

NEW CHARITY REGULATION PROPOSALS FOR ENGLAND AND WALES: OVERDUE OR OVERDONE?

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INTRODUCTION

While this Article will inevitably touch on charity governance *per se*, its primary aim is to consider the extent to which proposed changes to charity law in England and Wales include provisions for the *monitoring and enforcement* of charity governance.

In July 2001, the Prime Minister commissioned a review of the law and regulation of charities and other not-for-profit organisations in England and Wales,¹ with a view to making proposals for reform.² The scrutiny of the legal and regulatory framework for charities and the voluntary sector was carried out by the Strategy Unit,³ which undertook a broad-ranging review involving widespread consultation with the voluntary sector. The review considered how to improve the legal and regulatory framework to enable existing organisations to thrive, to encourage new types of organisations to develop, and to ensure public confidence.

This Article, consistent with the themes of this Symposium, will focus on the aspects of the review that impact on the regulation of governance. Before turning to the review and its outcome, the Article will begin by providing some background.

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1. For constitutional purposes charity law is a devolved matter, and its reform in Scotland and Northern Ireland is the subject of separate local initiatives. For example, in November 2004, the Scottish Executive published its Charities and Trustee Investment (Scotland) Bill, following a public consultation on the key proposals for reform.

2. Press Release, Prime Minister's Strategy Unit, Prime Minister Announces Voluntary Sector Review (July 3, 2001), available at <http://www.strategy.gov.uk/output/Page3887.asp>.

3. The Strategy Unit was set up in 2002, bringing together the Performance and Innovation Unit, the Prime Minister's Forward Strategy Unit, and parts of the Centre for Management and Policy Studies. Its aim is to improve the Government's capacity to address strategic, cross-cutting issues and to promote innovation in the development of policy and the delivery of the Government's objectives. The Strategy Unit reports to the Prime Minister through the Cabinet Secretary.

I. THE IMPORTANCE OF GOVERNANCE: THE CASE FOR REFORM

Pressure for charity governance reform has been building. There are a number of reasons why demands for greater openness and accountability of charities have grown.

First, there is a perception that incentives for improving efficiency, effectiveness, and accountability within the sector are not strong enough. A lack of accessible, appropriate information can make it difficult for donors to assess performance and register their views. Admittedly this is only an issue if donors care about such matters. There is some evidence to suggest that donors *do* care; for example, a recent public attitudes survey commissioned by the Charity Commission to investigate the views of the public on the information made available on charities found that the public considers the principles of transparency and accountability to be important.⁴ In particular, donors seem to be concerned about the proportion of funds used to support the administrative costs of running charities.⁵

Secondly, the fact that many charities receive public subsidies in one form or another puts them in the spotlight, and this increased visibility makes it all the more important that they operate in a transparent manner. The public sector is now the biggest single source of funding for charities, accounting for 37% of their annual £20billion income, according to the National Council for Voluntary Organisations (“NCVO”). New data, published by the NCVO in February 2004, revealed that public sector funding had marginally overtaken donations from the public for the first time.⁶ Government funders have a legitimate interest in ensuring that charities are accountable for public money.

Thirdly, and related to the second point, as the sector has grown in scope and size, charities are playing an increasingly important role in the provision of public services on behalf of national and local government. At the very least, good service delivery is assisted through good governance;⁷ in October 2003, the Charity Commission, Audit Commission, and Home Office Active Communities Directorate held a joint seminar aimed at im-

4. CHARITY COMM'N FOR ENG. & WALES, TRANSPARENCY AND ACCOUNTABILITY RS8, Annex A, tbl. 25 (June 2004), available at <http://www.charity-commission.gov.uk/publications/rs8annexs.asp#1> [hereinafter TRANSPARENCY AND ACCOUNTABILITY].

5. See MORI/Charity Commission, *A Survey of Public Attitudes to the Charity Commission (MORI Poll)* (Feb. 1999), available at <http://www.mori.com/polls/1999/charitycommission.shtml> (MORI is a market and public opinion research agency.). Compare, however, recent research in Australia, suggesting that donors do not care about the ultimate usage of funds. Gabrielle Berman & Sinclair Davidson, *Do Donors Care? Some Australian Evidence*, 14 VOLUNTAS 421 (2003).

6. NAT'L COUNCIL FOR VOLUNTARY ORGS., K. WILDING ET AL, UK VOLUNTARY SECTOR ALMANAC 2004 (2004).

7. One member of the Symposium panel suggested that “good governance avoids catastrophe.”

proving governance in large charities. It brought together over fifty representatives of the very largest charities. There was a consensus amongst this group that better governance results in better service delivery and, by definition, improves accountability to beneficiaries, donors, and other stakeholders.⁸ Conversely, bad governance can lead to problems for charities; details of reports on Charity Commission inquiries⁹ reveal that often, when things go wrong, poor governance is a contributing factor.¹⁰

Finally, there is also concern about the declining trend in the levels of individual and corporate charitable giving, which led to a package of tax reforms in the UK in 2000.¹¹ Well-governed charities are more likely to gain the public's trust, and such confidence is critical for fund-raising. Certainly revelations concerning badly governed charities are detrimental to charities' fund-raising capabilities.¹² Research published in 2004 shows that individual charitable giving continues to be a significant source of income, amounting to £7.3 billion in 2002, with more than two-thirds of the population giving in any one month.¹³ However, whilst the total amount given since the mid-1990s has risen, the number of people giving has declined, with fewer people giving more money. Unfortunately, as in the commercial world, some well-publicised scandals in the charitable sector affect reputations and damage trust. For example, in 2003, when a major fund-raising scandal hit two breast cancer charities in Scotland and England, leading to intervention by the courts¹⁴ and the Charity Commission,¹⁵ the director of communications at another (unconnected) cancer charity said, "[a]t the end of the day, mud sticks, and it's not just the public that needs to be protected There need to be far tighter regulations in place

8. CHARITY COMM'N FOR ENG. & WALES, LOOKING FORWARD TO BETTER GOVERNANCE: SEMINAR REPORT 3 (Oct. 2003), available at <http://www.charity-commission.gov.uk/spr/pdfs/sem-rep.pdf>.

9. Carried out in accordance with Charities Act 1993, c. 10, § 8 (Eng.) [hereinafter Charities Act], available at http://www.hmso.gov.uk/acts/acts1993/Ukpga_19930010_en_1.htm#end.

10. See the reports of recent Charity Commission inquiries at www.charity-commission.gov.uk/investigations/inquiryreports/inqreps.asp (last visited Feb. 11, 2005).

11. See HM TREASURY, REVIEW OF CHARITY TAXATION CONSULTATION DOCUMENT 1–2 (Mar. 1999), available at <http://www.inlandrevenue.gov.uk/consult/rct.pdf>; see also Finance Act 2000, c. 17, §§ 38–46 (Eng.), available at <http://www.hmso.gov.uk/acts/acts2000/20000017.htm>.

12. It was suggested at the Symposium that undetected bad governance does not impact on fund-raising. With charities increasingly in the public eye, however, their transgressions are more likely to come to the attention of donors.

13. UK VOLUNTARY SECTOR ALMANAC 2004, *supra* note 6.

14. Press Release, Scottish Executive, Breast Cancer Research (Scotland) (June 27, 2003), available at <http://www.scotland.gov.uk/News/Releases/2003/06/3733>.

15. Press Release, Charity Commission for England & Wales, Charity Watchdog Steps in to Protect Breast Cancer Charity (May 23, 2003), available at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=57786&NewsAreaID=2&NavigatedFromDepartment=True>.

to protect the reputation of charities that work hard to be transparent and accountable to supporters.”¹⁶

After corporate scandals, focus on good governance inevitably filters down to charities; against ever-increasing expectations for openness, accountability, and successful delivery, charities have just as much to lose as corporations from governance failures, if not more.¹⁷ As Alan Milburn MP¹⁸ said recently, “[t]he last thing the voluntary sector needs is an Enron-style scandal just at the point when it is becoming such a key part of service delivery in this country.”¹⁹

Public trust and confidence is vital for the sector, and yet there is a general decline in public trust and confidence in all social institutions—public, private, and voluntary.²⁰

In summary, there are concerns that whilst the charitable sector is evolving rapidly in response to changing economic and social circumstances, aspects of the legal and regulatory framework are outdated and may be restricting the efficiency and growth of the sector. A review of the legal and regulatory basis for the charitable sector provides an opportunity to develop a new framework which seeks both to encourage the sector to be innovative, dynamic, efficient, and effective on the one hand, and to protect beneficiaries, donors, staff, and volunteers on the other. Increased monitoring and enforcement of charity governance has a role to play in achieving these objectives.

II. A NOTE ON THE ROLE OF THE LAW

Whilst this Article focuses on the role of the *law* in the monitoring and enforcing of charity governance through regulation, it is trite to say that the law may only have a minor role to play (for example, in prescribing strict reporting requirements). Whilst important, there is more to effective governance (and monitoring thereof) than compliance with the law and financial regulation. In many areas, self-regulation or development of good

16. *Breast Cancer Groups Demand Stricter Laws*, THIRD SECTOR, June 4, 2003, available at http://www.thirdsector.co.uk/charity_news/full_news.cfm?ID=7012.

17. See *supra* note 12.

18. Labour MP for Darlington, Chair of the Joint Committee on the Draft Charities Bill. See *infra* p. 799.

19. Rt. Hon. Alan Milburn MP, Putting the Voluntary Sector Centre Stage, Speech to the NCVO's Political Conference (Nov. 12, 2003).

20. MORI, Bobby Duffy, *Who Do We Trust?* (Apr. 16, 2003), available at <http://www.mori.com/pubinfo/rd/trust.shtml>.

practice (through voluntary codes²¹ or peer review,²² for example) may be more appropriate.

In 2004, the NCVO consulted with the voluntary and community sector, including charities, on the need for and the contents of a draft code of governance, with a view to launching a code.²³ The project has the support of the Charity Commission and the Active Communities Directorate in the Home Office. The aim is not to specify in detail how trustee boards should be structured, nor how they should operate. Rather, it is to enshrine a number of overarching principles in relation to governance capable of application across the charitable sector, regardless of size or the sphere in which a charity operates. The intention is that this agreed-upon set of standards will be part of the sector's best practice tools, not an element of charity law and regulation.

Independent of the NCVO initiative, in January 2005, the Independent Commission on Good Governance in Public Services, which was established by the Chartered Institute of Public Finance and Accountancy ("CIPFA") and the Office for Public Management ("OPM"), launched its Good Governance Standard for Public Services, following extensive research and consultation.²⁴ The Standard is intended to help all organisations in the public sector—including the police, schools, the National Health Service, nondepartmental public bodies, and local government—as well as those in the voluntary and community sector who receive public money to provide specific services.²⁵

21. For example, in the corporate sector, in July 2003, the Financial Reporting Council published the Combined Code on Corporate Governance. Combined Code on Corporate Governance (2003), available at http://www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf. This document includes the Code itself and related guidance (the Turnbull Guidance on Internal Control, INTERNAL CONTROL: GUIDANCE FOR DIRECTORS ON THE COMBINED CODE (Sept. 1999) (published by the Institute of Chartered Accountants in England and Wales), the Smith Guidance on Audit Committees, AUDIT COMMITTEES: COMBINED CODE GUIDANCE (Jan. 2003), and various pieces of good practice guidance from the Higgs report, REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS (Jan. 2003)).

22. This is often best achieved through sub-sector groups of charities involved in similar fields, e.g., children's charities.

23. NAT'L COUNCIL FOR VOLUNTARY ORGS., A GOVERNANCE CODE FOR THE VOLUNTARY AND COMMUNITY SECTOR? A CONSULTATION PAPER § 1.2 (Mar. 2004), available at <http://www.ncvo-vol.org.uk/Asp/print/printPage.aspx?siteID=1&sID=18&subSID=88&documentID=1986&pageID=0>.

24. INDEP. COMM'N FOR GOOD GOVERNANCE IN PUB. SERVS., THE GOOD GOVERNANCE STANDARD FOR PUBLIC SERVICES (2004), available at http://www.cipfa.org.uk/pt/download/governance_standard.pdf.

25. There are a number of (conflicting?) current initiatives focused on charity governance. See, e.g., FOUND. FOR GOOD GOVERNANCE, DEVELOPMENT OF AN INTEGRATED GOVERNANCE STRATEGY FOR THE VOLUNTARY AND COMMUNITY SECTOR (May 2004), available at <http://www.governance-works.org.uk/pdfs/ACU%20Report%20Main-2.pdf>; INST. OF CHARTERED SECRETARIES & ADM'RS, ICSA PRINCIPLES OF GOOD GOVERNANCE FOR CHARITIES: A CONSULTATION DOCUMENT ON BEST PRACTICE FOR CHARITABLE ORGANISATIONS (2004), available at http://www.icsa.org.uk/pdfs/-ICSA_Principles_of_Good_Governance_for_Charities-1.pdf.

The Charity Commission has recently set out its understanding of the principles of sound governance in its publication, *The Hallmarks of an Effective Charity*,²⁶ which includes practical examples of the way in which larger charities might demonstrate that they have sound governance.

Prescriptive solutions might be particularly inappropriate for such a heterogeneous group as the charitable sector, where a more flexible approach is required. A series of seminars held in Liverpool, UK, on charity law and governance in 2002 generally concluded that the law should not have a major role in encouraging and supporting best practice in charity governance.²⁷ For example, there should not be legal requirements for the adoption of particular forms of governance. This view was attributable partly to the diverse nature of the sector and partly to the need to be able to respond quickly to changes in practice. The view was also expressed that moves for greater accountability were destroying the ethos and richness of the charity sector and that legal rules to enforce accountability should be treated with caution.

III. THE STRATEGY UNIT REPORT AND THE GOVERNMENT RESPONSE

The Strategy Unit published its report in September 2002.²⁸ It was not a statement of settled Government policy, but rather an analysis of the strengths and weaknesses of the existing legal and regulatory framework accompanied by a series of recommendations, addressed to the Government, for change. Wide-ranging changes in the law and regulation of the charitable and wider not-for-profit sector were proposed in four main areas: (1) modernising charity law; (2) improving the range of legal forms available to charities and social enterprises; (3) developing greater accountability and transparency to build trust in the sector; and (4) maintaining that trust by independent, open, and proportionate regulation.

Before responding to these recommendations, the Government sought views through an open public consultation that ran until January 2003. Over 1,000 people and organisations from the voluntary sector and elsewhere responded to the consultation,²⁹ and, in July 2003, the Government

26. CHARITY COMM'N FOR ENG. & WALES, *THE HALLMARKS OF AN EFFECTIVE CHARITY* CC60 (2004), available at <http://www.charity-commission.gov.uk/printable.asp?path=/publications/cc60.asp>.

27. Jean Warburton, *Charities and Governance: The Role of the Law*, in CHARITIES, GOVERNANCE AND THE LAW: THE WAY FORWARD 270 (Debra Morris & Jean Warburton eds., 2003).

28. STRATEGY UNIT, PRIVATE ACTION, PUBLIC BENEFIT: A REVIEW OF CHARITIES AND THE WIDER NOT-FOR-PROFIT SECTOR (2002), available at <http://www.number-10.gov.uk/su/voluntary/report/downloads/strat-data.pdf> [hereinafter PRIVATE ACTION, PUBLIC BENEFIT].

29. In general the proposals have received resounding support; of the respondents to the public consultation on the Strategy Unit's proposals, thirty were in favour for every one against. FIONA

published its much-awaited response,³⁰ setting out how it planned to take the reforms forward. The Government's response held few surprises for the charitable sector; it stated the Government's acceptance of almost all of the Strategy Unit's main proposals and explained how the accepted recommendations were to be taken forward. The response also summarised comments made by those responding to the consultation.

This Article will now focus on two of the main aims of the proposed reforms that impact upon the monitoring and enforcement of charity governance: developing greater accountability and transparency to build trust in the sector; and, maintaining that trust by independent, open, and proportionate regulation.

A. *Developing Greater Accountability and Transparency to Build Trust in the Sector*

Whilst recognising that the level of confidence in charities is high, the Strategy Unit report noted that the public has concerns about information, accountability, and fund-raising practices.³¹ Easy public access to accurate and relevant information about charities is essential for real accountability, trust, and confidence in charities. It is in charities' interests to keep the public well-informed about their achievements, policies, governance, and finances. Trust is closely linked to the issue of accountability, which is enhanced through greater monitoring and enforcement of charity governance.

The Charity Commission has an ongoing programme, independent of any legal developments, to enhance the accountability of charities. In June 2004, it released a report³² that presented the findings of an internal analysis of the information provided in the annual report and accounts of a sample of 200 of the largest charities. The report concluded that the general standard of performance, as against the transparency and accountability framework, was not satisfactory.

MACTAGGART MP, FOREWORD TO GOVERNMENT REPLY TO THE REPORT FROM THE JOINT COMMITTEE ON THE DRAFT CHARITIES BILL SESSION 2003–04, HL PAPER 167/HC 660 CM 6440, at 4 (Dec. 2004), available at <http://www.official-documents.co.uk/document/cm64/6440/6440.pdf> [hereinafter GOVERNMENT REPLY].

30. HOME OFFICE, CHARITIES AND NOT-FOR-PROFITS: A MODERN LEGAL FRAMEWORK: THE GOVERNMENT'S RESPONSE TO 'PRIVATE ACTION, PUBLIC BENEFIT' (2003), available at <http://www.homeoffice.gov.uk/docs3/charitiesnotforprofit.eng.pdf> [hereinafter CHARITIES AND NOT-FOR-PROFITS].

31. See, e.g., NAT'L COUNCIL FOR VOLUNTARY ORGS., BLURRED VISION: PUBLIC TRUST IN CHARITIES (1998), available at <http://www.ncvo-vol.org.uk/Asp/print/printPage.aspx?siteID=1&SID=18&subSID=92&documentID=769&pageID=0>.

32. TRANSPARENCY AND ACCOUNTABILITY, *supra* note 4.

1. Current Provisions on Financial Accountability

Financial accountability requires the preparation and submission of accounts. The legal requirements for most charity accounts are currently contained in Part VI of the Charities Act 1993 (“the 1993 Act”) and regulations made under it.³³ The following requirements apply to most registered unincorporated charities.

a. Keep Accounting Records

Section 41 of the 1993 Act requires all registered charities to keep accounting records sufficient to show and explain all of the charity’s transactions. It also gives details of what these should contain. The records should be kept for six years.

b. Prepare Statements of Accounts

The requirements for the preparation of the statement of accounts under section 42 of the 1993 Act vary according to the income and expenditure of the charity. Charities with gross income not over £100,000 in the relevant financial year may prepare their accounts on either a receipts and payments³⁴ basis or on an accruals³⁵ basis. If they choose the latter, they must do so in accordance with the relevant Regulations. Charities with gross income over £100,000 must prepare their accounts on an accruals basis in accordance with the Regulations. The 2000 Regulations prescribe the form and content of the statement in detail, and require that it be prepared in accordance with the Charity Commission Statement of Recommended Practice on Accounting and Reporting by Charities (“SORP”).³⁶

The SORP builds on the legislative framework and provides detailed procedures and a rigid accounting format, which it states, will, if followed, “not only ensure that they are in accordance with the law but also help the reader to gain a clearer understanding of the nature and extent of the char-

33. Charity (Accounts and Reports) Regulations, (1995) SI 1995/2724, available at http://www.legislation.hmso.gov.uk/si/si1995/Uksi_19952724_en_1.htm; Charities (Accounts and Reports) Regulations, (2000) SI 2000/2868, available at <http://www.legislation.hmso.gov.uk/si/si2000/20002868.htm>.

34. See CHARITY COMM’N FOR ENG. & WALES, RECEIPTS AND PAYMENTS ACCOUNTS PACK, CC64 (2001), available at [http://www.charity-commission.gov.uk/publications/pdfs/cc64\(notes\).pdf](http://www.charity-commission.gov.uk/publications/pdfs/cc64(notes).pdf).

35. See CHARITY COMM’N FOR ENG. & WALES, ACCRUALS ACCOUNTS PACK CC65 (2001), available at [http://www.charity-commission.gov.uk/publications/pdfs/cc65\(notes\).pdf](http://www.charity-commission.gov.uk/publications/pdfs/cc65(notes).pdf).

36. CHARITY COMM’N FOR ENG. & WALES, ACCOUNTING AND REPORTING BY CHARITIES: STATEMENT OF RECOMMENDED PRACTICE (SORP) (2000), available at <http://www.charity-commission.gov.uk/publications/pdfs/sorp.txt.pdf>.

ity's work"³⁷ and therefore "discharge the charity trustees' duty of public accountability and stewardship."³⁸

The accounts should be kept for six years.

c. Ensure Independent Examination/Audit of Accounts

Under section 43 of the 1993 Act, charities with gross income or total expenditure above £10,000, but with gross income not above £250,000 in the relevant financial year (or the preceding two years) must have their accounts externally examined. They can choose between independent examination³⁹ or audit. There is no statutory requirement for registered unincorporated charities with neither gross income nor total expenditure above £10,000 in the relevant financial year to have their accounts externally examined. However, the Charity Commission can require a full audit, regardless of income or expenditure, in exceptional circumstances. A full audit must also be carried out if gross income or total expenditure in the relevant year or the preceding two years is over £250,000.⁴⁰

d. Prepare and Submit Annual Reports

Section 45 of the 1993 Act requires all registered charities to prepare and submit an Annual Report. Under the 2000 Regulations, whilst charities with income over £250,000 must prepare a full Report reviewing all their activities, charities with income of £250,000 or less can prepare a simplified version, briefly summarising their main activities and achievements.⁴¹ Full Reports must include consideration of any major risks to which the charity is exposed and the systems designed to mitigate those risks. Reports must usually be submitted to the Charity Commission within ten months of the end of the financial year, and the Statement of Accounts and Auditor's or Examiner's reports discussed above should be attached.⁴²

e. Enable Public Inspection of Annual Reports and Accounts

Section 47 of the 1993 Act requires charities to make their Annual Reports available for public inspection at all reasonable times and to pro-

37. *Id.* para. 17.

38. *Id.* para. 3.

39. See CHARITY COMM'N FOR ENG. & WALES, INDEPENDENT EXAMINATION OF CHARITY ACCOUNTS: DIRECTIONS AND GUIDANCE NOTES CC63, at 3 (2002), available at <http://www.charity-commission.gov.uk/publications/pdfs/cc63text.pdf>.

40. See *infra* on improving auditor protection.

41. Charities (Accounts and Reports) Regulations, (2000) SI 2000/2868, reg. 7(3).

42. Charities Act 1993, *supra* note 9, c. 10, § 45(4).

vide copies of the accounts requested in writing, for which they can charge a reasonable fee. These requirements extend to all charities, including charitable companies and exempt or excepted charities.⁴³

f. Submit Annual Returns

As an additional monitoring requirement, section 48 of the 1993 Act requires charities, other than those with neither gross income nor total expenditure above £10,000 in the relevant financial year, to submit an Annual Return to the Charity Commission, usually by the same date that they must submit their Annual Report.

g. Variations

There are a number of exceptions to and variations from the general requirements contained in Part VI of the 1993 Act, which arguably involve differences in form rather than lowering of accounting standards.

“Exempt charities”⁴⁴ are currently⁴⁵ neither registered with nor regulated by the Charity Commission. This is because they are regulated by another body. These include universities and housing associations. Exempt charities may have specific legislation governing their accounting procedures. If not, then they must prepare consecutive statements of account in a prescribed form and preserve them for six years.⁴⁶

“Excepted charities”⁴⁷ (including some religious charities and scouts and guides) are not at present⁴⁸ required to register with the Charity Commission because they are registered with their own umbrella groups. They are, however, regulated by the Commission. Excepted charities that have chosen to register must fulfill the same accounting and reporting requirements as other charities. If they do not register, the requirements for external examination and the submission of Annual Reports do not generally apply.⁴⁹ However, under section 46 of the 1993 Act, the Charity Commission can request an Annual Report from excepted charities, and, if it does so, the report must be prepared in line with the Regulations and the procedural provisions of section 45 will apply.

43. *See infra*.

44. *See* Charities Act 1993, *supra* note 9, c. 10, § 3(5) & Schedule 2.

45. *See infra* for future developments in relation to exempt charities.

46. Charities Act 1993, *supra* note 9, c. 10, § 46(1)–(2).

47. *Id.* § 3(5).

48. *See infra* for future developments in relation to excepted charities.

49. Charities Act 1993, *supra* note 9, c. 10, § 46(4).

Charitable companies must produce Annual Reports and facilitate public inspection of them in the same way as other charities. However, the 1993 Act provisions regarding statements of accounts and external examination do not apply; their accounting procedures are mostly governed by the Companies Act 1985. They must prepare a Director's Report and Accounts (the accounts should be prepared on an accruals basis) and must file these with Companies House.

It should also be noted that charities may have specific provisions in their governing documents relating to accounts, reports, and auditing. Where statutory provisions and governing document provisions cover the same accounting matters, the Charity Commission advises that whichever provisions require the higher standard of accounting should be followed.⁵⁰

2. Improving Information Available to the Public

Whilst the Charities Act 1992⁵¹ had created an enhanced reporting and accounting regime for charities,⁵² the Strategy Unit recognised that the documents that this regime has produced are often inaccessible and ill-suited to the public's needs. It was claimed that, in the United States of America, levels of transparency are generally much higher with a range of state and federal bodies such as the Internal Revenue Service, the State Attorney General's office, and the Better Business Bureau playing a role in providing information about charities and other not-for-profit organisations.

a. Standard Information Return

The Strategy Unit wanted the public to get clearer information about larger charities' effectiveness, performance, and financial position. Whilst dismissing the value of league tables for charities, instead it was proposed that larger charities (those who have to provide audited accounts⁵³) should submit an annual Standard Information Return ("SIR") to the Charity Commission.

The SIR will be a brief document (no more than two sides of paper) that will highlight key qualitative and quantitative information about the charity, including its impact, how performance is measured, and how the

50. See CHARITY COMM'N FOR ENG. & WALES, CHARITY ACCOUNTS 2001: THE FRAMEWORK CC61, at 7 (2002), available at <http://www.charity-commission.gov.uk/publications/pdfs/cc61text.pdf>.

51. Consolidated in Charities Act 1993, *supra* note 9.

52. See *supra* Section III.A.

53. Currently charities with an income or expenditure over £250,000 have to provide audited accounts, although it is proposed to raise this to £1 million.

charity intends to improve. Details of governance (trustee recruitment and training), fund-raising, campaigning, trading, and policy on reserves and investments should also be included. This will form part of the charity's annual reporting and accounting information.

Whilst the SIR would make comparisons easier, it is recommended that this standardised information should come with warnings explaining the difference between ratios, for example, for mental health charities and children's charities.

The SIR is intended to complement information supplied in the Annual Report, which should provide a comprehensive review of the activities of the charity for each accounting year.⁵⁴ The SIR is designed to enable charities to provide an easily accessible summary of their aims, activities, and achievements that can signpost the "interested" general public to the more detailed information contained in the Annual Report and Accounts.

The Charity Commission has been tasked with taking this recommendation forward and proposes to include the SIR as an addition to the Annual Return process.⁵⁵ This will allow for flexibility to amend the form without seeking statutory approval. Hopefully, it will also mean that the information will be consistently presented and easy to make publicly available through display on the Charity Commission's website.⁵⁶ The Charity Commission has established a group, which includes a range of external sector representatives, to inform development of the SIR. Working jointly with the NCVO, research was commissioned on this issue⁵⁷ followed by a seminar in January 2004.⁵⁸ In May 2004, the Charity Commission published for comment and pilot a copy of the draft SIR, with a view to its introduction in 2005/2006.⁵⁹

The introduction of the SIR will allow for greater monitoring and enforcement of charity governance by both the Charity Commission and the general public.

54. *See supra* Section III.A.4.

55. CHARITIES AND NOT-FOR-PROFITS, *supra* note 30, at 19.

56. *See* <http://www.charity-commission.gov.uk/> (last visited Feb. 11, 2005).

57. SUE PEDLEY, NAT'L COUNCIL FOR VOLUNTARY ORGS. & CHARITY COMM'N FOR ENG. & WALES, RESEARCH INTO THE CONCEPT OF A STANDARD INFORMATION RETURN (2003), *available at* http://www.ncvo-vol.org.uk/asp/uploads/uploadedfiles/1/293/sir_research_findings_and_recommendations.pdf.

58. NAT'L COUNCIL FOR VOLUNTARY ORGS., NOTES OF THE SEMINAR TO DISCUSS THE JOINT NCVO/CHARITY COMMISSION STANDARD INFORMATION RETURN HELD ON 12TH JANUARY 2004 AT NCVO (2004), *available at* <http://www.ncvo-vol.org.uk/Asp/print/printPage.aspx?siteD=1&subSID=88&documentID=1922&pageID=0>.

59. Press Release, Charity Commission for England & Wales, SIR Steps Out—Charity Commission Publishes Draft SIR (May 10, 2004), *available at* <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=116736&NewsAreaID=2&NavigatedFromDepartment=True>.

b. Improvements to SORP

The Strategy Unit placed considerable weight on the SORP as a mechanism for making charities more transparent and accountable. Under the current SORP, financial information published by charities is not widely comparable, nor is it always easy for users to understand.

Several changes were proposed. For example, it was recommended that the SORP “should develop improved methods for apportioning costs and expenditure, enabling more meaningful financial comparisons between organisations to be made.”⁶⁰ It was also suggested that the SORP should “strengthen its focus on achievements against objectives, organisational impact and future strategy.”⁶¹

The 2004 annual review of the SORP has taken on broad issues raised in the Strategy Unit report, and changes to SORP have been under public consultation.⁶² These include significant changes to the trustees’ Annual Report, designed to explain the link between objectives, strategies, activities, and the achievements that flow from them. In addition, in order to create a greater focus for governance disclosures, a new section relating to a charity’s structure, governance, and management has been introduced to the trustees’ Annual Report, which will enable the reader to better understand the structure and governance arrangements adopted by the charity.

c. Guidestar UK

In March 2003, the Treasury announced plans to fund a new scheme that may ultimately provide a UK source of information about charity performance, and hence an additional mechanism for the monitoring and enforcement of charity governance. The £2.9million three-year project, funded from the Treasury’s “Invest to Save” budget, will create a common base of information about the finances, activities, and achievements of UK charities. The system, called GuideStar UK, is independent but will be sponsored by the Charity Commission and the Home Office’s Active Community Unit (“ACU”). According to the Charity Commission, the aim

60. PRIVATE ACTION, PUBLIC BENEFIT, *supra* note 28, at 62; *see also* CHARITY FIN. DIRS. GROUP, INPUTS MATTER: IMPROVING THE QUALITY OF REPORTING IN THE CHARITY SECTOR (2003), *available at* http://www.cfdg.org.uk/cfdg/includes/downloadfiles/Policy_CFDG_Inputs_Matter.pdf.

61. PRIVATE ACTION, PUBLIC BENEFIT, *supra* note 28, at 62.

62. CHARITY COMM’N FOR ENG. & WALES, ACCOUNTING AND REPORTING BY CHARITIES: STATEMENT OF RECOMMENDED PRACTICE, EXPOSURE DRAFT (June 2004), *available at* www.charitycommission.gov.uk/enhancingcharities/pdfs/consorp2005ed.pdf [hereinafter EXPOSURE DRAFT]. In order to ensure consistency with the suggested revision of the Charities SORP, draft regulations, which would replace the Charity (Accounts and Reports) Regulations, (1995) SI 1995/2724 and Charities (Accounts and Reports) Regulations, (2000) SI 2000/2868, were published in November 2004 and have also been the subject of consultation.

is to provide an integrated package of information, eliminate unnecessary duplication of effort, and improve quality and efficiency.⁶³ Then Chief Charity Commissioner, John Stoker, described the initiative as an “exciting opportunity for us and the charity sector.”⁶⁴ The creation of an easily accessible source of information that can be used by potential donors will be a significant step to providing relative qualitative and quantitative information on the sector.

GuideStar UK will follow the GuideStar US model both in the type of information it offers and in the way it distributes that data. Information for the US database is drawn both from charities’ Internal Revenue Service filings and from data that the charities voluntarily provide directly to GuideStar. The former comprises predominantly quantitative input/output data, and the latter allows charities to give further qualitative information relating to their goals, purposes, and impacts. Thanks to grants from charities, this programmatic and financial information is made available for free on the GuideStar website.⁶⁵

Established in 1994, donors, corporate funders, boards of trustees, grantmaking charities, government policymakers, and researchers all use GuideStar in the USA. It is hoped that GuideStar UK will serve as varied an audience as its US counterpart, enabling all to benefit from the more effective delivery of information about UK charities. The plans have been warmly welcomed by the charitable sector. For example, the Directory of Social Change, which has led calls for more open accounting and reporting by charities, supports the move, saying: “GuideStar in the US has brought new transparency to that already well-reported voluntary sector. In the more secretive UK its effect will be transformational, bringing into the open for the first time all kinds of information about charities.”⁶⁶

Annual filings made by charities to the Charity Commission⁶⁷ will constitute the core data for the GuideStar UK database, and the charities themselves will provide additional narrative information about their respective missions, programmes, objectives, and accomplishments. Neither charities nor the public will pay to use the GuideStar UK database, which will be accessible through a free website.⁶⁸

63. Press Release, Charity Commission for England & Wales, New Charity Information System Gets Funding of £2.9 Million (Mar. 20, 2003), available at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=28146&NewsAreaID=2&NavigatedFromDepartment=False>.

64. *Id.*

65. See <http://www.guidestar.org> (last visited Feb. 11, 2005).

66. Briefing, *TIMES* (London), Mar. 24, 2003, at 31.

67. See *supra* pp. 787–89.

68. See <http://www.guidestar.org.uk/> (last visited Feb. 11, 2005).

In April 2003, Guidestar UK was registered as a charity.⁶⁹ Its charitable purpose is the promotion of the voluntary sector for the benefit of the public⁷⁰ by establishing and maintaining a publicly available comprehensive database about the activities and finances of charities established in the UK. The GuideStar UK website will launch to the public in a series of phases beginning in late April 2005. Phase 1 will cover registered charities in England and Wales. Phase 2 will extend coverage to charities in Scotland and Northern Ireland and to “excepted” and “exempt” charities in England and Wales.

3. Improving Auditor Protection

The Strategy Unit noted that public support for charities is encouraged by the perception that stable regulation and monitoring is in place to detect fraud and abuse. Whilst it has been seen that the Charity Commission undertakes monitoring of all registered charities with an income or expenditure over £10,000, it clearly does not have the resources to look in detail at the operations of every large charity every year. Auditors, who examine in detail large charities’ accounts, are therefore potentially a valuable resource for the monitoring and enforcement of charity governance.

The auditors of registered charities that are not companies have a specific statutory duty to report to the Charity Commission abuse or significant breaches of charity law or regulation.⁷¹ Auditors who do so have statutory protection from the risk of action for breach of confidence or for defamation. Auditors of charitable companies, however, would have to rely on the protection given by case law if they made a similar report in the “public interest.” Guidance issued by the Auditing Practices Board attempts to address this issue by suggesting that matters of material significance to the regulator can safely be reported in the public interest.⁷² However, the Strategy Unit noted that some auditors remain uncomfortable with the lack of

69. CHARITY COMM’N FOR ENG. & WALES, APPLICATION FOR REGISTRATION OF GUIDESTAR UK: DECISION OF THE COMMISSION MADE ON 7 MARCH 2003, *available at* www.charity-commission.gov.uk/registration/pdfs/guidestardecision.pdf.

70. Following a Review of the Register consultation exercise in 2001, the Charity Commission have since accepted the promotion of the voluntary sector for the benefit of the public as a charitable purpose in its own right. *See* CHARITY COMM’N FOR ENG. & WALES, THE PROMOTION OF THE VOLUNTARY SECTOR FOR THE BENEFIT OF THE PUBLIC (2004), *available at* <http://www.charity-commission.gov.uk/printable.asp?path=/publications/tr13.asp>.

71. Charity (Accounts and Reports) Regulations, (1995) SI 1995/2724, reg. 6(5).

72. AUDITING PRACTICES BD., PRACTICE NOTE 11(REVISED): THE AUDIT OF CHARITIES IN THE UNITED KINGDOM para. 240 (Apr. 2002), *available at* [http://www.frc.org.uk/images/uploaded/documents/PN11\(r\).pdf](http://www.frc.org.uk/images/uploaded/documents/PN11(r).pdf).

statutory protection and suggested that there is a strong likelihood that this ambiguity has inhibited some auditors from reporting serious matters.

The Strategy Unit therefore recommended that auditors (and independent examiners) of all charities should have the same statutory protection from the risk of action for breach of confidence or for defamation, as do the auditors of unincorporated charities. This should help to strengthen the regulation of charity governance.

4. Measures to Encourage Trusteeship

Effective governance requires effective leadership. The Strategy Unit recognised that current difficulties in recruiting and retaining high quality trustees from diverse backgrounds⁷³ can undermine governance. An overriding principle of the charitable sector has always been that charities are governed by a voluntary board of independent trustees, and it was concluded that the principle of voluntary governance⁷⁴ for charities should be retained. However, it was recommended that a trustee body should have the statutory power to pay an individual trustee to provide a service to a charity (outside their duties as a trustee) if it reasonably believes it to be in the charity's interests to do so.

Currently, a trustee can be relieved of personal liability for breach of trust by the court when the court is of the view that the trustee has acted honestly and reasonably.⁷⁵ The Strategy Unit recommended that charity trustees should be able to apply to the Charity Commission as well as to the court for relief from personal liability for breach of trust when they have acted honestly and reasonably. While not excusing fraud, it will protect trustees who have made honest mistakes, therefore encouraging more people to act as trustees.

It was also recommended that charities should be required to state in their Annual Report how they recruit, induct, and train trustees. The Charity Commission intends to take this forward by including a requirement in the next revision of the Charities SORP that the trustees' Annual Report should include a statement about the policies and procedures adopted for

73. See, e.g., CHARITY COMMISSION FOR ENG. & WALES, TRUSTEE RECRUITMENT, SELECTION AND INDUCTION RS1 (2002), available at www.charity-commission.gov.uk/publications/pdfs/report1text.pdf.

74. A charity trustee can receive payment or other benefit if there is legal authority either through a clause in the charity's governing document, or, if there is no such clause, through permission from the Charity Commission.

75. Trustee Act 1925, 15 & 16 Geo. 5, c. 19, § 61 (Eng.).

the induction and training of trustees, as well as the procedures for recruiting and appointing them.⁷⁶

5. Regulating Fund-raising More Effectively⁷⁷

The Strategy Unit proposed a number of measures to ensure public confidence in fund-raising, including a new independent fund-raising body to develop self-regulation and oversee good practice. This body will act as a contact point for information about regulatory requirements for fund-raising, act to redress some of the negative perceptions of fund-raising, and act to develop an overall Code of Fund-raising Practice and specific voluntary codes.

The Institute of Fundraising received the approval of the Home Office to take over the task of investigating the possibility of establishing a self-regulatory governing body.⁷⁸ The Institute of Fundraising is a national charity, which is member-based and currently represents over 150 fund-raising charities and 3,500 individual members. As well as providing opportunities for continuing professional education, a forum for discussion on issues of common concern, and a source of information, the Institute of Fundraising has developed a code of conduct for fund-raisers, which all of its members must abide by and support.⁷⁹ It has also established codes of practice for different areas of fund-raising activity to which members and affiliated charities are committed. In response to the Strategy Unit, the Institute of Fundraising set up an independent commission to explore different models for a system of self-regulation and to recommend a preferred model.⁸⁰

The Strategy Unit contended that, although the Government should provide seed-corn funding for the body, it should be independent of Government and self-financing in the longer term, perhaps by a small levy on donated income. If the Government concludes that this voluntary initiative

76. See EXPOSURE DRAFT, *supra* note 62, at para. 28.

77. It is not intended to look at this area in any detail in this Article.

78. Press Release, Institute of Fundraising, The Future of Self-Regulation in Charity Fundraising (June 2003), at [http://www.institute-of-fundraising.org.uk/documents/The_Future_of_Self_Regulation_in_Charity_Fundraising_\(June%202003\).doc](http://www.institute-of-fundraising.org.uk/documents/The_Future_of_Self_Regulation_in_Charity_Fundraising_(June%202003).doc).

79. The Code of Conduct for Fund-raisers and all the Institute's Codes of Practice can be found on the Institute of Fund-raising's website: <http://www.institute-of-fundraising.org.uk/> (last visited Feb. 11, 2005).

80. See the final report of the Commission, which calls for the establishment of a Charitable Fundraising Standards Board, based on the Office of Fair Trading model: Rodney Buse, *The Future of the Self-Regulation of Charity Fundraising: Proposed Framework and Governance Structure* (Jan. 2004), available at www.busecommission.org.uk/public/docs/Buse%20Commission%20Phase%20-%202%20Report.pdf.

is failing, the Home Secretary will have a backup power to introduce a compulsory system of regulation.

A new updated and unified local authority licensing scheme for public collections is also proposed, focusing on basic minimum requirements.⁸¹ The scheme should encourage “legitimate collecting activity” within the constraints imposed by competition for space and avoidance of public nuisance.⁸²

B. Maintaining Trust by Independent, Open, and Proportionate Regulation

1. The Charity Commission

The Charity Commission is the government department that is established by law as the regulator and registrar for charities in England and Wales.⁸³ It does this through: providing an effective legal, accounting, and governance framework for charities; improving their governance, accountability, and effectiveness; and, identifying and dealing with abuse and poor practices. It is accountable for its decisions to the courts and for its efficiency to the Home Secretary. It carries out a wide range of functions, including the registration, monitoring, and support of charities, and the investigation of alleged wrongdoings. There are five Commissioners, appointed by the Home Secretary.

The Strategy Unit proposed significant reforms to the Charity Commission that would put the focus more clearly on its role as a regulator.⁸⁴ In an attempt to enhance the “guarding of the guardians” and perhaps to set an example for charity trustees, a more open and accountable Commission was proposed. Membership of the Commission board will be increased to include a wider range of stakeholders, and proposals for separate Chair and Chief Executive roles were put forward.⁸⁵ Under the reforms, the Charity

81. Presumably, this would put to rest forever Part III of the Charities Act 1992, which has never been implemented.

82. HOME OFFICE, PUBLIC COLLECTIONS FOR CHARITABLE, PHILANTHROPIC AND BENEVOLENT PURPOSES: A CONSULTATION PAPER ON PROPOSALS FOR A NEW LOCAL AUTHORITY LICENSING SCHEME (Sept. 2003), available at <http://www.homeoffice.gov.uk/docs2/fundraising.pdf>.

83. For the statutory functions of the Charity Commission, its constitution, and proceedings etc., see Charities Act 1993, *supra* note 9.

84. In fact, the proposal was made to change the name of the regulatory body to Charity Regulation Authority. See PRIVATE ACTION, PUBLIC BENEFIT, *supra* note 28, at 82. This proposal has not been taken forward.

85. This has already taken place. Earlier in 2004, in anticipation of the change in the Charity Commission’s status, two new posts were created: a nonexecutive Chair and a full-time Chief Executive. These posts were publicly advertised and have now been filled from outside the civil service. The

Commission will hold open meetings⁸⁶ and will have to report to Parliament on new, clear strategic objectives set out in statute, which will be: (1) increasing public trust and confidence in charities; (2) promoting awareness and understanding of the public benefit requirement; (3) ensuring compliance with charity law; (4) promoting the effective use of charitable resources; and (5) enhancing accountability to donors, beneficiaries, and the general public.

2. Charity Appeals Tribunal

The Charity Commission recently introduced a complaints and review system.⁸⁷ Nevertheless, the Strategy Unit recognised that it could take considerable time to go through this process and that there was no external or independent check on decisions. Currently, the only right of appeal to an independent authority against a decision by the Charity Commission is to the High Court,⁸⁸ which is costly and rare. Again, therefore, in an attempt to enhance the “guarding of the guardians,” the Strategy Unit proposed that an independent tribunal should be introduced to hear appeals against the Commission’s decisions. This will enable charities to challenge decisions at reasonable cost.

3. Registration

At present, any charity with an annual income of £1,000 or more must register with the Charity Commission.⁸⁹ The Strategy Unit proposed cutting back red tape for smaller charities by increasing the threshold for charity registration to £10,000 (the proposal is now £5,000⁹⁰). All charities

new Chair, Geraldine Peacock, was previously one of the Commissioners, and, prior to that, the Chief Executive of a large charity. The new chief executive also has extensive experience of the sector as a former finance director of a leading charity. Press Release, Charity Commission for England & Wales, Charity Commission Appoints New Chief Executive (June 25, 2004), *available at* <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=120884&NewsAreaID=2&NavigatedFromDepartment=False>.

86. On 1 September 2004, the Charity Commission announced that its first open board meeting would take place on the 29 September 2004 in London. Press Release, Charity Commission for England & Wales, Charity Commission Names Date of First Open Board Meeting (Sept. 1, 2004), *available at* <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=128131&NewsAreaID=2&NavigatedFromDepartment=True>.

87. For details, see CHARITY COMMISSION FOR ENGLAND & WALES, DISSATISFIED WITH COMMISSION STANDARDS OF SERVICE? (2004), *available at* <http://www.charity-commission.gov.uk/tcc/comp/proc.asp>.

88. Charities Act 1993, *supra* note 9, § 92.

89. *Id.* § 3.

90. In a change to the Strategy Unit’s recommendations, the Government, in its response, proposed that only charities with an income of up to £5,000 per year would qualify for exemption from registration with the Charity Commission. CHARITIES AND NOT-FOR-PROFITS, *supra* note 30, at 34.

below this level (currently nearly two-thirds of all registered charities⁹¹) will be free from the need to register, but in a concession to small charities' fears that a loss of registered status would damage their credibility with the public and hamper fund-raising, the final proposal is that they be allowed to register if they wish.

The Strategy Unit also proposed that "excepted charities,"⁹² which are not required to register with the Charity Commission because they are registered with their own umbrella groups, should be required to register. A higher threshold will be set to ensure that this focuses on larger charities—the Strategy Unit suggested a threshold of £50,000 annual income, but the current proposal is to set the initial registration threshold for formerly excepted charities at £100,000 annual income.⁹³ In 2000, the Charity Commission estimated that there were over 100,000 excepted charities in England and Wales.⁹⁴

Exempt charities are neither registered with nor regulated by the Charity Commission because they are regulated by another body.⁹⁵ The Strategy Unit found that some of these other regulatory bodies were not aware of charity law requirements or were not enforcing them. It was therefore proposed that existing monitoring requirements for such regulators should be amended to cover basic charity law requirements. The Charity Commission should also be given the power to investigate exempt charities at the request of the main regulator. Exempt charities without a main regulator but with an annual income above £100,000 will be required to register with the Charity Commission. For example, museums and galleries will probably have the Department of Culture Media and Sport as their main regulator, and universities will have the Higher Education Funding Council for England as theirs. By contrast, exempt charities that are currently without an acceptable main regulator include foundation and voluntary schools, the Colleges of Winchester and Eton, the Church Commissioners (and any institution under their control), and Students' Unions.

These changes to excepted and exempt charities are aimed at increasing public confidence in the sector by bringing as many charities as possi-

91. See CHARITY COMM'N FOR ENG. & WALES, ANNUAL REPORT 03–04, at 3 (2004), available at <http://www.charity-commission.gov.uk/spr/pdfs/annrep2004pt1.pdf> [hereinafter ANNUAL REPORT].

92. See *supra* p. 788.

93. CHARITIES AND NOT-FOR-PROFITS, *supra* note 30, at 35.

94. CHARITY COMM'N FOR ENG. & WALES & HOME OFFICE, CHARITY REGISTRATION: WHEN SHOULD IT BE VOLUNTARY? para. 9 (Aug. 2000), available at www.charity-commission.gov.uk/enhancingcharities/charregvol.asp.

95. See *supra* p. 788.

ble within the regulatory ambit of either the Charity Commission or an alternative regulator.

IV. THE CHARITIES BILL

The Charities Bill was introduced into the House of Lords on 20 December 2004. This was preceded by the publication of a draft Charities Bill, which was the subject of pre-legislative scrutiny by a Joint Committee of the two Houses of Parliament over the summer of 2004.⁹⁶ The Bill, if passed, will implement a majority of the accepted recommendations of the Strategy Unit, with the remainder to be (or, in some cases, having already been) implemented either through other legislation or by administrative action.

Debate over the summer has largely been concentrated on areas of the Bill that are unrelated to the themes of this Article. In particular, concern has been focused on the effect of the new legislation on charities that charge high fees, such as private schools and hospitals. Fiona Mactaggart MP, Parliamentary Under-Secretary of State in the Home Office with responsibility for charities and the voluntary sector, has pledged that these charities will have to prove that they offer a public benefit in order to retain their charitable status and tax breaks. However, public benefit is left undefined in the Bill. Instead it will be up to the Charity Commission to carry out the public benefit test—a position that could be jeopardised by the Commission's stated view that the new legislation would not change the charitable status of private schools because it would not alter existing case law. Published minutes of the evidence taken by the Joint Committee show its chair, Alan Milburn MP, clashing openly with Fiona Mactaggart. He concluded by describing the situation as a “dog's breakfast.”⁹⁷ Pressure has thus been growing on the Government to insert a definition of public benefit into the Bill or risk losing it altogether.⁹⁸

The next step towards turning the Bill into law will be for it to go through the usual Parliamentary process during the 2004/2005 session of Parliament. This would allow for the enactment of a new Charities Act

96. The Joint Committee took oral and written evidence on the draft Charities Bill in June and July 2004 and made its recommendations in a report published on 30 September 2004. JOINT COMMITTEE ON THE DRAFT CHARITIES BILL, *THE DRAFT CHARITIES BILL: FIRST REPORT, VOL. 1: FORMAL MINUTES AND EVIDENCE* HL 167-I/HC 660-I (Sept. 2004).

97. *Id.* at question 1069 (July 21, 2004).

98. The government is resisting this pressure. *See* GOVERNMENT REPLY, *supra* note 29, at para. 8.

before the next general election (expected sometime in 2005). This will depend upon the availability of Parliamentary time.⁹⁹

CONCLUDING REMARKS

Charities have developed significantly since they were first regulated four hundred years ago. The key role of the Charity Commission must change too, as it works to become a more strategic regulator. It must allow charities the flexibility that they need to succeed, while driving up performance across the sector. As with all aspects of the charitable sector, it is certainly not a case of “one size fits all.” The Charity Commission needs to focus efforts where there is most risk and ensure that good governance is in place. It is therefore appropriate that larger charities, with greater capacity and impact, should be subject to greater regulatory and accountability mechanisms, as is evident in the reforms to registration requirements and SORP accounting provisions, for example. A proportionate risk-based approach to regulation is the correct way forward. In this regard, the Charity Commission’s recent report that it has been increasingly focusing its resources on the larger and higher risk charities is welcome.¹⁰⁰ In 2003/2004, 82% of the 482 largest charities (those with an annual income over £10m) benefited as a result of Charity Commission guidance.

Greater regulation leading to improved accountability is not without its potential negative effects upon charities. First, the financial costs of compliance with external regulatory requirements need to be taken into account. As much as possible, the role of Government should be to facilitate and to help to develop capacity in this area, rather than to prescribe. It is recommended that Government provide support to the sector for work on performance improvement as part of its wider commitment to build the sector’s capacity.¹⁰¹ Increased investment in governance and accountability mechanisms raises their profile and signals their value. The recent Treasury Cross Cutting review of the voluntary and community sector recognised the

99. On the 5th of April, 2005, it was confirmed that the Charities Bill would not be passed due to the impending dissolution of parliament. See Press Release, Charity Commission for England & Wales, Charities Bill Fails to Be Enacted (Apr. 5, 2005), available at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=154638&NewsAreaID=2&NavigatedFromDepartment=True>.

100. ANNUAL REPORT, *supra* note 91, at 21.

101. See, e.g., HOME OFFICE, CHANGE UP: CAPACITY BUILDING AND INFRASTRUCTURE FRAMEWORK FOR THE VOLUNTARY AND COMMUNITY SECTOR (June 2004), available at http://www.homeoffice.gov.uk/docs3/changeup_report_new.pdf.

need for more attention and funds to be applied to the infrastructure of charities.¹⁰²

Secondly, increased regulation should not be at the cost of the charitable sector's independence and flexibility. The benefits of enhanced accountability should not become outweighed by the burdens on charities leading to the stifling of innovation, as charities become more risk averse. These views found support in the Treasury Cross Cutting Review of the voluntary and community sector where it was said: "in contracting with the VCS [voluntary and community sector] to deliver services, Government must ensure that regulation is proportionate and the independence of the sector is recognised. The greater the regulation the greater the risk that the best features of the sector are smothered."¹⁰³

In order to counter these concerns, charity regulation must be proportionate and appropriate. This is particularly relevant when charities are publicly funded. Funders (Government) should not seek to extend regulatory controls into areas that are properly the matter for the independent governance structures of the organisation. Government should not seek to regulate charities as though they were part of the public sector, regardless of the funding relationship. This principle also applies to other charity funders who may seek to control charities that they fund.¹⁰⁴ So far, the main pressure on charities has come from statutory funders; there is already a growing amount of evidence to suggest that "the 'contract culture' is partly responsible for the erosion of the independence of charities."¹⁰⁵ But, now private donors are also beginning, once again,¹⁰⁶ to take a more active role in directing where their money goes.¹⁰⁷ For example, donor-advised funds that allow donors to have more input into how their contributions are spent are becoming more common.

102. HM TREASURY, THE ROLE OF THE VOLUNTARY AND COMMUNITY SECTOR IN SERVICE DELIVERY: A CROSS CUTTING REVIEW 20 (2002), available at <http://www.hm-treasury.gov.uk/media/890/03/CCRVolSec02.pdf>.

103. *Id.* at 17; see also PRIVATE ACTION, PUBLIC BENEFIT, *supra* note 28, at 30–31, 88.

104. See generally Debra Morris & Karen Atkinson, *Charities Biting the Hand that Feeds: Relationships with Their Funders*, in CHARITIES, GOVERNANCE AND THE LAW: THE WAY FORWARD, *supra* note 27, at 195.

105. See, e.g., Debra Morris, *Paying the Piper: The "Contract Culture" As Dependency Culture for Charities?*, in THE VOLUNTARY SECTOR, THE STATE AND THE LAW 123, 124 (Alison Dunn ed., 2000).

106. Large donors do not seem to have been as actively involved in the last century, but, historically, founders were very involved with charities. See, e.g., MICHAEL CHESTERMAN, CHARITIES, TRUSTS AND SOCIAL WELFARE pt. 1 (1979).

107. See, for example, Warburton's discussion of "new philanthropy": Jean Warburton, *Trusts: Still Going Strong 400 Years After the Statute of Charitable Uses*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILARLY RING-FENCED FUNDS 163 (David Hayton ed., 2002).

As for the content of the accountability requirements, it is submitted that it is correct to put increased emphasis on impact reporting. Previously, charity accounts have simply replicated the style of corporate annual reports, producing many pages of financial statements. Whilst these are important, the added value of the charitable sector is in the real impact of its work. Charities' role is to maximise impact, not profit, and it is right that this should be reflected in the reporting requirements. The problem, of course, is the difficulty in measuring and comparing such impact in such a diverse sector. For example, within the sub-sector of children's charities, if a key performance indicator is prevention of child abuse, how is that measured? More fundamentally, how do children's charities compare their effectiveness to that of a grant-giving educational charity? If benchmarking is ever to get off the ground, it will need to be at the sub-sector level, where groups of organisations involved in the same area of service provision seek to develop common performance indicators. This should be done on a self-regulation basis without the involvement of Government or the Charity Commission.

To conclude by returning to a note on the role of the law. Whilst it cannot be denied (and this Article has sought to prove) key aspects of accountability are the legal accounting and reporting requirements, which have been discussed above, it should be recognised that many charities regard the fulfillment of these statutory obligations as "a technical process, requiring the technical expertise of finance directors and auditors,"¹⁰⁸ rather than a meaningful way of promoting transparency. Hopefully, the enhanced requirements to be included in the Charity Commission Statement of Recommended Practice on Accounting and Reporting will make this process a more meaningful one. In particular, the proposed Standard Information Return has the potential to be a useful tool.

Nevertheless it may well be that initiatives such as the establishment of Guidestar UK, and the publicity that it generates, will do more to enhance the accountability of charities than the legal changes to the accounting provisions themselves that are proposed through changes to SORP and the introduction of the SIR.

It is also interesting to recall that the reforms being put forward in order to enhance the accountability of charities in the area of fund-raising, arguably an area where public trust is most at risk of being damaged with dire consequences, are of a nonlegal nature, with self-regulation being proposed.

108. NAT'L COUNCIL FOR VOLUNTARY ORGS., ACCOUNTABILITY AND TRANSPARENCY 13 (June 2004), available at <http://www.ncvo-vol.org.uk/asp/uploads/uploadedfiles/1/416/acctrans.pdf>.