to be an area for focusing on improved compliance rather than changing the requirements.
- 6.34 As part of its work to develop a new information strategy, the Charity Commission should give thought to the guidance it produces on how to complete annual returns, reports and accounts. Guidance should be simple and focused on enabling charities to provide the right information. This will need to be alongside greater scrutiny of the information provided and better investigation of the reasons for poor responses, issues which are discussed further below.

³⁴ The Charity Commission/Sheffield Hallam University, *Public Benefit Reporting by Charities: Report of a study undertaken by Sheffield Hallam University on behalf of the Charity Commission for England and Wales*, June 2011

6.35 In the longer term, technology may present a way of helping charities to provide relevant and comprehensive information. The Charity Commission could consider giving charities themselves the opportunity to add information to their register entry on the Commission website, for example a short piece about the charity's impact. Technology could also enable charities to better access the right information and guidance they need. For example, a facility enabling charities to 'log in' to the Commission's website could be used so that only the relevant accounts preparation guidance and accounts scrutiny guidance is highlighted – this could make it much easier for charities to know what requirements apply to them.

6.36 These reforms, then, would leave the following information submission requirements in place for registered charities. As noted elsewhere (see Chapter 5), all unregistered charities will have to note this fact by carrying on their letterhead, cheques and fundraising materials the designation 'unregistered':

Tier 3 (Small) – income below the proposed compulsory registration threshold of £25,000:

Accounts preparation – Receipts and Payments option for non-company charities

Accounts scrutiny – no external scrutiny requirement

Accounts and simplified trustees' annual report (filed electronically)

Annual Return (including proposed risk indicators – see below)

Charity number to carry the prefix 'small' (see paragraph 6.47)

Tier 2 (Intermediate) – income £25,000 to £1million

Accounts preparation – Receipts and Payments option for non-company charities of £25,000 to £250,000, accruals accounts otherwise.

Accounts scrutiny – Independent Examiner (does not need qualification unless income over £250,000)

Accounts and full trustees' annual report

Annual Return (including proposed risk indicators – see below)

Tier 1 (Large) – income over £1million

Accounts preparation – Accruals accounts

Accounts scrutiny - Audit

Accounts and full trustees' annual report

Annual Return (including proposed risk indicators – see below)

6.37 Finally, it would be sensible if, instead of submitting all these documents separately, all the different elements could be compiled into a single return.

Is the information used and scrutinised effectively?

6.38 Scrutiny is a major area of weakness in the current system. It is not in dispute that the Charity Commission does not, and cannot, check information submissions; as previously noted, to scrutinise

each submission would be unworkable in any economic scenario due to sheer volume. However, that is not to say it cannot undertake any scrutiny or validation work at all; to identify malpractice and mismanagement is one of its most fundamental roles as a regulator and, as the research undertaken for the Review by Ipsos Mori makes clear, the public rightly sees this as a key role. Reputation, and so trust in the sector, is at risk here.

- 6.39 There are technological, largely automated, solutions that could be employed to enable basic validity checks on accounts submissions – these are already in use in organisations such as Companies House. While installing such systems would involve an up-front cost for the Charity Commission, it is arguable that such a system is necessary to reduce fraud and error and thus would strengthen the role of the regulator at relatively little ongoing cost. The business case for funding an up-front investment in such technology, and the possibility of sharing an existing system to reduce costs, should be thoroughly investigated. If the business case is proven, I would very much hope that HM Treasury would commit to funding this important endeavour.
- 6.40 The next issue is the identification of charities whose performance, either financial or organisational, gives cause for concern. We return here to the list of indicators mentioned in Chapter 4 for identifying risk – while the Commission already operates a risk-based regulatory system, and this is to be commended, the system could be strengthened and made more accessible and useful to the public if a list of key indicators was introduced at the very beginning of a charity’s annual return.
- 6.41 The list of indicators suggested below is intended to represent a balanced and objective set of criteria for identifying organisations that may have particular vulnerabilities. They are designed to mirror similar standards applied to businesses, pick up on features that indicate a higher possibility of (but in the vast majority of cases do not result in) fraud or mismanagement and identify charities where the role of the State is perhaps critical. However, it is more important that the principle of the list is accepted than the individual items selected; there is plenty of scope for further discussion and debate on content if the idea is valid.
- 6.42 My suggested list of indicators is as follows:
- a) Does the charity have remunerated staff?
 - b) Does the charity receive local or national government funding and, if so, what proportion of total funding does this represent?

- c) Does the charity raise money from the public and, if so, is it a member of the Fundraising Standards Board (see Chapter 8)?
- d) Does the charity spend money or have operations overseas and, if so, in which countries?
- e) Have any trustees served for more than nine years in total?
- f) Are any of the trustees paid?
- g) Has the charity ever been fined, or submitted a serious incident report, to any of its regulators?

6.43 Charities' responses to these indicators could easily be identified by computer algorithm. In most cases there will be no cause for concern. However, alongside identifying this risk-based sample of organisations to scrutinise, a random sample should also be identified to help encourage wider compliance.

6.44 The final issue to address is not one of internal process but of external perception. It has become apparent over the course of the Review that there is a distinct public misconception around the level of scrutiny charities are subject to. Once a charity is registered and falls within the purview of the Charity Commission, it appears that the public consider it to be subject to rigorous and regular scrutiny – a seeming effect of the presence or absence of a charity number.

6.45 As I stated at the outset of this report, it is my intention that people be encouraged to rely more on their own judgment, not on boxes ticked, in their relationships with charities. As part of this, there needs to be greater public understanding of the fact that, with the best will in the world, the Charity Commission cannot exercise the same level of scrutiny over every charity in England and Wales – there are trade-offs of risk and reward to be made. To start this process of education, I propose that registered charities with an income below £25,000 should be required to add the prefix 'small,' before their charity number. Alongside this, the Commission will need to be far clearer about the scrutiny it applies to each income category. Undoubtedly it will take time for the public to understand the implications of this categorisation, but that does not mean an attempt will be wasted.

Are the sanctions for non-compliance right?

6.46 There is mixed evidence about the issue of sanctions for compliance failures. The current practice of 'naming and shaming' was seen by many as a sufficiently serious sanction, given its potential impact on the reputation of a charity. While this measure was seen as largely effective, concerns were expressed that the Commission may not be sufficiently robust in investigating the reasons for delay.

- 6.47 However, the current system also allows for the criminal prosecution of trustees who fail to comply with reporting requirements. Although this power is little, if ever, used, it seems somewhat disproportionate, especially in view of the lack of intervening stages between naming and shaming and prosecution.
- 6.48 It was also suggested that naming and shaming could be strengthened by suspending the Gift Aid privileges of those organisations ‘named’ until their accounts are submitted – the information could easily be passed from the Charity Commission to HMRC as part of its information-sharing. They already send a list of charities that have been removed from the register so could simply expand this process to include those in default on account submission. Suspension from the charity register was also considered as an additional sanction, but would be impossible in practice.
- 6.49 Views were again mixed on whether fines would be an appropriate sanction. The key argument against, however, was that fines would not be an appropriate use of charitable funds. I do not see much force in this view, as charities are already required to pay fines to a number of other bodies for failures of regulatory compliance – to Companies House for charitable companies and to other regulators like the Care Quality Commission for service delivery charities. While it is of course undesirable that charities use money intended for charitable purposes to pay fines, it is similarly undesirable that they should be sufficiently poorly managed to fail to comply with their responsibilities. I consider that relatively small fines could be an appropriate measure for encouraging compliance.
- 6.50 Government and the Commission should give serious thought to introducing a system of fines, weighing the potential for increasing compliance carefully against the cost and difficulty of enforcement. In this regard, they should also investigate the system of enforcement operated by Companies House. Both regulators should work together to investigate the possibility of sharing or duplicating this system in the interests of efficiency.

Charging for regulation

The principles surrounding charging

- 6.51 Charity regulation is, at present, entirely funded by the State. Many would argue that this is as it should be. Successive Governments have placed a great emphasis on the need for a large and diverse charity sector and the benefits that brings to society so, it is argued, the Government should support the regulation of that sector in order to help preserve it. There is considerable force in this argument –

certainly, the State does and should continue to have a role in funding regulation of the sector. However, there are questions of both principle and practical reality that this argument must be weighed against.

6.52 There is no denying that the resources available to the Charity Commission have, as is the case for the rest of Government, reduced in recent years. The Commission's baseline budget in 2006-07 was around £30m. This remained relatively static until 2011-12, though in effect is a year on year real terms reduction due to inflation. By 2015, however, the Commission's budget will be reduced to £21m. As noted in Chapter 5, this Review has not addressed issues relating to the operational efficiency of the Charity Commission and the funding required to support it, but these numbers give a sense of the scale of the reduction and the significant changes this has required of the Commission.

6.53 Removing much of the Commission's role in granting permissions and overseeing low-level decisions (see Chapter 5) will reduce pressure on its budget. Similarly, moving away from providing bespoke advice work will help the Commission direct its limited resources towards priorities (registration and compliance). However, beyond that, it would appear that the only remaining area for reduction would be its work in relation to compliance and enforcement – the risk is that the Commission is able to investigate fewer and fewer cases as its budget continues to reduce.

6.54 Those, then, are the practical arguments for increased resources. The reason of principle that these resources could come from charities themselves is a simple one. Charities gain a great deal of the confidence in their 'brand' from the fact they are regulated by the Charity Commission. The fact that the absence of a charity number has such a profound effect on the ability of charities to access funding and other benefits is testament to the value of regulation. Although it can easily be argued this view of the importance of regulation is based on a fallacy, it remains the case that regulation is in the interests of the sector; a charity sector where fraud and mismanagement were common and where the public felt there was no central oversight or transparency mechanism as to how their money was spent would not long prosper.

6.55 However, it should be made absolutely clear at the outset that a system of combined funding from the State and the sector must not allow either side to rely unduly on the ability of the other to fill a gap. Put at its bluntest, this cannot become a race to the bottom – neither the sector nor the Government should view the contribution of the other party as a reason to reduce their funding contribution, in the hope the other side will move to fill the gap. Both the Government and the charity

sector have a great deal to gain from supporting the Commission to function effectively; both must accept responsibility for ensuring it is able to do so. For its own part, the Commission must continue to identify and investigate ways it can discharge its role more effectively and efficiently.

Practical implications

6.56 Charging by the Charity Commission is a highly controversial issue within the charity sector. Some organisations are entirely against it, others can see arguments in favour. Even among those prepared to accept charging, the type of services they see it as acceptable for, and the level at which charges should be set, are highly variable.

6.57 Although it would reinforce the Commission's independence from Government, as noted above, it would not be appropriate for the sector to fund the Commission's entire budget. Quite apart from the principle that the State has a responsibility to support the integrity of the sector, the charges for charities would have to be significant to make this possible, particularly for larger charities. Costs of collection, particularly from the very large numbers of smaller charities, would also be significant. Larger charities, in view of their large contribution, could also feel (or be seen as feeling) a greater sense of "ownership" or "entitlement" vis-à-vis the Commission, and this could compromise its independence.

6.58 It has been suggested in the course of the Review that the Commission might continue to offer similar bespoke advice (e.g. the creation of very specialist schemes for individual charities) to that which it offered previously, though begin charging for it on a cost-recovery basis (see Chapter 5). This would make use of the Commission's expertise and experience, ensuring it was not lost, while not impacting on budget. On a cost-recovery basis, it might also be more affordable for organisations than seeking similar legal advice from a private firm. I agree that this is a good idea, as it has benefits on all sides. The Charity Commission should decide, in the first instance, the practicalities of offering this service, before any action is taken to enable it to do so.

6.59 The other area of charging that could be introduced is charging for basic regulation, i.e. registration as a charity and filing of accounts. This reflects the principle that charities benefit from registration with and regulation by the Commission, as it strengthens their brand and increases trust and confidence. Anecdotal evidence gathered during the Review indicates that, although charging by the Commission remains a very divisive subject, many organisations in the sector could see the logic of and need for this approach, particularly for small fees set on a cost recovery basis (like those of Companies House). The advantage of cost recovery is that it can reflect complexity of transactions – there could, for

example, be a small charge (e.g. £30) where model governing documents and model objects are used (as these require less checking) and a much larger charge where bespoke governing documents and objects are used (e.g. £250), as these may require significant legal input from the Commission.

6.60 There are, of course, risks with fee charging of creating perverse outcomes. Fees for filing could discourage compliance, though strengthening sanctions could address this. Similarly, fees could discourage compliance with registration requirements. However, weighing up the value of tax reliefs against the small likely cost of registration, compulsory registration for those claiming tax relief is not inappropriate.

6.61 In light of the arguments above, I recommend 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. Options for charging for the provision of bespoke advice and authorisations should be explored too.

Recommendations

- 1. The Charity Commission should remain the main regulator of charities in England and Wales.**
- 2. The Charity Commission should continue its work to develop more partnerships with sub-sector umbrella bodies, enabling them to take on a greater role in promoting compliance, developing best practice (including model governing documents) and helping their membership with queries. The Commission should underscore these agreements with Memoranda of Understanding that are published on its website.**
- 3. The Commission should keep such partnership arrangements under review, and include a section in its annual report about the effectiveness of its partnership working.**
- 4. The Office for Civil Society and the Charity Commission should begin discussions with the Homes and Communities Agency about the feasibility of it becoming the principal regulator of charitable social housing providers in England.**
- 5. The Charity Commission should be given the power to delegate some or all of its functions to other bodies, where it considers this to be in the interests of good regulation and the overall standard of**

regulation will be equivalent. In all cases the Commission must both retain its powers to investigate any individual charity and be able to withdraw a co-regulation authorisation at any time.

6. The term “principal regulator” should be changed to “co-regulator.”
7. The Charity Commission should continue to ensure that the information available about the charities on its register meets public needs and demand and is regularly reviewed to ensure it continues to meet these requirements.
8. The requirement to submit accounts and reporting information should be aligned with the registration threshold (recommended in Chapter 4 to be set at £25,000, with the further caveat that charities claiming tax reliefs should also be required to register).
9. All compulsorily registered charities should be required to submit their accounts and Annual Return and they should be publicly available on the Commission website.
10. Voluntarily registered charities must submit accounts, for publication on the Commission’s website, but must do so electronically. Submissions by charities that are compulsorily registered but have an income below £25,000 per year must also be electronic.
11. All registered charities with an annual income of less than £25,000 should be identified on the Commission’s register as “small” alongside their registration number. The intention of this is to improve the public perception that these charities are subject to little proactive regulatory oversight – and alert potential donors to this fact.
12. The Summary Information Return should be abolished, subject to the requirement that all the information it provides is available elsewhere in charities accounts and Annual Returns.
13. The Charity Commission should continue with its plans to simplify and improve the Charities SORP.
14. The income level at which charities are required to have their accounts audited should increase from £500,000 to £1 million. The audit threshold for charities with assets valued at £3,260,000 should be removed completely.

- 15. The Charity Commission should explore technology-based ways of validating data from the information provided to it in both charities accounts and Annual Return.**
- 16. All information required to be submitted by charities should be combined into a single document for simplicity. The first page of this should be a list of key risk indicators to help the Commission identify a sample of charities for further investigation. The completed list should also be published on the charity's register entry to aid public understanding and exercise of judgment.**
- 17. Sanctions for late filing of accounts and Annual Returns should include the withdrawal of Gift Aid. Government and the Charity Commission should also give thought to the costs, benefits and logistics of introducing late filing fines.**
- 18. Government should work with the Charity Commission to develop a fair and proportionate system of charging for filing annual returns with the Commission and for the registration of new charities. Any such charges should be set at a level to reflect the activities that they cover. Any funds raised must be accepted by HM Treasury as being an incremental increase in resources available to enable the Commission to carry out its functions more effectively not merely reason to reduce its budget by the same amount.**
- 19. The Commission should be able to continue to offer bespoke legal advice such as the development of specialised schemes, on a cost recovery basis, if it wishes.**

7. Complaints, appeals and redress

7.1 There are two main types of complaint about the charity sector; complaints about charities themselves (either complaints from the public or arising from internal disputes) and complaints about the Charity Commission (by charities themselves or individual members of the public).

Complaints about charities

7.2 As has been noted elsewhere in this report, the Charity Commission will currently only take action on complaints about charities if they amount to serious mismanagement or misconduct (i.e. there is a potential breach of charity law). There is no single body to deal with less serious complaints; different Ombudsmen cover complaints about some services delivered by charities but otherwise there is no further provision beyond individual charities' complaint systems.

7.3 Ipsos Mori's research for this Review into public perceptions of charity indicates that the public would either direct a complaint about a charity to the Commission or to the charity itself. Wider evidence supports the view that it is often perceived to be the job of the Commission to deal with these general complaints; the Commission receives some 2,000 of these types of complaint a year.

7.4 It is not, however, the role of the Commission to deal with general complaints and, although many charities have procedures in place for dealing with internal disputes and complaints from third parties, the quality is variable and the coverage is not universal. There is therefore an argument that more should be done.

A role for a Charities Ombudsman?

7.5 It has been suggested that this Review should consider the possibility of providing a Charity Ombudsman (or expanding the remit of an existing Ombudsman to cover charities) as a clear, accessible, non-legal forum for addressing complaints that fall outside the Commission's remit and so would complement its role. This could take some pressure off the Charity Commission and give comfort to the sector by reassuring supporters.

7.6 However, most Ombudsmen are established to follow up complaints which are against public bodies and that involve a customer or consumer relationship between the individual and public body concerned (i.e. the provision of services). Internal disputes within charities or between charity partners rarely involve this type of relationship. Further, most Ombudsmen only make

recommendations rather than issue binding directions, which may not succeed in resolving complaints effectively.

- 7.7 It is not clear that a new Ombudsman would be either necessary or appropriate in addressing this gap in provision. Serious complaints are handled by the Commission, and other key areas of service delivery, such as healthcare, are already covered by existing Ombudsmen and, since another Ombudsman would add a further statutory body concerned with charity oversight, not only creating potential complication, but also requiring a charge upon the public purse to meet the expense of setting up and running such a body, it seems difficult to justify.

A role for the sector?

- 7.8 It is clear that the sector must take some responsibility for addressing its own mistakes and that individual charities must in turn take their share. Many charities already have their own processes for managing internal disputes and complaints from third parties, and it is my view that this practice, as far as possible, should be universal. It is in charities' own interests, as well as that of their supporters and the wider public, to ensure that robust processes are in place to deal with complaints so that people feel their concerns have been effectively dealt with. As well as representing basic good practice, this has clear links back to the overarching need to promote and protect public trust and confidence in the sector.
- 7.9 In an ideal world, such processes should contain an element of independent review, whether that be referral to another charity, an umbrella body or any other independent body deemed appropriate. In line with this, umbrella bodies should give thought to how they can support their members in this area, perhaps by offering an 'off-the-shelf' complaints process, reflecting best practice, for members to adopt, or even taking on more of a role as the independent element of a complaint process.
- 7.10 If there remains a strong desire for a single, accessible forum for dealing with complaints and arbitrating disputes that do not fall under the jurisdiction of another organisation, then it would seem sensible to encourage the sector itself, perhaps led by its umbrella bodies, to set up its own body or scheme. The Charity Commission could perhaps act as a facilitator of this process but not take responsibility for running or funding it. This, again, is something the sector will need to consider, possibly in combination with the idea of a sector-led advice line as discussed in Chapter 5.

A role for the Charity Commission?

- 7.11 There have been some who have argued that, although the Charity Commission does not currently handle complaints about charities that do not reach the threshold of risks to legal compliance, perhaps they should. While this is in many ways attractive, in that it would provide a simple, one-stop approach to complaints-handling, and would fit with current perceptions, it cannot, ultimately, be the right answer. Not only would the cost of expanding the Commission's remit in this way be very expensive (even in a time of economic plenty), but it would blur the Commission's role as a regulator. Additionally, on grounds of principle, it cannot be right that the sector should rely on the Commission (and the tax payer) to provide a system for resolving complaints when many organisations in the sector have failed to take responsibility for doing so in their own organisations.
- 7.12 Where the Charity Commission should retain a role, however, is in signposting charities and the public to the right sources of help and advice for resolving complaints and problems. Practically speaking, given that the Charity Commission does receive complaints and enquiries outside its remit and has to respond to them in some way (even if just to explain that they cannot take action), it may be useful for them to establish a triage service, by which they can signpost enquiries to relevant third parties. If the Commission wishes the boundaries of what it can and cannot do to be respected, it surely has a role to play in assisting people to find the help they need.

Complaints about the Commission

- 7.13 The main forum for resolving complaints against the Charity Commission is the Charity Tribunal (or the First Tier Tribunal (Charity) to give it its proper name). The Tribunal was set up by the Charities Act 2006 to handle challenges to the Commission's decisions and has been in operation for three years, during which it has heard 24 cases. A right of appeal against its decisions lies to the Upper Tribunal, whose decisions have binding precedent value (i.e. are a binding statement of the law for more junior courts to follow in future cases).
- 7.14 The Tribunal was explicitly set up with two main aims in mind, and it is against these that its performance to date must be judged. These two aims were i) to provide a low cost, accessible forum for delivering justice and ii) to provide a forum for the clarification and development of charity law.

Is the Tribunal a low-cost, accessible forum for delivering justice?

- 7.15 The Tribunal was originally intended to provide a more user-friendly alternative to the jurisdiction of the High Court (which still maintains its own jurisdiction over charitable matters, in parallel to the

Tribunal). Views on the Tribunal's ability to provide an accessible, low-cost forum for justice focused on three main issues (jurisdiction, complexity and time), all of which in many ways interact:

Jurisdiction

- 7.16 The Tribunal's jurisdiction is defined in a table set out in Schedule 6 (Sch 6) to the Charities Act 2011. This table is seen by the vast majority of contributors to the Review as over-complicated and too narrowly drawn – several specialist charity lawyers complained of difficulty in understanding it. The list of cases before the Tribunal³⁵ also shows a large number struck out for being outside the Tribunal's jurisdiction, which raises the question of whether its jurisdiction is sufficiently well-defined to address the concerns people have about the Commission's work. Of course, in any forum there will always be cases that fall outside its jurisdiction, but in combination with the wider concerns about Sch 6, the number of rejected cases does raise questions.
- 7.17 The Sch 6 table is focused on a specific range of formal legal 'decisions' made by the Commission – in some but, crucially, not all cases this includes a decision not to exercise a power. The decision not to open a statutory inquiry into a charity is a frequently-cited omission. Many of the 'decisions' in Sch 6 refer to the exercise of legal powers that the Commission, as part of its more refined and focused approach to regulation, is choosing to make less frequent use of. Concern has therefore also been expressed that, as the Commission moves towards this more light-touch regulatory approach, even more of its work will fall outside the scope of the Tribunal's jurisdiction.
- 7.18 Much of the evidence received was in favour of removing Sch 6 altogether and opening up the jurisdiction of the Tribunal to allow an appeal against any action or decision of the Charity Commission. This would, of course, be far simpler. However, this risks an increase in the number of appeals (possibly to the point of becoming unmanageable for the Commission) and could also risk undermining the Commission's authority to make decisions and deploy its resources independently and effectively; in the extreme, the Tribunal's powers to intervene could be sought so frequently as to create an environment in which the Tribunal was virtually directing the Commission.
- 7.19 There is, perhaps, a more elegant compromise to be made here. The Tribunal actually possesses two different types of jurisdiction (three, if one includes the Attorney General's reference process discussed below) – a power of review (which considers whether the decision-making process was properly executed, in a similar way to judicial review) and the right of appeal (which considers both the substance and procedure of a decision). The compromise solution would therefore be to remove

³⁵ Available at <http://www.justice.gov.uk/tribunals/charity/registered-cases>

Sch 6 entirely and, on the face of the Charities Act, create a right to review of any decision or action of the Charity Commission, together with a right of appeal against any *legal* decision of the Commission. This would mitigate the risks to the Commission's independence and efficiency while creating a simple and comprehensible system for broad access to the Tribunal. In order to support this broadening of the jurisdiction, standing to bring a claim should be given to (i) the charity (if it is a body corporate); (ii) the charity trustees; (iii) any other person affected by the decision, order, direction, determination or decision not to act, as the case may be. This would reflect what is already the case in many instances in Sch 6 now.

Complexity

7.20 It has been noted by many that the Tribunal, despite the hopes that it would be layman-friendly, too often resembles formal court proceedings, leading to expense for claimants and a perception of inaccessibility for laymen. In one recent (though admittedly legally highly significant) case, there were at least eight barristers in the room! The Tribunal and Commission both acknowledge this point, particularly as regards the level of legal representation, and the situation has improved slightly in recent cases, with more litigants appearing in person. However, it was noted by several contributors to the Review that guidance on how the Tribunal works and ways of accessing it is neither sufficient nor widely available. This is something that must be rectified to help open up access and ensure that those without legal expertise are able to understand and make use of the system. In particular, better guidance should be produced jointly by the Commission and the Tribunal on the scope of the Tribunal's jurisdiction and as to when and how claims can be brought, to help ensure claims are brought appropriately and more claimants feel able to represent themselves.

7.21 Feedback received on the operation of the Tribunal to date also indicates there is scope for the Tribunal further to assist both litigants and the efficient administration of justice, by making more frequent and robust use of its powers of case management. Often there may be scope for cases to be reviewed without the need for an actual hearing and, at hearings themselves, an adversarial style could be replaced by a more inquisitorial, fact-finding approach. There is some evidence from recent cases that this latter point is being acted upon already, which is welcome. However, to support the process, thought could be given to revising the Tribunal rules to embed this approach more effectively.

Time

7.22 The current time limit for bringing cases is considered to be too short (42 days), which allows trustees limited time to make decisions and fails to reflect the reality that many trustee meeting cycles operate on a quarterly basis. Furthermore, this time limit renders interaction with the Charity Commission's

own Internal Decision Review (IDR) process very difficult – although it is entirely possible in theory to make use of both IDR and then the Tribunal, the time taken to complete the IDR process can leave insufficient time to lodge a Tribunal claim afterwards.

- 7.23 An extension of the time limit to a period longer than three months would be a sensible improvement. It would allow for many charities' quarterly trustee meeting cycle, allow decisions on taking action to be made after due reflection, and would also give more leeway for use of both IDR and the Tribunal process. An extension of time would also allow the inexperienced more time to build their case, thus facilitating improved access to justice.

Permission from the Charity Commission

- 7.24 This is a more technical point than the themes set out above but, nonetheless, significant. Charities must currently apply to the Commission before taking legal action to ascertain that the proposed action is an appropriate use of charity funds. Many people have highlighted that organisations may feel reluctant to seek permission, given the fact that the Commission will be the other party to any subsequent Tribunal case. It would seem sensible to transfer responsibility for making decisions on appropriate use of funds in Tribunal litigation to the Tribunal to avoid this conflict.

- 7.25 There is the separate point, which is less easily resolved, that charities may feel reluctant in general to take action against their regulator. While one can sympathise with this view in many ways, it is surely right (and the Charity Commission would surely agree) that a regulator must remain accountable for its actions. Those who believe they have a genuine grievance should not fear making use of the systems put in place to support that accountability.

Does the Tribunal provide a forum for the clarification and development of charity law?

- 7.26 The Attorney General's power to refer points of law to the Tribunal for clarification has only been used twice, so it is too soon to make a final judgment on its overall effectiveness. However, some issues have emerged in its early operation.

Development of the law

- 7.27 A number of submissions underlined the importance of the Tribunal's ability to clarify and develop charity law. As was mentioned in Chapter 4, the Tribunal, as a court, is bound by the rules of precedent and of case law – and in charity law, a great deal of the law is rooted in judicial decisions and precedents. Naturally, therefore, the Tribunal in some senses will always be obliged to look backwards, whereas the Charity Commission has often adopted a purposive approach in its

application of the law, allowing the law to evolve to reflect social and economic circumstances. In an ideal world, these two approaches would be united and the Tribunal empowered to take changing social and economic circumstances into account in addition to legal precedent. There may not be an easy solution to this, but Government should consider whether there are any mechanisms that would facilitate this. If we are to depend on case law to help charity law evolve, the institutions involved must be fully equipped to achieve this.

7.28 In more purely practical terms, while there is no reason whatsoever to cast doubt as to the legal quality of the Tribunal's judgments, as someone who is unequivocally not a lawyer, I would register a plea for the Tribunal to perhaps reconsider the structure, length and language of some of its judgments! It is absolutely essential that the Tribunal should say, and be content it has said, everything necessary for the meaning of its judgment to be clear, in order to ensure the effective development of the law. However, if the Tribunal is truly to succeed as a forum accessible to all and effective in clarifying law, it must also ensure that its judgments are clear to all. While there are questions of language here, a good starting point may be to include a short, plain English summary in a judgment, in a similar way to the Supreme Court. This would no doubt assist litigants in person in understanding the law, not to mention others involved in this field.

Third party interventions

7.29 Some respondents felt that the procedures for intervention in reference proceedings are unclear and could (on some occasions, did) prevent organisations with an interest in the process from making interventions. The ability of charities to have a voice on issues of law that affect them is important and care should be taken to ensure the rights available to them are widely and well-understood. It is recommended that better guidance is made available on this.

Power of the Charity Commission to make referrals

7.30 It has been noted that currently the Charity Commission requires the approval of the Attorney General to refer cases to the Tribunal. Several contributors to the Review noted that this is an unnecessary measure, presenting a barrier to the Commission's ability to contribute constructively to the development of the law against which it is required to regulate. It is also true to say that the Commission has a great deal more daily interaction with charity law than the Attorney General's Office, and so is likely to become more quickly seized of issues. In view of this, the Commission should be given the power to make references to the Tribunal without the need for permission, provided notification of the reference is given to the Attorney General and the Attorney retains the power to be joined as a party to the case.

7.31 Overall, the Tribunal has made a reasonable start against its aims, and there are signs of further progress, for example in increased numbers of litigants in person feeling confident enough to bring cases. If the recommendations in this report are implemented, the Tribunal should be able to build upon the work that it has undertaken to develop its role and so establish itself as the accessible judicial body as originally conceived in the drawing up of the 2006 Act.

Recommendations

- 1. A new Charities Ombudsman, or expansion of an existing Ombudsman to cover charities, would offer little additional value and is not recommended.**
- 2. Individual charities should adopt and publish internal procedures for disputes and complaints. Umbrella bodies are ideally placed to support charities with this by the development of pro-forma procedures and support in their implementation, perhaps even taking on the role of adjudicator for their members.**
- 3. Schedule 6 to the Charities Act 2011 should be removed and the jurisdiction of the Tribunal reformulated on the face of the legislation as:
 - a. A right of appeal against any legal decision of the Commission**
 - b. A right of review of any other decision of the Commission****
- 4. Those who should have standing before the Tribunal to appeal or seek a review should be (i) the charity (if it is a body corporate); (ii) the charity trustees; (iii) any other person affected by the decision, order, direction, determination or decision not to act, as the case may be.**
- 5. The Charity Commission and Tribunal should work together to produce and agree guidance as to the scope of the Tribunal's jurisdiction and when a claim can be brought (including interventions by interested parties in reference cases).**
- 6. The time limit for bringing a Tribunal case should be extended to four months.**
- 7. Responsibility for making decisions on appropriate use of funds in specific litigation should be transferred to the Tribunal.**

- 8. The Charity Commission should be given the power to make references to the Tribunal without the need for the Attorney General's permission, provided they notify the Attorney of any references they make and the Attorney retains the right to become a party to the case.**

- 9. The Tribunal should consider whether there are any further ways in which it could use its caseload management powers to simplify proceedings, make them less adversarial and dispose of cases rapidly. Parties should be encouraged to deal with cases without an oral hearing where appropriate.**

- 10. The Tribunal should consider the value of including in each of its judgments a plain English summary of the key points and decisions, to aid understanding of the law.**

- 11. The Government should consider ways in which the Tribunal could be empowered to take account of changing social and economic circumstances as well as case law precedents.**

8. Fundraising

Introduction

- 8.1 Fundraising is fundamental to the charity sector's success, its sustainability and its independence. It is a vital public interface for charities, with billions of interactions between charities and donors or potential donors every year. For fundraising to be successful in maintaining and increasing public support, it must be undertaken responsibly and regulated in a way that empowers charities and gives the public confidence.
- 8.2 The Review has considered two specific issues relating to the way fundraising is regulated. First, I have looked at the sector's self-regulatory scheme run by the Fundraising Standards Board, which covers all types of fundraising and is designed to ensure best practice is followed – dealing with the “how” of all types of fundraising activity. The Review has considered whether self-regulation is working and, if so, how it can be improved.
- 8.3 Secondly, within this overall framework, I have considered the specific challenges of the licensing and regulation of charity collections in public places, primarily involving a passive or active face to face interaction – the “where and when” of a particular type of fundraising. This is an area where everyone agrees that there is need for change, and the public wants robust regulation, but where successive attempts at improvement over the last 20 years have failed, and we have a system of regulation that dates back almost a century.
- 8.4 Most charity fundraising is undertaken well and supports the vital work that charities undertake. Bearing in mind the volume of transactions, the level of complaints is very small by comparison. It is easy to get fixated on particular issues such as “chuggers” or direct mail, but at the same time in the context of billions of donor interactions each year, reported complaints of 30,000³⁶ to members of the self-regulatory scheme are a tiny proportion.
- 8.5 Nevertheless, surveys of public trust and confidence in charities continually identify poor fundraising practices as a cause for concern, suggesting that a well-regarded regime could boost trust and confidence, and thus potentially the level of donations. As the public are on the receiving end of

³⁶ The Fundraising Standards Board, *Good Honest Fundraising: Fundraising Standards Board Annual Report 2012* (2012) at page 27

fundraising “asks”, this is an area where the public’s views are particularly important. Ipsos Mori’s research for the Review shows that the majority (69%) believe that more should be done to regulate the fundraising activities of charities. The public also want strong sanctions; by far the most widely favoured sanction for poor practice was removal of charitable status (54%).

- 8.6 So there must be some form of fundraising regulation. Charities need it to preserve public trust and confidence, and the public want it; a free-for-all regime is not an option.

What happens now?

- 8.7 The current fundraising regulatory landscape is something of a patchwork; some matters are covered by statutory regulation (for example data protection requirements, regulation of lotteries, some types of charity collections) whilst others are covered by various forms of self-regulation (for example, direct mail under the Direct Marketing Association and the Mailing Preference Service, non-cash face to face fundraising under the Public Fundraising Regulatory Association). Further, some of these bodies cover commercial as well as charitable fundraising. While the need for more clarity in this area was recognised at the time of the 2006 Act, the Act itself does not specifically regulate fundraising. Rather, the sector was given an opportunity to attempt a self-regulatory system, with a residual power remaining with Government to legislate if they failed. It is to the results of this sector-led self-regulatory approach that we now turn.

What is self-regulation?

- 8.8 In 2006 the sector, led by the Institute of Fundraising, established the Fundraising Standards Board (FRSB) to take forward sector-wide self-regulation of fundraising; driving up standards and practices and providing the public with a means of complaint. The FRSB is a voluntary scheme. Its remit extends to all forms of charity fundraising, including, for example: direct mail; telephone fundraising; collecting cash and donated goods; future commitments to donate through direct debits; and commercial promotions on behalf of charities.
- 8.9 Members of the FRSB commit to:
- Use the scheme’s “Give with Confidence” tick logo on their fundraising materials;
 - Adhere to the “Fundraising Promise” and display it on their website;
 - Have a complaints process in place, detailed on their website, and explain to dissatisfied complainants the availability of the FRSB to consider complaints;
 - Abide by the Institute of Fundraising’s Codes of Fundraising Practice, which set the standards for good fundraising practice.

- 8.10 The FRSB's Fundraising Promise sets out six key pledges that centre on honesty, accountability and transparency. The Institute of Fundraising is responsible for developing and revising Codes of Fundraising Practice, which set out legal and best practice requirements for different types of fundraising activity. The FRSB investigates and adjudicates on complaints about breaches of the Fundraising Promise and Codes of Fundraising Practice. Its sanctions are limited to 'naming and shaming,' and potentially to suspension or withdrawal of membership of the FRSB.
- 8.11 Members pay an annual fee for membership of the FRSB, determined on a sliding scale based on voluntary income. The FRSB currently has around 1,400 members, including almost all of the top 50 fundraising charities.
- 8.12 Other bodies have roles in the self-regulatory landscape. I have already alluded to the important role of the Institute of Fundraising as the standards setter, producing its codes of fundraising practice. In relation to non-cash face to face fundraising, the Public Fundraising Regulatory Association (PFRA) produces its own standards, investigates complaints and enforces sanctions. The Charity Retail Association and Textile Recycling Association both have codes of conduct for their members in relation to textile collections.

Has self-regulation worked?

- 8.13 There is much consensus in favour of the general principle of self-regulation among contributors to the Review, and general support for the FRSB. However, the starting point for assessing whether or not self-regulation has been successful is consideration against the success criteria that were set out in 2006³⁷. These are set out in Appendix E below, and remain sound criteria for judging the scheme's success.
- 8.14 My assessment is that the FRSB has broadly met 10 out of the 12 criteria, but has not met two key criteria:
- A. *Number and distribution of members*
- With fewer than 1,500 members (of the estimated 45,000 fundraising charities), and falling well short of original expectations, the FRSB's penetration of the market remains its greatest weakness. It also remains dependent on the largest charities for most of its income.
- B. *Going beyond reliance on self-certification*

³⁷ <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060206/wmstext/60206m02.htm>

The FRSB does not proactively regulate its members, and relies on self-certification by its members, other than where a complaint escalates to the FRSB. This is largely due to its limited resources, driven by its limited membership. For the FRSB to be able to undertake more proactive regulation, it would need to significantly expand its membership base and grow its income.

What are the issues for self-regulation?

What form should regulation take?

8.15 I take the view that effective self-regulation is preferable to statutory regulation in this field. Self-regulation is more flexible, responsive, and cost effective than statutory regulation. The FRSB has made a good start and achieved much in its first five years. A notable success has been driving up standards of complaints handling in the sector, and it is right that its focus has been on improving standards. But it has now reached a plateau – it has already attracted those charities that are committed to following best practice, that are prepared to take the wider view and support a scheme that benefits the whole sector, not just their own charity’s interests. If the FRSB is to grow into a comprehensive, effective and publicly recognised self-regulatory scheme it will need a significant new impetus.

A confused self-regulatory landscape for the public?

8.16 Most participants at our regional events along with many other contributors saw a need for clarification of the roles, responsibilities and powers of the different bodies involved in the self-regulatory landscape and considered simplification of the current system as a necessary step forward for self-regulation.

8.17 Potential donors are currently faced with a confused landscape, with unnecessary duplication or division of functions. This has hindered the realisation of a simple, donor-focused self-regulatory scheme with a single point of entry for the public. To date the sector has tended to dance around these issues; I believe strongly that it is now time to tackle them head on. All sides will need to work together much better and make concessions if self-regulation is to succeed. As NCVO’s Advisory Panel aptly put it:

“...there is an immediate need to resolve the current confusion about the different roles and responsibilities of the 3 bodies involved in the self-regulatory system - the Institute of Fundraising, the FRSB and the PFRA. In particular, it is necessary to clarify: a) who sets the standards; b) who enforces

and adjudicates those standards; c) what is the role of charities with regards to ensuring the standards are followed?”³⁸

8.18 There needs to be a single, central point of responsibility. This is not an easy challenge for the sector, but if the sector fails to address it, self-regulation will ultimately fail.

Voluntary or compulsory self-regulation?

8.19 Many of the submissions to the Review pointed to the lack of universal coverage of FRSB as one of the weaker points of the current framework, and called for membership to be increased rapidly; some saw compulsory membership as the preferred option. Perhaps unsurprisingly, FRSB members themselves support compulsory membership for fundraising charities (75%) and stronger sanctions for non-compliance (74%)³⁹. “Free riding” of non-members is a real problem, and will remain so until the scheme reaches a certain size, and membership becomes the norm rather than the exception. Among the public, opinion was split on whether self-regulation should be made compulsory, with half supporting compulsion.

8.20 The Review carefully considered the option of universality (achieved via requiring membership of the FRSB, or by an innovative use of the statutory reserve power). Its main advantages are that it deals effectively with the “free rider” problem, boosts the income and sustainability of the FRSB, enabling more pro-active regulation and more effective sanctions, increases public awareness of the self-regulatory scheme, and immediately marginalises those undertaking poor practices. However, mandating membership would place a significant regulatory and financial burden on the sector at a time of stretched resources. Many are not ready to join the self-regulatory scheme – and the FRSB in its current form would struggle to cope with such a quick move to scale.

8.21 A particular concern is about if and how to regulate small scale local fundraising activity, where fundraisers and donors are usually known to each other in the community. This scale of activity cannot be expected to meet detailed best practice requirements, but should be encouraged to meet and be judged by the FRSB’s fundraising promise.

8.22 I have concluded that mandating universality is not the answer at this stage of the self-regulation scheme’s development. However, the prospect of requiring universality should be kept on the table

³⁸ NCVO Charity Law Review Advisory Group, *Final report and recommendations of NCVO’s independent review of the Charities Act 2006* (2012) at page 46

³⁹ Figures supplied by FRSB in their evidence to the Review, from a survey of members.

and reconsidered if the sector fails to support the step change that is needed for the next phase in the development of self-regulation.

- 8.23 Instead we need to consider what levers exist to drive up membership of the FRSB. This will need some further thought but for example could include waiving certain regulatory requirement for FRSB members, making it a condition of licensing charity collections, educating funders to check for FRSB membership as an indicator of a commitment to best practice.
- 8.24 As a starting point, however, there should be an expectation that all fundraising charities, initially with a fundraising income over £1 million (and so in the 'large' category), should be members of the self-regulatory scheme. Further, the proposed check list on the front of the annual return required of all registered charities (the 'traffic light' system - see Chapter 6) should include a question as to whether the charity raises funds from the public and, if so, whether it is a member of the FRSB.

A lack of visibility and awareness?

- 8.25 For a self-regulatory scheme to be truly effective, public awareness of the FRSB and its kite-mark are important. Thus, publicity is essential for an effective scheme. Eventually, the public should expect to see the tick logo on fundraising material of all fundraising charities. It is consequently a source of concern that Ipsos Mori's research for this Review found that, at present, 91% of the public had not heard of the FRSB.
- 8.26 A brake on the visibility and branding of the FRSB in the past has been the failure of many of its members (including some of the largest charities) to use the FRSB tick logo on fundraising and marketing material. While there has been some improvement in the last two years, there remain a number of charities that routinely fail to use the tick logo. If the FRSB is to reach into the public consciousness, this needs to change.
- 8.27 A key issue is that, if the FRSB is to achieve the degree of market penetration it needs, then the Charity Commission will need to develop a stronger relationship with FRSB than it has done to date. This should be in the interests of the Charity Commission as well as the FRSB, as a fair proportion of the public enquiries and complaints that the Charity Commission receives are about fundraising, and could be better dealt with by the FRSB.

The sustainability and affordability of the model?

- 8.28 Some have suggested that Government should fund self-regulation, either directly or through a levy on Gift Aid. This misses the essential point about self-regulation – it should be funded by the market it regulates.
- 8.29 The ability not only to sustain but also to grow as a financially viable operation must underpin the entire regime. For non-statutory regulation to work in the context of charitable fundraising regulation, there must be willingness on all sides to participate — from the state not just in the form of seed funding but also through the pending threat to legislate in the case of failure, to the Charity Commission in enforcement assistance, to the charities themselves in setting the standards, living the standards and enforcing the standards, right through to the general public in its appreciation of and insistence upon high standards in fundraising practice.

Are the FRSB's sanctions effective?

- 8.30 There were a large number of calls from a variety of respondents, from larger charities to members of the public, for giving more powers to FRSB to issue tougher sanctions. Some went further, suggesting a need to put the FRSB on a statutory footing. The public's strong preference was for removal of charitable status as the main sanction.
- 8.31 The public and media pay most attention when they witness rigorous enforcement of a scheme. Thus, evidence of interim assessments, published outcomes of complaints and public records of measures taken against charities when codes are breached will do as much for public profile as any advertisement ever could; the success of the Advertising Standards Agency in promoting its decisions could be a model to learn from. Evidence of enforcement can act as its own deterrent.
- 8.32 One possible solution would be for the continuation of “naming and shaming” of both members and non-members, but accorded a higher profile, and followed up in cases of persistent non-compliance by loss of membership for FRSB members or referral to relevant enforcement agencies (Charity Commission, local licensing authorities, or police) for non-members. The FRSB should develop stronger links with the enforcement agencies so that they would follow-up on referrals from the FRSB to achieve maximum publicity and act as a deterrent.

Setting the right Standards?

- 8.33 The Institute of Fundraising is, and should continue to be, the standards setter. The Institute's Codes of Fundraising Practice are recognised internationally as models of best practice, but they will only be more widely adopted by the charity sector if they are proportionate, comprehensible, transparent and

simple. They are currently under review with the aim of creating shorter, simpler codes and moving matters of guidance on techniques out of the Codes and into training and best practice guidance. This is to be welcomed.

Professional Fundraisers and Commercial Charity Promotions

- 8.34 Where fundraising businesses work for charities, or commercial organisations undertake charity promotions, the law requires transparency. Such “professional fundraisers” or “commercial participators” must make a statement when fundraising or selling goods or services from which a charity will benefit. In principle this is the right approach as it means potential donors/purchasers can make informed choices.
- 8.35 However, there have been requests for the solicitation statements to be simplified; the statements are seen as complex and confusing by some (mostly larger) charities. Simple guidance is needed to help people meet the legal requirements, and provide the public with the information they need to make informed decisions.

Public charitable collections

- 8.36 While the FRSB can provide overarching fundraising self-regulation designed to improve standards, there are specific challenges relating to the licensing of charity collections both on the street and undertaken house-to-house, referred to hereafter as ‘public charitable collections.’

What is a public charitable collection?

- 8.37 ‘Public charitable collection’ broadly refers to situations where the public donates money or goods to a charity, either in a public place (e.g. on the street), on private property (e.g. a supermarket forecourt) or by means of the collectors going from house to house.
- 8.38 This Chapter has already highlighted the case for the general regulation of fundraising, and those arguments apply even more strongly here, where the fundraising takes place in the public realm. The strong reactions that ‘chuggers’ and house-to-house collectors have aroused in the course of the Review support the view that this is an important area in which to get that regulation right. The question, then, is whether the current system is fit for purpose, and if not, what should replace it?

How are public charitable collections currently regulated?

- 8.39 The existing legislation regulating public charitable collections in England and Wales dates from 1916 for charitable street collections (then, only ‘tin-rattling’) and 1939 for house-to-house. The intention behind it was to allow the co-ordination of public collections in any given area, to minimise public

nuisance and ensure fair access for the various types of charity, but it has been widely criticised as not being fit for purpose in the 21st Century. Under this legislation, collections are licensed by local authorities, except in London where the licensing authorities are the Metropolitan Police and the Common Council of the City of London.

- 8.40 Local authorities are able to set their own licensing regulations for street collections based on national model regulations. Charities, or those collecting on their behalf, can then apply to the local authority for permission to collect in a particular area, in line with the regulations set by that authority. Local authorities also consider applications to licence house to house collections in line with the requirements of the 1939 legislation. A right of appeal exists where a local authority refuses to grant a house to house collections licence (there is no right of appeal for street collection licence refusals).
- 8.41 There is a broad consensus that the current licensing legislation doesn't apply to fundraising on the street involving non-cash (e.g. direct debit) commitments, known as "chugging" by its detractors.
- 8.42 Responding to the lack of regulation, the Public Fundraising Regulatory Association (PFRA) – the sector body that represents and self-regulates non-cash face to face fundraising – has established voluntary site management agreements in relation to non-cash face-to-face fundraising on the street, and has agreements with more than 60 local authorities. The PFRA was set up in recognition of the risks to public confidence of an unregulated activity. Its role is to develop best practice, promote the benefits of face to face fundraising and self-regulate the activity. The PFRA is run by its members, a mixture of the commercial fundraising agencies and the charities that undertake face to face fundraising, which could be viewed as a conflict of interest. It is paid for by its members through a levy on each sign-up of a supporter achieved.
- 8.43 Some charities that undertake house to house collections across a large number of local authorities on a regular basis can apply for a National Exemption Order, which exempts them from the need to apply for individual licenses in each local authority; they need only notify the authority of the date and time of collections in their area. This was intended to reduce the burden on large scale collections, for example the Christian Aid Week collections.
- 8.44 Significant issues with the current licensing regime emerged in both the regional meetings and responses to calls for evidence. This is unsurprising, given the age of the legislation involved and the fact that social and technological change in particular has rendered it in many ways outdated. Provision was made in the Charities Act 2006 for a new licensing regime, but this has not been

implemented due to concerns about effectiveness and affordability. The Charity Commission estimated that it would require an additional £4 million to set up the new scheme and £1.5m per year to run the new system, which is not a practical answer.

What are the issues?

Lack of clarity about the existing system?

8.45 Many aspects of the existing system were criticised by contributors for their lack of clarity. The complaints can be broadly categorised as follows:

- a) A view that the IoF, FRSB, PFRA and local authorities (as the main groups involved in regulation) are not well co-ordinated among themselves and communication is lacking. In an already complex framework, this compounds the systemic issues.
- b) Following on from this, there is low awareness among the public of the regulatory regime (both in general, as noted in the section above, and particularly in relation to public collections).
- c) Awareness among local authorities of their responsibilities and their options in this area also seems limited. For example, only 62% of local authorities are aware of the possibility of operating a site management agreement and 38% of professional standards.⁴⁰
- d) The uncertainty of some aspects of the current regime as it fails to keep pace with developments. For example, it is not clear what qualifies as a “public place” requiring a street collection licence. Do – or should - you need a licence to collect in a shopping precinct, or on a railway station concourse, both of which the public has unrestricted access to?
- e) Similarly, there are reports of inconsistent application of the licensing rules by different local authorities (e.g. in licensing local versus national collections, different policies around collections carried out by professional fundraisers or commercial participators on behalf of charities).
- f) Leaving aside the different licensing arrangements and policies of different local authorities, administration, notification requirements etc vary widely across different areas. For example, some authorities only require a few weeks’ notice before a collection, others up to two years. Information on requirements can also be difficult for charities to find, which has been anecdotally reported as leading to non-compliance through frustration.
- g) Some of the reporting requirements under the existing legislation are onerous and outdated, and again are inconsistently applied by different local licensing authorities.

8.46 Considering this list, it is little wonder that the current system is seen as ineffective. If those attempting to operate a system cannot understand it or engage with it, there are clearly significant

⁴⁰ Local Government Association, *Street Fundraising survey* (2012) at page 15

problems. This list of challenges alone is sufficient to justify overhaul; to attempt piecemeal reform of an already over-complex system would be at best ineffective. However, there are some further specific issues with the current system to highlight, in addition to these systemic points.

The specific challenge of ‘chuggers’

8.47 Collections of direct debits or standing orders, known as or “chugging” to its detractors, have become an increasingly popular way for charities to sign up committed donors in recent years. The PFRA estimates that donors recruited through this method make a combined contribution of around £130 million to charity each year.⁴¹

8.48 However, there are those who argue that this approach to fundraising represents a public nuisance (68% of councils responding to the LGA survey had received complaints about the professional conduct of chuggers)⁴² and should be banned. While one need often only look to the media for evidence of public distaste, this anecdotal perception is borne out by the fact that only 6% of people prefer to be asked to donate in this way, according to Ipsos Mori’s research for this Review. Detractors also point to the high costs involved for charities; most face to face fundraising is undertaken by agencies, which are paid by charities to sign up a certain number of donors. The cost generally equates to the value of the first 10-18 months’ donations, on the expectation (evidence-based) that donors remain signed up for on average 4 years. It is hard to disagree that the relative cost can be high, which can be troubling for those concerned with efficient use of resources.

8.49 The costs and benefits, however, are an issue for trustees; they have a wide discretion to take action to further their charity’s objects and that discretion should and does extend to making decisions about how best to raise money to spend on those purposes, within the obvious limits of the law. Banning street fundraising is no answer. Being asked to donate to charity on the street through a collecting tin is an entirely accepted practice and the most preferred way to be asked to give, according to our research. However, this is a passive approach to fundraising, where people feel in control of the situation and not under pressure. The problem with ‘chugging’ is that it is seen as, and can be, aggressive, to the point where anecdotal evidence suggests that the presence and activities of ‘chuggers’ can discourage people from going to nearby shops, or even visiting high streets at all. These are issues of frequency and behaviour – both of which can and should be addressed through regulation.

⁴¹ Source: http://www.pfra.org.uk/face-to-face_fundraising/how_much_does_f2f_raise_for_charity/

⁴² Local Government Association, *Street Fundraising survey* (2012) at page 11

8.50 The problem is that non-cash face to face fundraising's inclusion in the regulatory system is both patchy and subject to debate. As an activity that causes no little public irritation when done badly, it is important that this form of fundraising is brought clearly within the regulatory scheme, alongside other types of public charitable collection.

8.51 In practical terms, the PFRA's voluntary site agreements seem to have worked well in addressing some of the issues of frequency and behaviour. The LGA reports 74% satisfaction among those authorities that use the PFRA to manage site agreements.⁴³ The LGA and PFRA have recently joined forces in an attempt to grow awareness of these voluntary site agreements with local authorities, and encourage more authorities to sign up. I would urge local authorities to try voluntary site agreements – and only if problems persist, consider resorting to statutory regulation.

Perceived unfairness of National Exemption Orders

8.52 In relation to house to house collections, there is a view that National Exemption Orders create an unlevel playing field, disadvantaging smaller, more local charities in particular. Exemption Order holders are asked to notify local authorities of their proposed collection dates as soon as possible each year in order to avoid overlapping collections. However, some local authorities have complained that they are either not informed of when collections are scheduled to take place or just receive notification that collections will be taking place throughout a 12 month period in their area. This makes it difficult for authorities to keep an accurate list of who will be collecting where and at what time and therefore to allocate collection slots to charities that do not hold Exemption Orders, especially to local charities which causes resentment.

8.53 There is a further issue that, increasingly, charities holding Exemption Orders are entering into agreements with commercial organisations, who either conduct face to face collections or textile collections under the auspices of a charity's Exemption Order. This is viewed by some as a circumvention of the licensing system by the commercial collectors, as it means they can avoid the administrative burden of having to apply for a licence in each area in which they carry out collections.

8.54 It is important to remember, when considering these issues, that Exemption Orders were originally created to allow occasional, large scale national cash collections on recognised 'flag days,' such as the annual Poppy Appeal. It would appear, then, that their use has expanded and is now causing unfairness and complexity in the system. My proposal, then, is to abolish exemption orders. However, this should be contingent on ensuring that provision can be made for a few nationally-accepted flag

⁴³ Calculated from data in Local Government Association, *Street Fundraising survey* (2012) at page 17 (Table 3)

days and urgent (e.g. disaster) appeals. Thought will need to be given on how to minimise the regulatory burden for existing exemption order holders before implementation.

Inequality of textile collection regulation

8.55 Charitable textile collections are an important source of income for many charities, raising an estimated £250 million per year⁴⁴ for good causes. House-to-house textile collections by charities are regulated in the same way as other house-to-house charitable collections. However, the high prices that can be obtained for second hand textiles makes this a very competitive market involving charities, commercial organisations working on behalf of charities, commercial organisations for commercial purposes, and increasingly local authorities themselves. Unless acting for a charity, commercial collectors are, however, subject to no licensing requirements at all, which seems a somewhat unfair and irrational position.

Bogus textile collectors

8.56 The impact of bogus textile collections and theft is not only the great financial loss to charities but leads to a growing sense of mistrust, concern and confusion amongst the giving public. Unchecked, this has the potential to undermine public trust and confidence in legitimate charity collections. However, this is largely an enforcement issue. Determined individuals will always seek to circumvent or ignore any legislative requirements and it is only through rigorous enforcement that this will ever be addressed. Tougher regulation risks creating an unnecessary burden for legitimate collectors, but which bogus collectors would continue to ignore.

Rights of appeal

8.57 The right of appeal against a decision of a local authority to refuse a house to house collections licence under the 1939 legislation is to the Minister for the Cabinet Office. There is no right of appeal against refusal of a street collection licence. This level of Government involvement in licensing decisions is an anomaly in modern times; not only is the Minister not best-placed to consider the compliance of local authorities with their own regulations, decisions of this type should normally be for a judicial authority, as an independent forum, to resolve. I therefore recommend that the Charity Tribunal should consider appeals against local authority decisions to refuse a street or house to house collections licence.

What does the collections regime require to be effective?

8.58 At the outset, it is clear that not only is the current system ineffective but that implementing the entire licensing regime from the Charities Act 2006 is unaffordable, and also may not be effective. An

⁴⁴ Sector estimate

alternative, more streamlined solution is needed that takes account of cost to both local authorities and charities themselves.

8.59 In some ways, a national system would be helpful; it would be simpler, be easier for the public to understand and reduce the burden on charities applying for licenses. However, it would remove freedom from local authorities to reflect their preferred approach; a successful one-size-fits-all system appropriate to all areas would be very difficult to construct and even harder to agree with implementing authorities. In addition, it would also require the development of a relatively sophisticated regulatory scheme which would be costly to police.

8.60 However, an entirely localised system has its flaws too; the complexity and inconsistency that dogs the system now would continue unchecked and the challenge and costs of compliance for charities would only increase. The future system, then, will require a combination approach.

8.61 Starting from this fundamental principle and based on the evidence gathered, a national legal framework and guidance could be developed within which different degrees of local discretion could be exercised; this would reduce the existing inconsistencies between the local authorities while giving some space for localism to flourish. This could either be developed under existing legislation, with appropriate modifications, or new legislation and should have the following characteristics:

- National guidelines or model regulations covering (a) eligibility criteria for organisations wishing to apply for a licence, (b) accountability and transparency of collections, (c) the balance between different types and scale of collection, (d) frequency of collections, and (e) conduct of collections;
- Within this framework, local authorities should have a significant degree of freedom in determining the frequency and extent of different types of collections, but should not be able to ban a particular fundraising method that is accepted nationally. Local licensing authorities should be able to opt to delegate the management of different types of collections (taking licensing back in-house if problems arose), or continue to manage licensing directly themselves. For example, face to face collections on the street could be delegated under existing well-developed voluntary agreements for the PFRA to manage, and this could be extended to face to face collections undertaken house to house. Similarly, the Charity Retail Association and Textile Recycling Association could pilot the management of house to house textile collections on behalf of several local authorities as an alternative to local authority direct management;
- Face to face collections on the street should be brought into the licensing regime;

- Licensing of collections on private property to which the public have access should be left to the discretion of the owner/manager of the property. This can be dealt with by guidance;
- Removal of existing bureaucratic requirements for the licensing of public charitable collections such as the requirement to advertise in local papers;
- Removal of National Exemption Orders, which cause frustration to local authorities and the vast majority of non-holder charities, but ensure that provision can be made for nationally accepted flag days and urgent (e.g. disaster) appeals;
- There should be a right of appeal against the refusal of any type of licence to the Charity Tribunal;
- In London, consideration should be given to transferring licensing responsibility from the Metropolitan Police to local licensing authorities.

8.62 As with all types of regulation, public awareness and transparency will be important elements in building confidence in the system. In this regard, better use of technology in making licensing transparent for the public should be considered (e.g. use of QR codes, which could be read by smart phones to check if a collection was licensed). Thought should also be given to listing authorised collections on council websites (which some local authorities already do), or existing central websites (such as the PFRA for face to face collections).

8.63 Collaboration and communication between all those involved in the regulatory system must improve. This is not just about internal co-ordination (which remains essential) but also concerns relationships with the wider world. Those involved in regulation (the PFRA, LGA and local councils) should work with groups such as the Association of Town Centre Managers and Business Improvement Districts to highlight the benefits of partnership working in preventing nuisance and promoting good practice and complaints handling.

8.64 The inequality between the regulation of charitable textile collectors and commercial collectors (who are subject to no licensing requirements whatsoever) should be considered. As a starting point, the Cabinet Office should explore with the relevant Government departments the potential for a system of regulation that would apply to all commercial textile collectors, and so address the current anomaly.

8.65 Finally, there should be a Standing Committee of the main organisations to drive these changes forward and monitor their implementation; in a group to consider the self-regulation of fundraising, and an extended group the licensing of public charitable collections. These should initially be chaired

by the Cabinet Office (where Ministers hold the reserve power to regulate). The core Committee should include the Cabinet Office, Charity Commission, FRSB, and Institute of Fundraising. The extended Committee which would drive forward changes to the regulation of public charitable collections should additionally involve the PFRA, the Charity Retail Association, the Textile Recycling Association, the Local Government Association, and the National Association of Licensing and Enforcement Officers.

- 8.66 The first task for the Standing Committee will be to consider simplifying the self-regulatory landscape. There should be a single standards setter, a single investigator/adjudicator, and others involved as necessary in space allocation. As part of this process the Committee will need to consider and address potential or perceived conflicts of interest.

Recommendations

i) Sector self-regulation

- 1. The FRSB and sector umbrella bodies, assisted by the Cabinet Office and Charity Commission, need to address the confused self-regulatory landscape, and agree a division of responsibilities which provides clarity and simplicity to the public, and removes duplication. This is a key challenge for the sector, which within six months of the acceptance of this recommendation should work up and agree firm proposals to deliver the next stage of a sector-funded, public-facing, central self-regulatory body covering all aspects of fundraising.**
- 2. The Charity Commission should do more to support self-regulation - for example including the FRSB tick logo on member charities' public register pages, asking at registration whether organisations are members of the FRSB, promoting the FRSB in communications to charities, and publicising for the public the FRSB as the complaints handler in relation to fundraising.**
- 3. The FRSB tick logo and branding should be retained. Members of the self-regulatory scheme must use the 'tick' logo on fundraising materials – there should be a “comply or explain” approach to this. Sector umbrella bodies also need to do much more to support and promote the FRSB and self-regulation among their membership.**
- 4. Government, the regulator, umbrella bodies and the FRSB should work together on levers that would promote membership of the FRSB. For example:**

- a) Explore the potential for waivers from certain regulatory requirements on the grounds that FRSB members are following best practice and are properly self-regulated.
 - b) Encourage grant funders to consider membership of the FRSB as a sign the organisation is committed to best practice and good complaints handling, and include it in their risk indicators or funding criteria.
5. More should be done to promote the rulings of the FRSB in relation to both members and non-members. Where members persistently fail to meet the standards they should be ejected from the scheme. Where non-members persistently follow poor or illegal practices, the FRSB should develop formal referral mechanisms to the relevant statutory regulators or enforcement agencies including a commitment to take action on such referrals.
 6. As it grows, the FRSB should audit its members' compliance, moving away from a system that relies on self-certification. New members should be given a transitional or probationary period during which they can develop their compliance with the Codes, but could have complaints judged solely against the Fundraising Promise. Likewise the FRSB should consider how to regulate fundraising by small (<£25,000) member charities, who may struggle to meet all aspects of the IOF's Codes. Instead, small charities should have their complaints assessed only against the Fundraising Promise.
 7. Membership of the FRSB should not be compulsory at this stage - neither the sector nor the FRSB would be ready for such a significant shift. Instead, there should be an initial 'expectation' that all fundraising charities with an income over £1 million ('large' charities) should be members of the FRSB. Over time this expectation should expand to capture more charities.
 8. Government should review the progress of the FRSB in another five years' time to determine whether it has made the step change required in terms of coverage, and public awareness. The reserve power for Government to regulate or require membership of the self-regulatory scheme should remain a serious option if self-regulation stalls or fails to make sufficient progress.
 9. Government should work with the Institute of Fundraising, FRSB and other specialists to produce simple guidance on solicitation statements for professional fundraisers and commercial participators.

ii) Public charitable collections

1. The following key changes need to be made to the rules for licensing public charitable collections, either under existing legislation or new legislation:

- a) National guidelines or model regulations should be developed covering (a) eligibility criteria for organisations wishing to apply for a licence, (b) accountability and transparency of collections, (c) the balance between different types and scale of collection, (d) frequency of collections, and (e) conduct of collections;
- b) Within this national framework, local authorities should have a significant degree of freedom in determining the frequency and extent of different types of collections, but should not be able to ban a particular fundraising method that is accepted nationally.
- c) Local licensing authorities should be able to opt to delegate the management of different types of collections (taking licensing back in-house if problems arose), or continue to manage licensing directly themselves.
- d) Face to face collections should be brought into the licensing regime. However, local licensing authorities should be encouraged to rely on self-regulation of these types of collection by the PFRA.
- e) Collections on private property should remain, as at present, at the discretion of the owner/occupier.
- f) The Government should explore the appetite and options for licensing all types of house to house textile collections to equalise the position between commercial and charitable collections.
- g) National Exemption Orders should be abolished, though provision must be made to allow for collections on recognised 'flag days' and urgent (e.g. disaster) appeals, and thought given on how to minimise the regulatory burden for existing exemption order holders before implementation.
- h) There should be a right of appeal against the refusal of any type of licence to the Charity Tribunal.
- i) In London, consideration should be given to transferring licensing responsibility from the Metropolitan Police to local licensing authorities if there is demand for such a change.

iii) Implementation and Monitoring

1. A standing committee should be formed to drive forward these changes and monitor progress. Initially this should be chaired by the Cabinet Office and its core membership should include the Charity Commission, FRSB, and Institute of Fundraising. Wider membership should be brought in (as suggested in paragraph 8.65) for public charitable collections.

9. Social investment

What is it?

- 9.1 In recent years, social investment has emerged as a new approach to finance; one which, as the name suggests, delivers a social and financial benefit. As is often the case in new fields of endeavour, a range of names and definitions have emerged, describing various aspects of this activity, including “mixed motive” and “programme related” investment. In this chapter, at the risk of offending the initiated, we use ‘social investment’ as a catch-all term to describe investments that have social impact as an element of their overall benefit.
- 9.2 As an entirely new form of investment (unheard of until 2005) and still at a very early stage of development, it is not surprising that the nascent social investment market faces a great number of barriers in a system not set up to cope with it.
- 9.3 While the primary focus of this Review is of course on charity law, the evidence we have been presented with on this topic covers a far wider field. The Review’s terms of reference require it to consider developments in the social investment market and these wider issues are highlighted in the course of this chapter to stimulate debate and emphasise the need for a cross-departmental and cross-professional approach.
- 9.4 There is a wider issue to be considered. Interest in social investment is increasing rapidly around the world. To date, the UK has been in the lead in the intellectual ‘heavy lifting’ required. Now the challenge is to move into the implementation phase. If a comprehensive and effective regulatory system can be established in the UK there is an opportunity for this country to become the world’s centre of excellence in this increasingly important area.

What are the challenges?

The position of charity trustees

- 9.5 At the moment, charity trustees have a ‘general power of investment’ that allows them to make the same range of investment decisions as if the money was their own. However, in exercising this power, they must ensure that the type of investments they are making are suitable for their charity and that their investments are diversified. What this means in practice will change with the size of the charity, its income and many other factors; trustees must use their judgment and take proper advice.

- 9.6 However, when the law talks about ‘investment’, it generally means an outlay that is intended to generate a financial return (whether from capital growth or income). As a result, most people have accepted that this means the main duty of trustees in making investments is to get the best possible financial return, which they can then spend on their charitable work. Where an outlay is primarily intended to deliver a social benefit (i.e. help the charity in fulfilling its charitable objectives), it therefore tends to count as part of the charity’s spending on achieving its purposes rather than being an ‘investment’.
- 9.7 Despite the absence of an explicit legal power to do so, and in the absence of specific case-law on the point, it is reasonably widely (but not universally) accepted among charity lawyers that charities are legally permitted to make these mixed motive investments. The Charity Commission has recently produced new guidance on the exercise of investment powers by trustees (CC14),⁴⁵ which specifically includes an explanation of how powers can be exercised to make social investments that blend both social and financial benefits, instead of focusing on one type or other. Guidance from the Charity Commission on this point is very welcome but it does not have the force of statute law. It can be (and indeed, in one instance, has been) overturned.
- 9.8 Against this background, there are reports of professional advisers (whose role we discuss below) unable or unwilling to advise that social investment was appropriate for an organisation. There is also evidence of increased nervousness and unwillingness among charity trustees to consider social investment for fear of the legal and financial risk, in particular in organisations where trustees would be personally liable. However, on closer examination, it was felt in many cases that those unwilling to consider social investment had not fully understood the nature of the investment and had been primarily driven by aversion to risk.
- 9.9 One problem with the present law is that it makes no distinction between the duties of a trustee of a private trust and those of a charitable trust – in all cases, preservation of capital is paramount. Now in many cases, particularly for private trusts, this is entirely appropriate. Consider a pension fund; capital preservation is essential if the pensions are to be paid. But for charitable trusts this does not hold true to the same extent. The trustees of a charity (without permanent endowment) whose objects are to reduce school exclusion might consider it appropriate to devote a proportion of their capital to support these sorts of proposals.

⁴⁵ The Charity Commission, *Charities and Investment Matters: A guide for trustees* (October 2011)

Involving external investors

- 9.10 One of the attractions of the social investment market is the ability of charities to increase their range of funding sources by involving external investors. These investors, while supporting the charitable objectives of the individual charity are prepared to invest their money alongside and through the charity. They are not giving their money outright, though they accept that they may lose it; they hope for its return and, if all goes well, with a modest additional incremental return.
- 9.11 This means that, at law, the charity's activities are generating a private benefit for investors, which is generally permissible only within strict limits. The generally accepted wording (here and in all other areas of charity law) is that private benefit is acceptable where it is "necessary and incidental." There are concerns that this is overly-limiting, in that it not only creates a legal uncertainty as regards what can be offered to investors but also a conservative mindset among potential charity investors as to what they can and cannot invest in.

Absence of agreed legal forms

- 9.12 There is currently no effective, off-the-shelf legal vehicle to use to create a social investment product. This means every product at the moment has to be bespoke and so is very expensive to create, with the net result that few investment opportunities are created (especially for smaller schemes where the 'fixed costs' are proportionately heavier) and the process of natural market growth is held back. While in many ways this goes beyond the realm of charity law, addressing it would make social investment a cheaper, significantly less daunting proposition for trustees and so help encourage culture change. The challenge is to create a format which can unite (say) charitable, private and Government money while keeping these different streams of funding separate, because each of the streams has different objectives, tax treatment and timescales.

Approach of HMRC

- 9.13 The issue of tax is one of a number that have been mentioned in the course of the Review. It is very welcome that HMRC have signed off on the new Charity Commission guidance. However, it seems that there is still uncertainty among charities over the general tax position of social investment. It is a further reason why charities considering making such investments are deterred.

Approach of the Financial Services Authority

- 9.14 Financial advisers and/or investment managers are currently both unable and unwilling to offer advice on social investments as they do not fit normal investment assessment criteria used to determine suitability for a client. Many advisers are thus discouraged from advising on social investment for fear of falling foul of the FSA's rules. Furthermore, the current rules on financial promotions make it

difficult for charities and other social businesses to raise small amounts of finance; getting approval to market a product under the current rules is expensive and often disproportionate for small transactions. These two issues make it hard to increase the range of investors for social investment products, strangling attempts to increase the availability of capital.

Approach of the actuarial profession

9.15 The influence of actuarial advisers on issues affecting the long term balance of and return on portfolios of assets is very considerable. We received very limited specific evidence on this point, but if or when the social investment market begins to grow, the actuarial profession will have an influential role in addressing some very challenging issues, especially those of valuation.

Approach of the accounting profession

9.16 Social investments do not fit neatly into existing accounting processes, whether charitable or general; in particular, they are difficult to value and hard to place within a standard set of accounts. This may sound like a dry, technical distraction but it has a significant real-world impact. Firstly, it can also offer further discouragement to trustees; if the complexity of making and the expense of accounting for social investment are too great a proportion (or even larger than) the investment itself, there is no point in continuing. One adviser to a large foundation gave an example of a due diligence programme for a loan which cost double the amount of the loan itself! Unsurprisingly, the trustees decided it would be better to make an outright grant instead. Additionally, if social investments are reflected as a component of expendable income, they can begin to eat into funding usually assigned to grants. This is unwelcome to many trustees and also counter-productive in terms of making more funding available for delivering charitable aims.

9.17 The pricing of risk for individual proposals is a major challenge to market development. The lack of standard impact measures for assessing the level of social benefit delivered by a project, and the lack of available products to benchmark against mean a great deal of time and effort is required to quantify the level of risk associated with each investment. This has two major effects. Firstly, investors are unwilling to enter the market as they have no effective way to understand what they are taking on and, secondly, those investors that do take the plunge generally require high rates of return. Higher rates of return increase the pressure on the investee organisation and can make them unwilling or unable to take on the investment. This creates something of a vicious circle by inhibiting the market growth and maturity that would help resolve these issues naturally.

9.18 Finally, once the investment has been made, there is the issue of interim valuations of the investments. Most social investments will have a period of two or three years before it is clear whether they have proven themselves. During this time, the issue as to what constitutes a “true and fair” valuation becomes critical. Certainly if trustees are told they immediately have to write down (maybe substantially) the value of any social investments pending proof of performance, this will hardly encourage further investment!

What can be done?

9.19 From the outset, it should be recognised that many of the difficulties facing the social investment market are simply functions of its own immaturity and should resolve over time if the market is allowed to mature at its own pace; indeed, to force that pace could be very damaging. The challenge, therefore, is to facilitate that natural process of growth, whether by removing legal and regulatory barriers or providing support for those involved in the market to draw on as they see fit.

9.20 It will take a concerted effort by a number of different groups to remove these barriers and, without each of them committing fully to the endeavour, the process as a whole is unlikely to succeed. Government of course has a role to play, via a number of different Departments, but, as noted above, the importance of professional groups such as investment advisers, accountants, actuaries and lawyers should not be under-estimated. The conclusions of this Review are intended to encourage debate and discussion but it will need leadership from Government and a supportive and positive approach by other groups to make progress.

9.21 My first conclusion is that charity law (along with general trust law and prevailing accounting and financial regulation), while not actively prohibiting social investment, is certainly not set up to support it. There is no clear legal basis for investments of this type, causing nervousness among trustees and their advisors. This lack of clarity extends further, into the accounting and reporting processes that underpin investment. In this situation, social investment will always be the difficult option, discouraging those with a flicker of interest from pursuing the project further and presenting serious barriers to even the highly committed.

9.22 Social investment, then, should become far better integrated into the overall legal and regulatory framework. Reforms to charity law are a good place to start. Many of the contributors on this subject highlighted the need for a coherent set of principles to underpin investment by charities, based in the fundamental idea that charities exist to help their beneficiaries. The question is how to deliver this.

- 9.23 The idea of an obligation on trustees to make investment decisions in the light of their charity's purposes has been raised a number of times during the Review. However, it would surely be unwise to go this far, particularly at this early stage. Not only is imposing another legal obligation on trustees and usurping their judgment not a decision to be taken lightly, but to compel them to make social investments in an undeveloped market could risk investments being made in badly-designed products. The subsequent failure of these would cause market failure and set back the long-term development of social investment. The same arguments apply even more strongly to suggestions that trustees could be required to invest a percentage of permanently endowed assets in social investments.
- 9.24 What is needed is a more permissive legal environment, where trustees are confident of their ability to take the action they consider to be in the best interests of their charity – which is, after all, their primary duty! Given this primary duty, trustees should, in making investment decisions, be entitled to consider the totality of benefit that an investment is expected to provide, in terms of both the financial and social return. 'Investment,' for these purposes, should include any outlay of money where the charity expects some form of financial return, whether or not that is the primary motive for making the outlay. The other principles governing investment (standard investment criteria etc.) contained in the Trustee Act 2000 continue to apply. This means that the suitability of the investments will still need to be considered and regularly reviewed, but in the light of the overall duty to further purposes rather than simply focusing on financial return. Charitable companies should take care to reflect these investment principles in their articles of association to give themselves access to the same powers.
- 9.25 Similarly, charities with permanent endowment should be given the space to consider whether they want to involve themselves in social investment. A power to use permanent endowment for social investment would achieve this. However, there are risks around erosion of capital that should be considered. A requirement that levels of capital be regained after a certain period should mitigate this.
- 9.26 A further step that Government could take to help support charities to involve themselves in social investments is to develop a standard legal form. Such a form would be a ready-made vehicle for social investment, facilitating the pooling of resources for such investment, providing a much simpler alternative to bespoke forms and so avoiding much of the significant legal and other professional up-front costs associated with them. This is primarily a challenge for Government, as it would require primary legislation, but would need to be executed in partnership with those involved in social

investment and to draw on the experience of existing products and projects. Such a legal structure would need to reflect the rules on private benefit applicable to charities and maintain the different tax treatment, without over-complicating the final product – a not insubstantial set of challenges!

- 9.27 I also consider that the wording of the test of private benefit should be altered in relation to investment. While it remains the case that private benefit must be ‘necessary’ in order to maintain the emphasis on public benefit, altering the second limb of the description to ‘proportionate’ seems a better reflection of the reality of investment. In particular, this will enable the appropriate tax treatment of investments by HMRC, particularly where returns have far outstripped expectations. Care (and guidance) in implementing this change, however, will be needed to avoid undermining the principle of restricting private benefit in other contexts too.
- 9.28 An amendment to the Trustee Act to draw attention to the wider responsibilities imposed on the trustees of charitable trusts would also be helpful. Capital preservation is important but overemphasising it in the context of charities runs the risk of impeding the growth of social investment.
- 9.29 However, the suggestion made to the Review of the addition of a further charitable purpose on “social impact reporting,” is not recommended. While there is no question that being able to measure social impact will assist greatly in designing, pricing and valuing investment products, adding a new head of charity to the list is not necessary to achieve this; social impact measurement is already recognised as a charitable purpose by analogy.
- 9.30 These specific reforms to charity law would be important steps in developing the social investment market. However, they will ultimately be ineffective without the support of Government as a whole and wider professions involved in investment. Included in the list of recommendations below are some suggestions for wider action in response to the broader issues identified. The key point, though, is that a committed and co-ordinated effort will be essential for making sustained progress in this field.

Recommendations

- 1. The rules governing investment by charities (in the Trustee Act 2000) should be amended to the following effect:**

- a. As the primary duty on charity trustees is to further the purposes of their charity, trustees are entitled to consider the totality of benefit that an investment is expected to provide, in terms of both financial and social benefit, when making investment decisions;
 - b. The term 'investment,' for these purposes, includes any outlay of money where the charity expects some form of financial return, whether or not that is the primary motive for making the outlay;
 - c. The other existing principles governing investment (the standard investment criteria, requirement to review investments and duty to take advice) in the Trustee Act 2000 should continue to apply.
2. The Government should also consider an amendment to the Trustee Act 2000 to draw attention to the distinct responsibilities imposed on the trustees of charitable trusts as opposed to private trusts (i.e. the need to further charitable purposes rather than simply preserve capital).
3. The Government should introduce a legal power for non-functional permanent endowment to be invested in mixed purpose investments, with the requirement that capital levels must be restored within a reasonable period.
4. The Government should work to develop a standard social investment vehicle to allow funding from different sources to be invested, and maintained separately, in the same product.
5. The private benefit requirement in relation to investment should be reworded to "necessary and proportionate", although the Charity Commission should produce clear guidance on this change to ensure it does not undermine the wider public benefit principle.
6. Development of social impact measurement should not be added to the existing statutory list of charitable purposes at this time.
7. The charities SORP should be revised to facilitate the appropriate reporting of social investments. As part of this, the professional accountancy bodies should identify a standard system for valuing social investments; one possibility might be that trustees' valuation is used until a reasonable period of operation has elapsed to allow investments time to demonstrate their merits. The approaches followed in the early years of the private equity industry, which faced similar challenges, might usefully be considered.

- 8. The Government should consider amendment to the Financial Services Bill to provide a statutory and regulatory underpinning to social investment.**
- 9. Charities should be able to apply to HMRC for a prior clearance on tax treatment ahead of the making of an investment; in time, as the market matures, HMRC should provide clear guidance on the tax treatment of different types of social investment. HMRC should also consider establishing a specialist unit for handling social investment issues.**
- 10. The Government should consider ways of revising financial promotion rules to allow social investment advice to be given. Proportionate approaches to promotions requirements for low-value deals should also be investigated in order to free up the lower end of the investment market without undermining important consumer protections.**
- 11. The FSA should consider establishing a specialist unit to deal with the challenges of social investment – for both the investor and the investee.**
- 12. The name of the term ‘mixed motive investment’ should be replaced with ‘mixed purpose investment’ to provide the general public with a clearer understanding.**

10. Technical issues

Mergers and winding up

10.1 The Charities Act 2006 included several provisions to facilitate charity merger and restructuring, and the passing on of assets when a charity winds up. These measures included a new “register of mergers” maintained by the Charity Commission and were all intended to help charities and the sector evolve more easily. However, a few practical issues with their operation have emerged since the Act was passed. Some are reflected here; more minor points are included in Appendix A.

Shell Charities

10.2 ‘Shell’ charities are the legal skeleton of former charities that are kept on the register after the organisation of which they were once part either incorporates as a company or merges with another charity. There are some specific reasons that lead new organisations to keep these ‘shells’ of their former selves on the register in perpetuity.

‘Gift over’ provisions

10.3 Wills that include gifts left to charities are often not drafted by individuals with a detailed knowledge of charity law, and so can often fail if the named charity has ceased to exist, which it will have done legally if a new entity has been created from an incorporation or merger (even if there is no reason to believe the testator would not have wanted the new organisation to benefit). Leaving the ‘shell’ of the former charity in place means legacies pass to the former charity and can then be moved into the new organisation.

10.4 It would seem sensible to modify the merger provisions in order to provide that all bequests shall be treated as a gift to the new, merged or incorporated charity where the original organisation is linked to the new one through the register of mergers. This should include sensible safeguards around the relevance of the new charity’s objects to ensure that the intentions of the testator are respectfully considered. It will remain possible for those drafting wills to expressly prevent this from happening, should the testator desire.

10.5 However, this is something of an inelegant solution, and still involves an element of overriding the testator’s stated intentions (albeit that the testator may often have accidentally misstated them!). In the longer term, then, it would also be helpful for the legal profession to identify a standard form of wording for a charitable bequest that addresses this issue and can then be used by will drafters and members of the public without the need for detailed legal knowledge.

Administrative complexity

- 10.6 Incorporation or merger often requires organisations to change not only their charity number but wider administrative arrangements like bank accounts, on the grounds they are technically a ‘new’ organisation. The practical ramifications of transferring assets and other structures (such as direct-debit donations and grants) from one organisation is far greater than the administrative burden of having technically to maintain a shell charity. In practice, many donors will often forget or otherwise fail to change their direct debit instruction (or similar) and the charity will lose income as a result.
- 10.7 To help alleviate some of the issues facing organisations that incorporate or merge, the Charity Commission and HMRC should revise their registration practices so that, when an unincorporated charity transfers its assets and undertaking to a new corporate charity which essentially continues to be the same organisation, it is allowed to continue to be registered under the same number.
- 10.8 It would also seem reasonable for the banking industry to allow charitable organisations that have incorporated or merged to transfer specific accounts to their new body, thus removing the necessity to close accounts and open new ones. Some banks already do this as a matter of good practice – others should be strongly encouraged to join them.

Recommendations

- 1. Modify the merger provisions to provide that all bequests shall be treated as a gift to the new, merged or incorporated charity where a will may otherwise cause a gift to fail if the original charity has ceased to exist. This should include safeguards around the relevance of the new charity’s objects to ensure that the intentions of the testator are respectfully considered.**
- 2. Professional advisers should work to identify a standard form of wording for a charitable bequest that can be used easily by will drafters and members of the public.**
- 3. The Charity Commission and HMRC should revise registration practices to allow newly-incorporated organisations to continue to be registered under their original charity number where there has not been a material change to the organisation’s objects.**
- 4. The banking industry should allow charitable organisations that have incorporated or merged to maintain and rename their existing accounts in the name of the new body.**

Disposals of land

10.9 Charities in England and Wales make thousands of sales and other disposals of interests in land each year. While the Charities Act 2006 did not change the law on charity land disposals, responses to the Cabinet Office's 2010 consultation, "*Making it easier for charities to sell and make other disposals of land*,"⁴⁶ which considered whether the definition of "qualified surveyor" in the Charities Act 1993 should be extended, led the Government to conclude that this Review should consider whether wider changes to the regulation of disposals of charity land are needed.

The regulation of land disposals

10.10 "Disposals" of charity land includes, as one would expect, sales, exchanges and leases of charity land, but also encompasses other transactions that involve interests in such land (for example, granting easements such as rights of way).

Requirements for making a disposal

10.11 In most cases, charities can dispose of their land without the need for the approval of the Charity Commission⁴⁷, provided that the charity's trustees comply with certain requirements. Those requirements are broadly that, once they have decided that a disposal may be in the best interests of the charity, the trustees must:

- Obtain and consider a written report on the disposal from a fellow or professional associate of the Royal Institution of Chartered Surveyors who, the charity trustees reasonably believe, has ability in, and experience of, the type of transaction in the area where the land is situated. The content of the report is prescribed by very detailed regulations⁴⁸.
- Advertise the disposal in the way advised by the surveyor, unless the surveyor advises that advertising is not needed.
- Having considered the surveyor's report, be satisfied that the terms of the disposal are the best that can reasonably be obtained for the charity.

10.12 In addition to these requirements, the disposal documentation must also include certain statements, and the trustees have to give certain certificates upon the disposal of the land. This is to enable the trustees to provide assurance to the purchaser that they are validly disposing of the charity's interests.

⁴⁶ <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/voluntary-sector/charity-law-regulation/latest-consultations-proposals.aspx>

⁴⁷ While this paper refers to the approval of the Charity Commission, the Courts also have this power but only use it on very rare occasions.

⁴⁸ The Charities (Qualified Surveyors' Reports) Regulations 1992 (www.legislation.gov.uk/uksi/1992/2980/contents/made)

- 10.13 If the requirements above cannot be met for whatever reason, the Charity Commission’s approval must be obtained, via a formal Order⁴⁹. The Commission has also in the past been involved where the value of the disposal is very small and the costs involved in meeting the requirements are disproportionately high, for example where small parcels of land are being exchanged to straighten a boundary.
- 10.14 This is, by any measure, a stringent set of requirements. The evidence gathered by the Review is firmly of the view that the current requirements are disproportionate, particularly where small transactions are concerned; in the case of minor disposals, such as grants of easement or sales of small areas of land, the costs associated with complying with the Charities (Qualified Surveyors' Reports) Regulations 1992 often means that the benefit of the proceeds of the transaction goes to the charity’s professional advisers and not to the charity! This, clearly, is neither sensible nor proportionate – especially when compared to the Trustee Act 2000,⁵⁰ which effectively deregulated investment in stocks and shares by allowing trustees to choose investments as if they were their actual owner, subject only to the duty of care defined in that Act. Similarly, it is well worth noting that the *acquisition* of land by charities is not subject to an equivalent regime.
- 10.15 Notwithstanding the prescriptive nature of the existing regulatory regime, the evidence points to problems in its implementation. The first is possible gaps in coverage - although the requirements for the contents of a surveyor’s report has been described as a “Counsel of Perfection,” and requires information that is not usually needed, it does not actually cover all the relevant issues on sales of agricultural land. It seems unlikely that this is the only example of a deficiency in the regulation, simply because of the diverse range of transactions it is attempting to cover. The second issue is lack of clarity, for example on when in the process advice should be sought (particularly as the wording of the Regulations and the Charity Commission’s guidance⁵¹ strongly suggests that the report should be a formal valuation rather than advice on marketing).
- 10.16 In short, the scheme for regulating disposals of land does not appear fit for purpose and so should be removed. Trustees are already under a legal duty to act in the best interests of their charity, which includes seeking advice when appropriate, and this applies to disposal of land as much as any other aspect of their work. Given the complexity of some transactions, the Charity Commission, working

⁴⁹ Section 117 of the Charities Act 2011 (<http://www.legislation.gov.uk/ukpga/2011/25/section/117>)

⁵⁰ www.legislation.gov.uk/ukpga/2000/29/contents

⁵¹ The Charity Commission, “Sales, leases, transfers or mortgages: What trustees need to know about disposing of charity land” (CC28)

with appropriate professional bodies where necessary, should supplement the standard duty of care in this context with guidance to clarify how trustees should act in relation to both acquisition and disposal of land, specifically addressing common types of transaction.

10.17 This change will enable charities' professional advisers to give advice that is both appropriate and proportionate to the sale. However, allowing trustees to exercise judgment will be essential – the simple sale of a house left to the charity will be an entirely different proposition from a complex disposal of large areas of land and trustees will naturally (and rightly) want to reflect this in the process they adopt in each particular circumstance.

Disposals to connected persons

10.18 The Charity Commission must currently approve all disposals of land to “connected persons” of the charity. This would, for example, include the trustees or staff. These disposals are one point on which regulation remains necessary, as Charity Commission approval of such sales exists to help identify and prevent fraud and abuse. However, the definition of “connected person” should be amended to exclude charities' wholly owned subsidiary trading companies. This is a simple reflection of the fact that such companies are entirely owned and controlled by the charity themselves, limiting the risks attached as in practice the interest in the property remains with the charity.

Land disposal by administrators

10.19 One final point made in the evidence submitted to the Review was that formally-appointed administrators acting in the winding up of a charity should be authorised to execute disposal documents. This idea has merit, saving the cost in time and money seeking the signatures of trustees who may be difficult to trace.

The regulation of mortgages

10.20 Most mortgages taken out by charities do not need the approval of the Charity Commission or the courts. However, while this is an altogether less burdensome approach than in relation to disposals of land, there remain barriers that might be removed. For example, Charity Commission approval must still be obtained where grant-making bodies require that recipients secure their conditional repayment obligation by means of a charge over the charity's land.

10.21 In the interests of both reducing administrative burdens and of consistency and simplicity in regulation, there seems no reason not to adopt the same approach here as in relation to the wider land disposal regime and rely on trustees' overarching duty of care (supplemented by guidance) to regulate decisions about mortgages.

Recommendations

- 1. Disposals of and mortgages and other charges over charity land should be deregulated and rely on the charity trustees acting under their duty of care following Charity Commission guidance.**
- 2. The Charity Commission should work with relevant professional bodies to develop this guidance and include specific types of common transaction – including acquisitions as well as disposals.**
- 3. The Charity Commission should still approve disposals to “connected persons,” plus mortgages and other charges granted to connected persons.**

Organisational forms

10.22 There are currently three main legal forms that charities may take. They are:

- Charitable trust.
- Charitable unincorporated association.
- Charitable company limited by guarantee

10.23 A small proportion of charities also exist as a type of Industrial and Provident Society (IPS) and a still-smaller proportion exist as Royal Charter charities or statutory corporations.

10.24 Each of these legal forms is suitable for a different kind of charity. However, none of them are designed specifically for charities, so the Charities Act 2006 introduced a new legal form designed to be used exclusively by them - the charitable incorporated organisation (CIO). A CIO will have the benefits of incorporation; ‘legal personality’ for the charity, enabling it as a corporate body to enter contracts and act under its own powers; and limited liability for the CIO’s trustees and members. In addition to new charities, an existing unincorporated charity will, in effect, be able to “convert” to be a CIO (in due course a statutory process for charitable companies to convert will also be implemented). However, a CIO will not be registered with Companies House or regulated under company law. A CIO will have a constitution, and will be registered with and regulated by the Charity Commission. Unlike any of the other forms of charity it will not have a legal existence until it is registered with the Commission.

Charitable Incorporated Organisations

Implementation

10.25 The key concern on CIOs is, unsurprisingly, that they have not yet been implemented. Implementation of the CIO has been long-awaited by the sector; it was originally scheduled for 2009 but has been severely delayed. This delay has been a great disappointment to charities and to the professional advisers who work with them. There have been reports from a wide range of groups that they wish to make use of the organisational form as soon as it becomes available, and the delay is causing them to either have to delay their activities pending the CIO's introduction, or register as an alternative form (usually a company). This has also had cost implications for some organisations, particularly those that have opted to incorporate as a company.

10.26 However, the secondary legislation that will create CIOs will soon be laid before Parliament and, pending Parliamentary approval, should be operational by the autumn. This is very welcome progress, if not before time.

Register of charges

10.27 The need for a register of charges for CIOs has been considered by the Review but, based on the evidence received, appears unnecessary. While the lack of a register may discourage some large organisations who want to access lending and are likely to have floating charges over their property from becoming CIOs, the issue is far less important for smaller organisations as mortgages over property will still be registered with the Land Registry and noted in the charity's accounts, and thus accessible to potential lenders.

Conversion by existing charitable companies

10.28 A need for a conversion process for CIOs to become charitable companies limited by guarantee, once they outgrow their original form, has been mentioned. This is a sensible point, as a company form would be helpful for CIOs who grow to the point where they are ready to take on more finance and run into the issue of the lack of register of charges. The process for converting existing charitable companies, IPS and Community Interest Companies into CIOs will be set up by regulations to be introduced in 2013; this presents an ideal opportunity to legislate for CIOs to convert to companies as well. Linked to this, some small technical changes needed in relation to the primary legislation underpinning CIOs, to bring it into line with recent changes to company law, have been flagged in the course of the Review. These changes are set out in the list at Appendix A.

Industrial and Provident Societies

10.29 Only a small proportion of IPS are charities; all of those are community benefit societies. Charitable IPS are exempt from registration with the Charity Commission and, although they are *registered* with the Financial Services Authority (like all IPS), the FSA undertakes no regulation in respect of any type of IPS. This, then, is essentially an unregulated sector.

10.30 The lack of effective regulatory oversight of these bodies has led to problems in a small number of societies, such as organisations issuing shares or having employee-controlled boards (both of which generally contravene the rules on private benefit). Issues like this have the potential to undermine trust and confidence in charities.

10.31 The solution to this lack of charitable regulation is relatively straightforward; require those IPS who wish to be or to remain as charities to register with the Charity Commission and thus fall under its full regulatory jurisdiction. Those that do not wish to register could then continue as community benefit societies but would no longer be entitled to the benefits of charitable status. This would effectively address the issue in a transparent and simple way. Although the process of registration would be burdensome for the Charity Commission, this could be addressed by incorporating this process into the arrangements for registering CIOs that have converted from the IPS, Community Interest Company and limited company forms.

Charitable companies

10.32 As noted in Chapter 5, the requirement for dual submission of accounts and annual reports by charitable companies to both Companies House and the Charity Commission remains an unnecessary and not inconsiderable burden. However, on a similar accounts and reporting note, the potential impact of plans to replace the current UK Generally Accepted Accounting Practice (GAAP) with the International Financial Reporting Standard for Small Entities (IFRS) on incorporated charities was noted. A consultation is currently ongoing regarding the introduction of this standard; although the scope of the change goes far beyond the charity sector, it is essential that the change does not impose a further burden on charities. Proportionality in the implementation of the changes will be essential.

Royal Charter Charities and Statutory Corporations

10.33 The Review specifically asked for suggestions as to how the regulatory burden on Royal Charter charities and statutory corporations could be reduced. The system was generally agreed to be overly burdensome and suggestions for reform are set out in Appendix A.

Recommendations

- 1. Charitable IPS should be required to either register with the Charity Commission or resign their charitable status.**
- 2. The application of IFRS to charitable organisations should be proportionate and should add no additional burdens to these organisations; the Financial Reporting Council should work with the Charity Commission before and during implementation to ensure this.**
- 3. The impact of CIOs should be assessed three years after implementation.**
- 4. Regulations to allow charitable companies, IPS and Community Interest Companies to convert to CIOs should be expanded to include enabling CIOs to convert into charitable companies.**

Summary of recommendations

<i>Recommendation</i>	<i>How achieved</i>				
	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Charity Commission should consider providing a single piece of guidance setting out how it defines each of the charitable purposes and the factors it will consider when applying those definitions to a decide whether an organisation qualifies as charitable. It should also give thought to producing more model objects to supplement this guidance and assist new charities to comply with the law.		√			
The attention of the Tribunal should be drawn to the important role it has to play in ensuring case law precedents reflect emerging social mores.			√		
The Charity Commission, in its drafting of new guidance on public benefit and more widely, should take on board the comments made by the sector regarding the need for a clear distinction between legal requirements and best practice in the text.		√			
In order to address future public concerns about ‘what constitutes a charity,’ in practical as opposed to historical-legal terms, the Government should stimulate a widespread sector and public debate on the question.			√		
The Charity Commission, as part of its information strategy review, should identify and implement ways of drawing public attention to the public benefit reports of individual charities.		√			
Charities should recognise the importance of public benefit reporting both to public confidence and their own ability to attract supporters, and take responsibility for complying with reporting requirements, stressing the ‘impact’ rather than the ‘process’ of their activities.	√				
The Charity Commission should instigate a set of key indicators to help identify charities which might be at higher risk of failing to meet their legal obligations and should then take steps to improve organisations’ performance or take the necessary action against them.		√			

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
Charities who fall into the 'large' category set out in Chapter 6 should have the power to pay their trustees, subject to clear disclosure requirements on the quantum and terms of any remuneration in the individual charity's annual report and accounts.					√
Trustees of all charities should consider reimbursing trustees' expenses, especially if they consider this would result in a wider range of individuals taking on the role.	√				
The Government, through the Civil Society Red Tape Challenge, should consider the totality of the regulation facing charity trustees with a view to reducing it where possible.			√	√	√
The Charity Commission should work with umbrella bodies and other groups in the sector (e.g. infrastructure organisations) to promote their best practice guidance on trustee recruitment.	√	√			
The Government, working with business, should produce best practice guidance for employers on what trusteeship is, the benefits for employees, and how to effectively support employees who are trustees to meet the commitments of their role.			√		
The Government should lead the way in demonstrating good practice by encouraging staff to consider trusteeship and enabling them to use volunteering days in this way.			√		
Businesses should explore the potential for loaning or seconding staff to charities.			√		
Trusteeship should normally be limited in a charity's constitution to three terms of no more than three years' service each, and the Charity Commission and umbrella bodies should amend their model constitution documents to reflect this. Any charity which does not include this measure in its constitution should be required to explain the reasons for this in its annual report.	√	√			
Umbrella bodies should, working with the Charity Commission and Government, investigate ways to draw together and promote a centralised portal for trustee vacancies.	√	√	√		

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Government should introduce a 'right to know' for all charitable trustees i.e. a right to access any information, within the confines of data protection law, held by the charity that they reasonably judge necessary to discharge their duties effectively.					√
The Government should consider if and how to widen the types of criminal offences disqualifying individuals from charity trusteeship, taking into account the need to support rehabilitation of former offenders.					√
The Charity Commission should prioritise its core functions.		√			
The Commission's statutory objectives are sound, but it should focus more tightly on regulation of the sector; not just reactive but proactive regulation, including checking random and risk-weighted samples of charity accounts. The Commission should be more proactive in deterring, identifying, disrupting and tackling abuse of charitable status.		√			
The Charity Commission's competence is in charity law. It should not be producing guidance on issues that are not concerned with that, unless it provides clarity on an issue that directly impacts on charity law and is published jointly with another organisation that can provide authoritative advice.		√			
The Commission needs to be adequately funded to properly regulate the sector. Some analysis of financial efficiency and requirements needs to be undertaken as reductions in the Charity Commission's budget take place.			√		
Consideration should be given to whether the name 'Charity Commission' is sufficiently well-matched to the Commission's role going forward to support public and sector understanding of its role. A change to "Charity Authority" is suggested.					√
The Charity Commission exercises a number of functions and grants a number of permissions that could be moved elsewhere, or removed altogether, to streamline regulation. A list of the functions that could be altered or removed is set out in Appendix A. Where this de-regulation enables charities themselves to make more decisions, there should be a "comply or explain" approach.		√		√	√

	Charity sector	Charity Commission	Discretion (Ministerial or other)	Secondary legislation	Primary legislation
The general threshold for compulsory registration should be raised to £25,000 (to match the accounting threshold), with compulsory registration also applicable to all (non-exempt) charities that claim tax relief.				√	√
The process of lowering the registration threshold for excepted charities should continue, first to £50,000 and then to £25,000, over a period of three years. This three year period should commence once all existing organisations wishing to convert to a Charitable Incorporated Organisation have had two years to do so, to manage the impact on the Charity Commission.		√		√	
Voluntary registration should be introduced by bringing s30(3) of the Charities Act 2011 Act into force, once the process of registering excepted charities with an income over £25,000 has been completed and when all existing organisations wishing to convert to a Charitable Incorporated Organisation have had two years to do so. Applications for voluntary registration should only be available online.		√		√	
The processes for registering and organisation with the Charity Commission and for tax relief with HMRC should be joined up into a single process. The Charity Commission and HMRC will need to work together to design and implement such a process.		√	√		
All charities which are unregistered should be required to disclose this fact on their correspondence, fundraising materials and cheques.	√				√
The Charity Commission should continue to ensure that the information available about the charities on its register meets public needs and demand and is regularly reviewed to ensure it continues to meet these requirements.		√		√	
Work by Companies House and the Charity Commission to create a single reporting system for charitable companies, as recommended in <i>Unshackling Good Neighbours</i> , should continue as a matter of urgency. The potential for joint accounting requirements should also be investigated.		√	√		

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Charity Commission should continue its work to develop more partnerships with sub-sector umbrella bodies, enabling them to take on a greater role in promoting compliance, developing best practice (including model governing documents) and helping their membership with queries. The Commission should underscore these agreements with Memoranda of Understanding that are published on its website.	√	√			
The Commission should keep such partnership arrangements under review, and include a section in its annual report about the effectiveness of its partnership working.		√			
The Office for Civil Society and the Charity Commission should begin discussions with the Homes and Communities Agency about the feasibility of it becoming the principal regulator of charitable social housing providers in England.			√		
The Charity Commission should be given the power to delegate some or all of its functions to other bodies, where it considers this to be in the interests of good regulation and the overall standard of regulation will be equivalent. In all cases the Commission must both retain its powers to investigate any individual charity and be able to withdraw a co-regulation authorisation at any time.					√
The term “principal regulator” should be changed to “co-regulator.”					√
The Charity Commission should continue to ensure that the information available about the charities on its register meets public needs and demand and is regularly reviewed to ensure it continues to meet these requirements.		√			
The requirement to submit accounts and reporting information should be aligned with the registration threshold.				√	
All compulsorily registered charities should be required to submit their accounts and Annual Return and they should be publicly available on the Commission website.	√	√		√	
Voluntarily registered charities must submit accounts, for publication on the Commission’s website, but must do so electronically. Submissions by charities that are compulsorily registered but have an income below £25,000 per year must also be electronic.	√	√		√	

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
All registered charities with an annual income of less than £25,000 should be identified on the Commission’s register as “small” alongside their registration number. The intention of this is to improve the public perception that these charities are subject to little proactive regulatory oversight – and alert potential donors to this fact.		✓			✓
The Summary Information Return should be abolished, subject to the requirement that all the information it provides is available elsewhere in charities accounts and Annual Returns.		✓		✓	
The Charity Commission should continue with its plans to simplify and improve the Charities SORP.		✓			
The income level at which charities are required to have their accounts audited should increase from £500,000 to £1 million. The audit threshold for charities with assets valued at £3,260,000 should be removed completely.				✓	✓
The Charity Commission should explore technology-based ways of validating data from the information provided to it in both charities accounts and Annual Return.		✓			
All information required to be submitted by charities should be combined into a single document for simplicity. The first page of this should be a list of key risk indicators to help the Commission identify a sample of charities for further investigation. The completed list should also be published on the charity’s register entry to aid public understanding and exercise of judgment.		✓			
Sanctions for late filing of accounts and Annual Returns should include the withdrawal of Gift Aid. Government and the Charity Commission should also give thought to the costs, benefits and logistics of introducing late filing fines.		✓			✓
Government should work with the Charity Commission to develop a fair and proportionate system of charging for filing annual returns with the Commission and for the registration of new charities. Any such charges should be set at a level to reflect the activities that they cover. Any funds raised must be accepted by HM Treasury as being an incremental increase in resources available to enable the Commission to carry out its functions more effectively not merely reason to reduce its budget by the same amount.		✓	✓		✓

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Commission should be able to continue to offer bespoke legal advice such as the development of specialised schemes, on a cost recovery basis, if it wishes.		√		√	
Individual charities should adopt and publish internal procedures for disputes and complaints. Umbrella bodies are ideally placed to support charities with this by the development of pro-forma procedures and support in their implementation, perhaps even taking on the role of adjudicator for their members.	√				
Schedule 6 to the Charities Act 2011 should be removed and the jurisdiction of the Tribunal reformulated on the face of the legislation as: a) A right of appeal against any legal decision of the Commission b) A right of review of any other decision of the Commission					√
Those who should have standing before the Tribunal to appeal or seek a review should be (i) the charity (if it is a body corporate); (ii) the charity trustees; (iii) any other person affected by the decision, order, direction, determination or decision not to act, as the case may be.					√
The Charity Commission and Tribunal should work together to produce and agree guidance as to the scope of the Tribunal's jurisdiction and when a claim can be brought (including interventions by interested parties in reference cases).		√	√		
The time limit for bringing a Tribunal case should be extended to four months.				√	
Responsibility for making decisions on appropriate use of funds in specific litigation should be transferred to the Tribunal.					√
The Charity Commission should be given the power to make references to the Tribunal without the need for the Attorney General's permission, provided they notify the Attorney of any references they make and the Attorney retains the right to become a party to the case.					√

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Tribunal should consider whether there are any further ways in which it could use its caseload management powers to simplify proceedings, make them less adversarial and dispose of cases rapidly. Parties should be encouraged to deal with cases without an oral hearing where appropriate.			√		
The Tribunal should consider the value of including in each of its judgments a plain English summary of the key points and decisions, to aid understanding of the law.			√		
The Government should consider ways in which the Tribunal could be empowered to take account of changing social and economic circumstances as well as case law precedents.			√		√
The Government should consider ways in which the Tribunal could be empowered to take account of changing social and economic circumstances as well as case law precedents.			√		√
The FRSB and sector umbrella bodies, assisted by the Cabinet Office and Charity Commission, need to address the confused self-regulatory landscape, and agree a division of responsibilities which provides clarity and simplicity to the public, and removes duplication. This is a key challenge for the sector, which within six months of the acceptance of this recommendation should work up and agree firm proposals to deliver the next stage of a sector-funded, public-facing, central self-regulatory body covering all aspects of fundraising.	√	√	√		
The Charity Commission should do more to support self-regulation - for example including the FRSB tick logo on member charities' public register pages, asking at registration whether organisations are members of the FRSB, promoting the FRSB in communications to charities, and publicising for the public the FRSB as the complaints handler in relation to fundraising.		√			
The FRSB tick logo and branding should be retained. Members of the self-regulatory scheme must use the 'tick' logo on fundraising materials – there should be a “comply or explain” approach to this. Sector umbrella bodies also need to do much more to support and promote the FRSB and self-regulation among their membership.	√				
Government, the regulator, umbrella bodies and the FRSB should work together on levers that would promote membership of the FRSB.	√	√	√		

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
More should be done to promote the rulings of the FRSB in relation to both members and non-members. Where members persistently fail to meet the standards they should be ejected from the scheme. Where non-members persistently follow poor or illegal practices, the FRSB should develop formal referral mechanisms to the relevant statutory regulators or enforcement agencies including a commitment to take action on such referrals.	√	√	√		
As it grows, the FRSB should audit its members' compliance, moving away from a system that relies on self-certification. New members should be given a transitional or probationary period during which they can develop their compliance with the Codes, but could have complaints judged solely against the Fundraising Promise. Likewise the FRSB should consider how to regulate fundraising by small (<£25,000) member charities, who may struggle to meet all aspects of the IOF's Codes. Instead, small charities should have their complaints assessed only against the Fundraising Promise.			√		
There should be an <u>initial</u> 'expectation' that all fundraising charities with an income over £1 million ('large' charities) should be members of the FRSB. Over time this expectation should expand to capture more charities.	√				
Government should review the progress of the FRSB in another five years' time to determine whether it has made the step change required in terms of coverage, and public awareness. The reserve power for Government to regulate or require membership of the self-regulatory scheme should remain a serious option if self-regulation stalls or fails to make sufficient progress.			√		
Government should work with the Institute of Fundraising, FRSB and other specialists to produce simple guidance on solicitation statements for professional fundraisers and commercial participators.	√		√		
The following key changes need to be made to the rules for licensing public charitable collections, either under existing legislation or new legislation: a) National guidelines or model regulations should be developed covering (a) eligibility criteria for organisations wishing to apply for a licence, (b) accountability and transparency of collections, (c) the balance between different types and scale of collection, (d) frequency of	√		√		√

<p>collections, and (e) conduct of collections;</p> <p>b) Within this national framework, local authorities should have a significant degree of freedom in determining the frequency and extent of different types of collections, but should not be able to ban a particular fundraising method that is accepted nationally.</p> <p>c) Local licensing authorities should be able to opt to delegate the management of different types of collections (taking licensing back in-house if problems arose), or continue to manage licensing directly themselves.</p> <p>d) Face to face collections should be brought into the licensing regime. However, local licensing authorities should be encouraged to rely on self-regulation of these types of collection by the PFRA.</p> <p>e) Collections on private property should remain, as at present, at the discretion of the owner/occupier.</p> <p>f) The Government should explore the appetite and options for licensing all types of house to house textile collections to equalise the position between commercial and charitable collections.</p> <p>g) National Exemption Orders should be abolished, though provision must be made to allow for collections on recognised 'flag days' and urgent (e.g. disaster) appeals, and thought given on how to minimise the regulatory burden for existing exemption order holders before implementation.</p> <p>h) There should be a right of appeal against the refusal of any type of licence to the Charity Tribunal.</p> <p>i) In London, consideration should be given to transferring licensing responsibility from the Metropolitan Police to local licensing authorities if there is demand for such a change.</p>					
<p>A standing committee should be formed to drive forward these changes and monitor progress. Initially this should be chaired by the Cabinet Office and its core membership should include the Charity Commission, FRSB, and Institute of Fundraising. Wider membership should be brought in for public charitable collections.</p>	√	√	√		
<p>The rules governing investment by charities should be amended to the following effect:</p> <p>a) As the primary duty on charity trustees is to further the purposes of their charity, trustees are entitled to consider the totality of benefit that an investment is expected to provide, in terms of both financial and social benefit, when making investment decisions;</p> <p>b) The term 'investment,' for these purposes, includes any outlay of money where the charity expects some form of financial return, whether or not that is the primary motive for making the outlay;</p> <p>c) The other existing principles governing investment in the Trustee Act 2000 should continue to apply.</p>					√

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Government should also consider an amendment to the Trustee Act 2000 to draw attention to the distinct responsibilities imposed on the trustees of charitable trusts as opposed to private trusts (i.e. the need to further charitable purposes rather than simply preserve capital).					√
The Government should introduce a legal power for non-functional permanent endowment to be invested in mixed purpose investments, with the requirement that capital levels must be restored within a reasonable period.					√
The Government should work to develop a standard social investment vehicle to allow funding from different sources to be invested, and maintained separately, in the same product.			√		√
The private benefit requirement in relation to investment should be reworded to “necessary and proportionate”, although the Charity Commission should produce clear guidance on this change to ensure it does not undermine the wider public benefit principle.		√			
The charities SORP should be revised to facilitate the appropriate reporting of social investments. As part of this, the professional accountancy bodies should identify a standard system for valuing social investments; one possibility might be that trustees’ valuation is used until a reasonable period of operation has elapsed to allow investments time to demonstrate their merits. The approaches followed in the early years of the private equity industry, which faced similar challenges, might usefully be considered.		√	√		
The Government should consider amendment to the Financial Services Bill to provide a statutory and regulatory underpinning to social investment			√		√
Charities should be able to apply to HMRC for a prior clearance on tax treatment ahead of the making of an investment; in time, as the market matures, HMRC should provide clear guidance on the tax treatment of different types of social investment. HMRC should also consider establishing a specialist unit for handling social investment issues.			√		

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
The Government should consider ways of revising financial promotion rules to allow social investment advice to be given. Proportionate approaches to promotions requirements for low-value deals should also be investigated in order to free up the lower end of the investment market without undermining important consumer protections.			√		√
The FSA should consider establishing a specialist unit to deal with the challenges of social investment – for both the investor and the investee.			√		
The name of the term ‘mixed motive investment’ should be replaced with ‘mixed purpose investment’ to provide the general public with a clearer understanding.		√	√		
Modify the merger provisions to provide that all bequests shall be treated as a gift to the new, merged or incorporated charity where a Will may otherwise cause a gift to fail if the original charity has ceased to exist. This should include safeguards around the relevance of the new charity’s objects to ensure that the intentions of the testator are respectfully considered.					√
Professional advisers should work to identify a standard form of wording for a charitable bequest that can be used easily by Will drafters and members of the public.			√		
The Charity Commission and HMRC should revise registration practices to allow newly-incorporated organisations to continue to be registered under their original charity number where there has not been a material change to the organisation’s objects.		√	√		
The banking industry should allow charitable organisations that have incorporated or merged to maintain and rename their existing accounts in the name of the new body.			√		
Disposals of and mortgages and other charges over charity land should be deregulated and rely on the charity trustees acting under their duty of care following Charity Commission guidance.				√	√
The Charity Commission should work with relevant professional bodies to develop this guidance and include specific types of common transaction – including acquisitions as well as disposals.		√	√		

	<i>Charity sector</i>	<i>Charity Commission</i>	<i>Discretion (Ministerial or other)</i>	<i>Secondary legislation</i>	<i>Primary legislation</i>
Charitable IPS should be required to either register with the Charity Commission or resign their charitable status.		√	√	√	
Work by Companies House and the Charity Commission to create a single reporting system for charitable companies should continue as a matter of urgency. The potential for joint accounting requirements should also be investigated.		√	√		
The application of IFRS to charitable organisations should be proportionate and should add no additional burdens to these organisations; the Financial Reporting Council should work with the Charity Commission before and during implementation to ensure this.		√	√		
The impact of CIOs should be assessed three years after implementation.		√	√		
Regulations to allow charitable companies, IPS and Community Interest Companies to covert to CIOs should be expanded to include enabling CIOs to convert into charitable companies.				√	

The Review has also made the following recommendations, which do not require action:

1. No change should be made to the list of charitable purposes.
2. For the time being, the recommendation of the Calman report that a UK-wide definition of charity be introduced should not be implemented. However, the harmonisation of the definition across the UK remains desirable in the longer term, and this issue should be revisited at a later date.
3. The Charity Commission should remain as a Non-Ministerial Department, with its independence protected in statute.
4. The Commission should prioritise its core functions: registering charities (and maintaining an accurate register); identifying, deterring, and tackling misconduct and abuse of charitable status; and 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.
5. To minimise the impact on the Charity Commission, deregistration of those outside the new limits should be upon request only.
6. The Charity Commission should remain the main regulator of charities in England and Wales.

7. A new Charities Ombudsman, or expansion of an existing Ombudsman to cover charities, would offer little additional value and is not recommended.
8. Membership of the FRSB should not be compulsory at this stage - neither the sector nor the FRSB would be ready for such a significant shift. .
9. Development of social impact measurement should not be added to the existing statutory list of charitable purposes at this time.
10. The Charity Commission should still approve disposals to “connected persons,” plus mortgages and other charges granted to connected persons.

Appendices

Appendix A: Technical issues

Over the course of the Review, a number of technical points which need addressing have been proposed in relation to current legislation. Some have already been mentioned in the course of other chapters but are included here for completeness. The list is divided into two sections; I consider that the points in section (i) would all be suitable for investigation and, where appropriate, subsequent action by the Law Commission, and I hope very much that they will feel able to take them up. The Law Commission is an independent body set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law; it reviews areas of the law and makes recommendations for change where it is needed. A project on selected issues in charity law, examining a range of issues concerning the constitution and regulation of charities and their activities, forms part of the Commission's 11th programme of law reform.⁵² The points in section (ii) are beyond the scope of the Law Commission, and will be for Government and the Charity Commission to consider.

i) Issues for the Law Commission

1. Royal Charter charities currently require the approval of the Queen in Council to change their Constitutions and the Privy Council to amend their bye-laws. This process can often take significant periods of time and involves a great deal of consultation with the Charity Commission and wider Government. To streamline this process and relieve some of the administrative burden on all involved, the Queen in Council could be invited to consider the following changes:
 - a. Power to approve changes to the constitutions of Royal Charter charities should be delegated to the Charity Commission, with a requirement that notice of the change is given to the Privy Council;
 - b. Powers to approve changes to bye-laws should be delegated to the trustees of the charity, with a requirement to notify the Charity Commission and Privy Council;
 - c. Power to move administrative provisions from a charity's constitution into its byelaws should be given to the trustees in order to reduce the burden of making administrative changes;
 - d. The need for a scheme to be made under s68 of the Charities Act 2011 where objects are being changed on a cy-pres basis should be clarified;
 - e. Whether property is held by Royal Charter charities on trust, or as corporate property for charitable purposes, should be clarified to make administration and transactions easier (particularly as regards permanent endowment).

⁵² For more information see the Charity Law project pages on www.lawcom.gov.uk

2. Parliament could be invited to consider similar changes to the rules applied to statutory corporations, in order to maintain regulatory oversight while minimising the burden on Parliamentary time.
3. Charities themselves should be able to apply property cy-près in most cases without the need for Charity Commission approval.
4. Proceeds of a failed appeal should be applied for the charity's general purposes unless the donor expressly requests otherwise or, where the appeal is not for a specific charity, proceeds should be applied cy-près.
5. Trustees should be given:
 - a. A power to delegate to the Chief Executive the consideration of making ex gratia payments and the making of the approach to the Commission for permission; and
 - b. A power to make small ex gratia payments themselves (below a certain threshold).
6. The Commission should be given the power (like the Court) to enable it retrospectively to authorise a trustee retaining an unauthorised benefit of a small amount under the "equitable allowance" rule.
7. The position on access to permanently endowed funds in the event of insolvency to meet properly-incurred liabilities should be rationalised between charitable trusts and companies. It is broadly accepted that this option is open to charitable trusts (provided the permanently endowed property is not a separate charity) by virtue of the Trustee Act 2000 s31, though not to charitable companies. The issue of whether property held under a special trust (a trust with narrower purposes than the charity's general ones) should also be available upon insolvency could also be addressed.
8. At present, charities who seek comfort that an appeal to the Tribunal would be an appropriate use of their funds must apply to the Charity Commission for a decision to this effect, which has created concerns about an apparent conflict of interest for the Commission. This is an unnecessary pressure for both the Commission and charities; a clear power for the Tribunal to authorise expenditure on proceedings should be introduced to resolve this.
9. There are no specific statutory provisions as to the "remedy" available in Reference proceedings, or any description of the powers exercisable by the Tribunal on determining a Reference. The Act merely

empowers the Tribunal to “hear and determine” the Reference. In the first Reference, the Tribunal relied on the parallel judicial review proceedings which had been transferred to it to make an order confirming the outcome; clarity over the remedies available would resolve the uncertainty.

10. The power to require a charity to change its name (s.6 Charities Act 1993, now s.42-45 Charities Act 2011) should be extended to enable the Charity Commission to require an institution applying for registration as a charity to change its name as a condition of registration. At present, an institution may apply to register even if it has the same name as a (completely unconnected) charity that is already registered. This is not always picked up at the application stage; even where it is, the Commission’s power to require a change of name does not apply technically until the institution is already registered; at this point the risk of confusion has already arisen. It may also be helpful for the Charity Commission’s power to be extended to cover all charities, even those that are not required to register.
11. The powers to suspend or remove a trustee as trustee or from membership of a charity should be widened. Firstly, the Commission should be able to remove a charity trustee who has been found by HMRC not to be “fit and proper” for the purposes of Sch 6 Finance Act 2010. The powers should also apply in regulatory cases, even where no statutory inquiry is in place. It could also be made available to charity trustees themselves where a trustee has been removed in accordance with its internal procedures (following, for example, a breach of a code of conduct), but cannot be removed as a member of the charity. However, a fuller review of the powers should also be undertaken to determine whether any additional safeguards need to be included.
12. Power to determine membership of a charity should be extended to apply to charity trustees as well as members. In practice, as noted by many regional event attendees, it is common to come across charities where the trustee body has been constituted incorrectly for a long period. Nominating bodies may have ceased to exist or may not have exercised their power to nominate for many years. The persons acting as trustees may not know they are trustees. It would be helpful for the Commission to be able to ratify the appointment of such trustees and confirm who the trustees are, although charities may be reluctant to use this option in case it demonstrates to the Commission that they are not maintaining up to date records. The resource implications for the Commission would also need to be considered.
13. Minor, non-substantive amendments to the governing documents of trusts and charitable companies should not require the authorisation of the Charity Commission (for example, changes to cross-

references or renaming defined terms). Guidance will be needed on the meaning of 'non-substantive,' however.

14. The statutory power for a trustee to be paid for services provided to the charity extends only to goods where they are supplied in connection with the provision of the services. The statutory power to pay should be extended to apply also to the provision by a trustee of goods alone (i.e. not in conjunction with services).
15. There was a view that the ability of the Tribunal to protect third party rights (e.g. of beneficiaries) is too limited. There will be occasions where a third party (other than the charity involved in the situation complained of and the Commission) has standing to bring a claim, as set out in column two of the table in Sch 6. Concerns have been expressed that on some of these occasions, the claims relate to a decision or action of the charity which has been approved by the Commission, which the Tribunal has no power to prevent the progress of despite the fact a complaint is before it. A classic example is the disposal of land – the Tribunal has no power to prevent trustees acting on a legal authority from the Commission to dispose of land, no matter what objection to the disposal is brought by the third party. Further thought should be given to the Tribunal's powers to suspend the effects of a Commission scheme or authorisation pending determination of a case.
16. Where charities considering merger hold permanently endowed assets, the current law protects permanent endowment from being transferred in breach of the original trust, for example if the transferee charity is a company (permanent endowment cannot be held as corporate property). If the trustees of the transferor charity do wish to transfer permanent endowment, they would generally need to look to the Charity Commission to make a Scheme to appoint the recipient charity (or its trustees) as trustee of the endowment. This is somewhat cumbersome and artificial, and creates a significant burden on the charity and Commission. Reforms to allow the transfer to take place in this way without need for a Commission scheme would be a simpler approach.
17. When leaseholds and other covenants are vested in a transferee charity via a vesting declaration following merger, existing law prevents this process happening where the lease or agreement requires consent from a third party before transfer. This protects a landlord from a situation where a tenant charity could assign its lease without consent. However, this exception only covers situations where the restriction in the lease or agreement is subject to third party consent; it is not clear what the situation is

where there is an absolute prohibition on the lease being transferred. This is something of an anomaly, and requires clarification.

18. Consideration should be given to reducing the current three month period in which the Commission may object to resolutions to enable larger charities to spend permanent endowment to 60 days (in line with the procedures to transfer assets and change purposes), with a power for the Commission to extend its deadline for objection if it considers there to be good reason for doing so.

ii) Issues for other bodies

19. Regulation of Common Investment and Common Deposit Funds should pass from the Charity Commission to the FSA, as the Commission does not have the expertise to regulate what are primarily financial products (albeit only available to charities). HMT is already considering how best to reform the regulation of CIFs and CDFs as part of their work to implement the Alternative Investment Fund Managers Directive (AIFMD), and as part of this are considering possible legislative opportunities.
20. There are many powers in the Charities Act 2006 (and now 2011) that are only available to the Commission if it opens a statutory inquiry, which, following the cuts in funding, the Commission has indicated that it will now rarely do. Consideration ought to be given to the powers unlocked by a section 8 Inquiry being made more generally available to the Commission (subject to suitable safeguards). While this would be helpful in some ways given the limited number of statutory inquiries opened, the powers available under s8 are wide-ranging and give the Commission significant powers to intervene. Careful thought would need to be given to their extension.
21. Power to give specific directions and to direct the application of charitable property could have wider application beyond their use in conjunction with statutory inquiries. These powers could be extended to cover the Commission's more general regulatory work, although recognising that there needs to be sufficient protection for trustees. Since this represents a potentially-significant incursion into property rights, suitable controls would need to be put in place setting out the basis on which these powers could be exercised, however.
22. Greater transparency around use of the power for the Charity Commission to enter premises and seize documents was suggested. However, this power is already being reviewed by the Office for Civil Society as part of the implementation of the Protection of Freedoms Act 2012 so this issue can be considered in the context of that review.

23. A self certification process whereby in cases of changes to objects, trustee benefit and dissolution clauses, prior authority of the Charity Commission would not be required if certain conditions are met was also suggested. However, this should be resisted; purposes are fundamental to a charity and changes to them have far-reaching implications. There is a serious risk that trustees could knowingly or mistakenly self-certify illegitimate changes without the Commission's knowledge.
24. The definition of professional fundraiser currently refers to a person who "for reward" solicits money or other property, which may not be readily understood. Elsewhere in the statute and the related Regulations, reference is made to "remuneration or expenses"; it is not clear, therefore, whether "reward" in the definition of "professional fundraiser" is intended to include both remuneration and expenses or, as the term "reward" would suggest, remuneration only. This is a small point that could be addressed by defining "reward" in guidance.
25. There is a view that copies of all charity governing documents should be available for viewing on the publicly searchable register, in the same way as charity accounts, to increase transparency. While this would in many ways be helpful, it would also have resource implications for the Commission in relation to updating the register and would add a regulatory burden for charities, albeit a very small one. There are also practical challenges where documents are very long or have been frequently amended. The benefits and disadvantages of this idea will need to be carefully explored pending any further action.
26. At present unincorporated charities that have an annual income of £10,000 or less (and do not own what is called "designated land") can change their purposes or transfer their assets to another charity with similar purposes by using a simple procedure that takes effect by passing a resolution that must be sent to the Charity Commission. This is a procedure that works well and should be available to larger charities. The income level for charities that can use these procedures should be raised, I consider to £25,000. This will enable many more charities to use these procedures, reduce the number of schemes the Commission has to make and bring the income threshold into line with the proposed compulsory registration threshold, helping to underline the fact that these are small charities.
27. The power for the trustees to spend permanent endowment without the need for the Charity Commission's approval should be revised, in line with the other threshold changes. The Law Commission will need to consult on where the right balance lies, but I would suggest that a significant increase should be considered – perhaps assets of £100,000 and an income of £10,000.

28. One contributor felt that more clarity around what qualifies as a 'connected institution' in relation to exempt charities (Para 28 of Sch 3 to the Charities Act 2011) is needed. The confusion is around how such entities differ from endowments and/or special trusts of the same institution and around consolidation of accounts. Further investigation may help to reveal whether this is a concern more widely; if so, it appears to be one that could be resolved through guidance.
29. Similarly, there is a view that the reporting requirements set out in the Education Act 1994 s22 can make reporting lines confused for Students' Unions linked to universities, now they have been required to register with the Charity Commission. The exact nature of any conflicts should be investigated.
30. A conversion process for CIOs to become charitable companies should be set up alongside the process for converting existing charitable companies, IPSs and Community Interest Companies into CIOs, under the secondary legislation due to be introduced in 2013. This would allow large CIOs to access finance more easily as the company form includes a register of charges.
31. The rules governing CIOs should be changed to reflect updates to company law, to the effect that a 75% majority is required to make constitutional changes or a resolution to transfer assets outside the context of a meeting. This would reduce the administrative burden on CIOs and retain parity between the two sets of requirements.
32. Legislation should be amended so that constitutional changes to CIOs take effect immediately (provided any necessary Charity Commission prior approval has been obtained). There should be a requirement for subsequent notification of any changes to the Charity Commission. This would reduce the regulatory burden and allow changes to be made more quickly.
33. The Charities Act s20 provides the Commission with the power to do "anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties". However, the power does not extend to the Commission's objectives. It has been argued that, as the Commission is a statutory corporation and, as such, depends upon the powers it is given in statute in order to act, the limitation could create difficulties for the Commission. However, the objectives may also have been deliberately excluded as discharge of the duties and functions should be designed to achieve the objectives.

34. Clarity over the circumstances in which the Commission would exercise its power under s.73 Charities Act 2011 (the power to make schemes altering provisions originally made by Act of Parliament e.g. in relation to charities established by Act of Parliament), and the test applicable, would be welcome. This could be achieved through guidance.
35. If a fundraiser does not receive more than £10 per day or £1000 per year, they are categorised as a “low paid collector” and exempted from the definition of ‘professional fundraiser.’ There is an anomaly in the current law to the effect that, if a person is paid less than £10 per day but more than £1000 per year, it appears they still fall within the low paid collector exception (though this is likely to catch few people). This should be tidied up and the thresholds for this exception could also be reviewed.
36. There is the very minor point that, in commercial participator statements to comply with s.60, “donations” should be replaced with “payments”. Often some or all of the money paid by the commercial participator is paid to the charity’s trading subsidiary, in which case the sums paid are more correctly described as “payments”.
37. Regulation 6 of the Charitable Institutions (Fund-raising) Regulations should be amended to make it clear that references there to payment to the charitable institution include payment to a connected company of the charitable institution where this is agreed with that institution. This reflects the reality that many charities prefer to have sums arising from, in particular, commercial participation arrangements to be paid to the charity’s trading company.

Appendix B: Executive summary of Ipsos MORI research

This report presents the findings of a survey of the general public conducted to inform the Review of The Charities Act 2006. A representative sample of 1,004 British adults aged 18+ were interviewed by telephone between 20th-22nd April to capture their views on the following areas:

- The nature and role of charities
- The Charity Commission and regulation
- Information and complaints about charities
- The role of trustees
- Fundraising practices.

The nature and role of charities

Over a third of the general public have high levels of trust and confidence in charities (35%), defined as those giving a score of 8 or higher on a 10 point scale. The mean score given by the public is 6.45. How charities spend their money is a key issue for those who lack trust and confidence. Over two fifths (45%) of those with low trust and confidence in charities feel charities 'spend too much of their funds on salaries/administration', while a quarter say they do 'not know how charities spend their money' (27%) and a fifth think charities 'waste money' (21%).

More than half of people see the main role of charities as funding research (55%) and providing advice, guidance and support to individuals (53%). These were overwhelmingly seen as the two most important activities, with less than three in ten seeing providing services (28%) and overseas poverty relief (27%) as important.

The Charity Commission and regulation

Over half of people agree that charities are effectively held to account for how they spend the money they receive (56%), whilst one fifth disagree (20%). Nearly half of those surveyed had heard of the Charity Commission before the survey (47%). Amongst those who have heard of the Charity Commission, understanding of what it does is mixed with just under half feeling they understand what the Charity Commission does well (48%), and a similar proportion feeling they do not (51%).

The public were given a list of possible roles or functions of the Charity Commission and asked whether they thought it was likely or unlikely that these were areas the Charity Commission had responsibility for. All of

the options given were felt to be likely responsibilities of the Commission by the majority of the public. It is clear from the findings that the public have a misconception over what the Charity Commission's roles are. The most identified likely role is 'investigating complaints about charities' work' (91%), which is not something the Charity Commission has responsibility for. This is followed by 'inspecting charities to ensure they are meeting their legal obligations' (88%), a role the Commission does play.

Following this, respondents were given some more information about the roles of the Charity Commission and asked if they felt these were being fulfilled. Two thirds of the public feel that the Commission does fulfil these functions (64%) and less than one in ten disagree (8%). A large minority are undecided, however, with three in ten (29%) neither agreeing nor disagreeing, or saying they don't know.

Information and complaints about charities

Respondents were asked, from a choice of nine aspects, what was important to them when deciding whether to support a charity. Nearly all feel that details about what the charity does (98%), what the charity spends its money on (97%) and evidence of the impact the charity has (97%) are the most important factors. All the options given were seen as important, with the lowest result being for details of salaries of its executives and staff, which is still seen as important by two thirds of people (76%).

When it comes to complaining about charities where people are unhappy with service or conduct of a charity, most would raise this complaint with another person or department in the charity (71%) or with the Charity Commission (67%). However, when the issue is around a charity's funds not being used properly, seven out of ten would raise this with the Charity Commission (72%), and just over half with another person or department in the charity (53%).

The role of trustees

Current involvement with charities was low, with one in seven working for a charity as a paid employee, trustee, volunteer or member of a charity's executive and only two per cent saying they were a trustee of a charity. Four in ten said they did not have the time to be a trustee (39%) while a quarter had never thought about it (25%). Those who were not currently trustees were asked if they thought trustees got paid; over a third think they are not paid (37%) while three in ten think they are (31%), and the rest do not know (32%).

When asked what they the role of trustees was, from a provided list, eight in ten feel trustees "ensure that the Charity complies with the law" (80%), and seven in ten identify "financial management" (71%) and "oversight of management" (68%) as roles.

When given more information about the role of trustees, the majority of the public feel that trustees should not be paid (61%), other than expenses. However, views here do vary widely on demographic grounds, with nearly half of 18-24 year olds thinking trustees should be paid (47%), and half of BME people (50%) compared to a third of White people (32%). In addition, two thirds of people agree that paying trustees would encourage a wider range of people to consider signing up to be one (65%), while just one in five disagree (20%).

Fundraising practices

Respondents were asked about the ways they had been asked to give to charity, and the ways they preferred to give to charity. Most had been asked to put money in a collection tin (86%) and also preferred to give this way (79%). Sponsoring someone was also a common way to be asked (75%) and a popular way to give (77%). Six in ten had been asked to donate via an ongoing direct debit (58%) but fewer preferred to give this way (41%).

A third have been asked to give money to a door-to-door collector (34%) but only a fifth prefer to give this way (17%). Similarly, a third have been asked to sign up to a direct debit off the street (34%) but few prefer to give this way (6%).

Seven out of ten believe that more should be done to regulate the fundraising activities of charities, but very few have heard of the Fundraising Standard Board (FRSB) which fulfils the role. Nine in ten have not heard of the FRSB (90%). When given information about what the FRSB does, the public are split in their views on whether the scheme should be compulsory or voluntary, with 50% saying compulsory, 43% voluntary and 7% undecided.

Where a charity continually fails to follow fundraising standards, over half feel it should have its charitable status removed (54%), by far the most popular sanction. Other options given include naming and shaming of charities, (15%), fines (14%) and sanctions against the trustees of the charity (12%).

Appendix C: Terms of reference of the Review

Background

The Charities Act 2006 (the 2006 Act) requires (in s.73) the Minister for the Cabinet Office to appoint a person to undertake a review of the Charities Act 2006. The review must result in a report, which will be presented to the Minister for the Cabinet Office and which the Minister must lay in Parliament.

Aim of the Review

The aim of the Review is twofold;

- 1) To report on the operation and effectiveness of the provisions of the 2006 Act.
- 2) To consider whether further changes could be made to improve the legal and regulatory framework for charities.

Structure of the Review

The Review will be able to interview representatives of the charity sector and other interested bodies and will gather evidence and seek views from relevant stakeholders. The Review will be independent; the findings and recommendations of the Review will represent the views of the Reviewer. The Reviewer will be supported by designated officials from the Office for Civil Society, and sponsored by the Executive Director of the Office for Civil Society.

The Review will aim to report to the Minister for the Cabinet Office before summer recess 2012. On completion, the Review is to be compiled into a report, including recommendations, to be presented to the Minister for the Cabinet Office, for the Minister to lay in Parliament.

Scope of the Review

This Review fundamentally aims to understand how the 2006 Act is operating in practice, how effective it is, and whether the legal framework for charities in England and Wales is fit for purpose now and in the future. In doing so, the Review will need to take into account the significant political, economic, social and technological changes in the sector's wider operating environment since the 2006 Act was passed.

Therefore, the Review should take a broad approach and should seek to address these three issues: what is a charity and what are the roles of charities?; what do charities need to have/be able to do in order to be able to deliver those roles?; what should the legal framework for charities look like in order to meet those needs (as far as possible)? Note, however, that formal recommendations should relate only to the third of these.

In answering these questions, the Review should also relate the following core principles:

- The need to maintain public trust and confidence in charities;
- The need to maintain the independence and diversity of the sector;
- The need to ensure the sustainability and resilience of the sector;
- The need to facilitate innovation and growth in the sector.

The breadth of these questions and principles will give the Review scope to address a wide variety of issues. However, within this broad framework, s73 of the 2006 Act requires that the impact of the 2006 Act on the following matters must be considered in the Review:

- i) public confidence in charities;
- ii) the level of charitable donations;
- iii) the willingness of individuals to volunteer;
- iv) charities that were “excepted” but have had to register as a result of the Act;
- v) the status of the Charity Commission as a non-Ministerial Department.

In addition, within the context of the three main questions set out above, the Review should consider the following specific matters, which have all been brought to the attention of the Government by the sector and others as issues requiring consideration:

- a) The operation of the 2006 Act provisions relating to the definition of charity and the changes made by the 2006 Act in relation to the public benefit requirement, taking into account any relevant decisions of the Upper Tier Tribunal (Chancery and Tax);
- b) The licensing regime for public charitable collections - the review should consider whether the 2006 Act provisions are workable and represent value for money, or whether there is an alternative approach under existing or new legislation that could meet the objective of a licensing scheme that is proportionate, facilitating responsible fundraising whilst deterring bogus collections and preventing public nuisance;
- c) The two Calman Commission recommendations relating to i) a UK-wide definition of charity, and ii) measures to prevent regulatory burdens for charities registered in one part of the UK but operating additionally in other parts of the UK. This should include seeking views from the devolved administrations and charities that operate throughout the UK;
- d) The success of self-regulation of fundraising as delivered by the Fundraising Standards Board (FRSB), and should also consider whether the scheme could be strengthened or whether Ministers should consider exercising the reserve power in the 2006 Act to regulate fundraising;
- e) The success of the First Tier Tribunal (Charity) – and the range of Charity Commission decisions that are appealable to, or reviewable by, the Tribunal;
- f) Measures to reduce bureaucracy on charities, including relevant recommendations from the Red Tape Task Force Report “Unshackling Good Neighbours” and improvements to the rules regulating the disposal of charity land (following an Office for Civil Society public consultation in 2010 which recommended reform);
- g) The objectives, functions and structure of the Charity Commission, including relevant recommendations from the Charity Commission’s own Strategic Review;
- h) Measures to facilitate social investment or “mixed purpose” investment by, and into, charities;
- i) The operation of the charity merger provisions of the 2006 Act, making recommendations for the improvement of these provisions (in light of the known flaws in existing law);

j) The 2006 Act provisions, and the policy approach to, the regulation of exempt charities as charities – including the “principal regulator” approach;

k) The transparency and accountability of the charity sector, including current accounting, reporting, audit procedures (and within this, various financial thresholds for different requirements and the system of cross-border reporting) and the operation of fundraising disclosure statements);

l) Thresholds for registration of charities, including the £5,000 general registration threshold, and the £100,000 registration threshold for excepted charities;

m) The effectiveness of organisational forms available to charities, including the Charitable Incorporated Organisation;

n) Methods of supporting and encouraging individuals to volunteer as trustees, recognising concerns about trustee liability.

For the avoidance of doubt, the review may also consider any other matters in relation to charity law as it sees fit, and may consider other matters subject to the agreement of the Cabinet Office.

Appendix D: Tables summarising existing charity reporting and accounting requirements

Type of charity	Threshold	Type of accounts	External Scrutiny*	Trustees' annual report	Information to be sent to Commission
Registered unincorporated charities	Gross income up to £25,000	Receipts and payments, or accruals basis in accordance with SORP	No requirement	Must be prepared but it may be simplified	Annual Return (If income is under £10,000 the requirement is only to notify of changes to basic information on the Register of Charities)
	Gross income between £25,000 and £250,000	Receipts and payments, or accruals basis in accordance with SORP.	Independent examination or audit by a registered auditor	Must be prepared but may be simplified	Annual Return Annual Report and accounts must be sent within 10 months of financial year end
	Gross income between £250,000 and £500,000 (and gross assets do not exceed £3,260,000)	Accruals basis in accordance with SORP	Independent examination or audit by a registered auditor. If gross income exceeds £250,000 an independent examiner must belong to a body specified in the 1993 Act	A full Annual Report must be prepared	Annual Return Annual Report and accounts must be sent within 10 months of financial year end
	Gross income exceeds £500,000; or gross income exceeds £250,000 and gross assets exceed £3,260,000	Accruals basis in accordance with SORP	Statutory audit carried out by a registered auditor	A full Annual Report must be prepared	Annual Return. Annual Report and accounts must be sent within 10 months of financial year end. Charities with a gross income exceeding £1,000,000 must also complete a Summary Information Return (SIR)
	Where the charity has either charitable or non-charitable subsidiaries and the income of the group exceeds £500,000	Accruals basis in accordance with SORP	Statutory audit carried out by a registered auditor		The parent charity completes the Annual Return and SIR on a group basis Annual Report and accounts must be sent within 10 months of financial year end Charities groups with a gross income exceeding £1,000,000 must also

					complete a SIR
Registered Charitable companies	<ul style="list-style-type: none"> • Annual Return requirements are as for unincorporated charities. • Must prepare directors' report and accounts under the Companies Acts and file these at Companies House. This means that they cannot prepare their accounts on the receipts and payments basis. • Must comply with Annual Report requirements. In practice, the directors' report is expanded to include information required in the Annual Report 				
Excepted charities (unregistered)	<ul style="list-style-type: none"> • Must produce annual accounts in the same way as an equivalent type of registered charity (company or non company) • Copies of accounts must be provided to the public on request, but not sent to the Commission unless requested. • Commission can require an Annual Report to be produced in exceptional circumstances 				
Exempt charities (unregistered)	<ul style="list-style-type: none"> • Must keep proper accounting records and prepare accounts • Where having to prepare accounts giving a true and fair view, they should follow SORP 2005, unless a specialised SORP applies, for example English universities follow the Higher Education Funding Council for England's SORP. • Must provide copies of accounts to the public on request • Audit requirements depend on how charity is constituted and the regulatory regime under which it operates 				

Appendix E: Measuring the success of the proposed self-regulatory regime

1. The scheme will need to attract high levels of voluntary participation across the sector, although it is appreciated that it will take time to build up levels of participation. Participation should reflect the diversity of voluntary sector fundraising;
2. The scheme and its participants must provide a clear public promise of what should be expected from fundraisers who are participants in the scheme, and from the scheme itself. The codes of practice underpinning the scheme should go beyond requiring compliance with the law, and should set a high standard of good practice;
3. The scheme and its participants should actively encourage awareness among non-members and the public of the scheme's existence, and good fundraising practice;
4. The scheme should promote openness, transparency and accountability in fundraising practice;
5. The control of the scheme must be independent and impartial. Its governing body must include consumer representatives and those with fundraising experience;
6. Compliance with the scheme must be monitored proportionately. But there should not be complete reliance on self-certification;
7. There must be fair and effective sanctions for non-compliance which are proportionate to the nature and extent of any non-compliance. The initial focus should be on improving performance;
8. The scheme must have a clear and effective complaints handling process which is easily accessible to the public and which provides fair redress;
9. The scheme must be clear about its remit and should work effectively with other regulators, particularly where issues are outside its remit;
10. The scheme must be accountable through the publication of an annual report which details the scheme's performance. The scheme should also develop its own meaningful performance indicators following consultation with stakeholders;
11. The scheme should identify emerging trends in fundraising practice, and the public's perception of it, and be sufficiently flexible to quickly adapt and evolve codes of practice where necessary;
12. Regulation should be proportionate and the scheme should keep to a minimum any regulatory burden to participants.

Source:

<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060206/wmstext/60206m02.htm>

Appendix F: List of contributors

The following individuals and organisations kindly submitted their views on some or all of the issues raised by this Review. Their contribution is very much appreciated and has, as far as is possible, been reflected in the text. Any omissions from the list are entirely accidental and the Review team offer their sincere apologies for the oversight:

A C Mole & Sons
AAP Fundraising Ltd
Action with Communities in Rural England (ACRE)
Action Medical Research
Mr Nick Aldridge
Amnesty International
Angel AIM Business Improvement District
Anthony Collins Solicitors
Appco Group Support
Aquaterra Leisure
Archbishops' Council, Church of England
Arts Council England
Association of Chartered Certified Accountants
Association for Charities
Association of Charitable Foundations
Association of Charity Independent Examiners
Association of Colleges
Association of NHS Charities
Association of Fundraising Professionals
Association of Provincial Bursars
Association of Town Centre Management
Baptist Union Corporation
Mr John Barron
Bates Wells & Braithwaites
Battersea Dogs and Cats Home
BIG Lottery
Birmingham City University
Birmingham Settlement
Bournemouth University
Breakthrough Breast Cancer
Ms Oonagh Breen
British Heart Foundation
Mr Stanley Brodie QC
Mr Andrew Brown
Mrs Sheila Brown
Mr Tim Butler
Cambridge University
Canolfan Maerdy

Cats Protection
Central Association of Agricultural Valuers
Charities Advisory Trust
Charity Commission
Charity Finance Group
Charity Law Review Advisory Group
Charity Retail Association
Children in Crisis
Christian Aid
Christian Institute
Chartered Institute of Public Finance and Accountancy
Mr Ian Clark
Mr Stuart Clark
Churches' Legislation Advisory Service (CLAS)
Clothes Aid
Coalition for Efficiency
Committee of University Chairs
Community Foundation Network
Concern Charity Trading
Mr Kevin Curley
Ms Claris D'Cruz
Democracy Matters
Departmental Trade Union Side, Charity Commission
Directory of Social Change
Disability Cornwall
The Dogs Trust
East Northamptonshire Council
Engineering Council
Equity
Esmee Fairbairn Foundation
Ethical Property Foundation
Evangelical Presbyterian Church
Prof G R Evans
Farrer & Co
Fundraising Standards Board
Fundraising Initiatives Ltd
General Assembly of Unitarian and Free Christian Churches
Ms Joanna Griffiths
Higher Education Funding Council for England
Help the Hospices
HM Land Registry
Home Fundraising Ltd
Mr Andy Hobson
Ms Susan Horsfall

Hospital Broadcasting Association
Institute of Chartered Accountants in England and Wales
Independent Schools Council
Institute of Fundraising
Institute of Promotional Marketing
Islington Council
Ms Valerie James
Mr Howard Jones
Kings College London
Lancaster University
Mr Paul Langton
Leeds City Council
Leslie Edwards Trust
Local Government Association
Mr John Lowrie
Mr Karl Mackie
Marie Curie Cancer Care
Mr Trevor Mayes
Mazars LLP
Mr James McCallum
Methodist Church
Mr Alan Meyer
Ms Marion Moore
Mr Nigel Mullan
Mr Terry Murphy
Museums Association
National Association of Licensing Enforcement Officers
National Association of Estate Agents
National Trust
National Association of Voluntary and Community Action
NCVO Governance Forum
Newcastle CVS
Northern Ireland Council for Voluntary Action
National Union of Students
Mr David Orbison
Oxford University
PDSA
Mr Hugh Pearce
Ms Sue Pearlman
Public Fundraising Regulatory Association
Principal Judge of the First-tier Tribunal (Charity)
Portland Bird Observatory and Field Centre
Red Cross
Representative Body of the Church in Wales

Royal Institution of Chartered Surveyors
RNIB
Royal Surrey County Hospital NHS Foundation Trust
RSPCA
RSPCA (Wales)
Save the Children
Scope
Scottish Council of Independent Schools
Ms Alison Seabeck MP
Mr Martin Shaw
Sheffield Hallam University
Shelter
Mr Chris Smail
Mr Colin Snape
Social Finance
Society of London Theatre and the Theatrical Management Association
Southampton Solent University
St John's Ambulance
STEP
Stewardship
Sir Adrian Stott
Mr Neil Summerton
Textile Recycling Association
The Advertising Association
The Self-Help Group
Together Fundraising
Trowers & Hamlin LLP
United Reformed Church
United Reformed Church Trust
Universities UK
University of Bristol
University of Derby
University of Lincoln
University of London Union
UrbanLeaf
Voluntary Services Overseas
Warwick University
Welsh Council on Voluntary Action (WCVA)
Mr Terry Webber
Mr Albert West
Mr Nik Wright
Wood Green Animal Shelter

Appendix G: List of meetings

Lord Hodgson met with the following organisations and individuals to gather and discuss evidence over the course of the Review. Their contribution is, again, most gratefully appreciated:

Advisory Board of Big Society Capital
Association of Charitable Foundations
Lord Best
Sir Stephen Bubb
Business in the Community
Charities' Property Association
Charity Commission
Charity Finance Directors' Group
Charity Law Association
Chief Legal Ombudsman
Churches Legislation Advisory Service (CLAS)
Co-operatives UK
Department for Education
Financial Ombudsman Service
Financial Services Authority
Fundraising Standards Board
Sir Stuart Etherington
Higher Education Funding Council for England
Her Majesty's Revenue & Customs (HMRC)
Her Majesty's Treasury (HMT)
Independent Schools Council
Institute of Chartered Accountants (England & Wales)
Institute of Fundraising
Minister for Security (James Brokenshire MP)
Mr Martyn Lewis
Ms Geraldine Peacock
National Association of Voluntary and Community Action (NAVCA)
National Audit Office
National Council of Voluntary Organisations (NCVO)
National Housing Federation
National Union of Students
NCVO Shadow Panel (Baroness Howe)
Office of the Scottish Charity Regulator (OSCR)
Lord Phillips of Sudbury
Public Fundraising Regulatory Association (PFRA)
Professor Gareth Morgan
Public Administration Select Committee
Scottish Council for Voluntary Organisations (SCVO)
Scottish Government
Small Charities Coalition
Volunteering England



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