*To: Joint Committee on the Draft Protection of Charities Bill*

Preliminary submission (prior to Oral Examination)

by

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## 1. About myself

I have some 25 years experience of research concerning charities and voluntary organisations. At Sheffield Hallam University I have led the inter-faculty Centre for Voluntary Sector Research since 1998. Since 2007 I have held a personal chair in the University as Professor of Charity Studies. I also lead a postgraduate course for charity professionals and I supervise doctoral students in this field.

I am the author of two books, and seventeen refereed journal articles in the field of charity regulation and accounting. My research analyses these issues in all three UK jurisdictions.[1] However, my interest in charity regulation is primarily from a social sciences perspective – I am not a lawyer.

Outside the university I act approximately 1 day/week as professional adviser to a range of charities (mainly small to medium sized – typical income range £50K to £1M). This includes some work assisting charities in negotiations with the Charity Commission – typically charity registrations but in two instances I have advised charities undergoing inquiries by the Commission. I also act as independent examiner to several charities under s.145 of the Charities Act 2011. I have provided lay assistance to one organisation in an appeal to the First Tier Tribunal (Charity).

## 2. The Context of Charity Regulation in England & Wales

I consider that the state of charity regulation in England and Wales is currently in a *state of crisis.* Broadly speaking I feel the Draft Bill is simply "tinkering round the edges".

The crisis, in my view, is to due a combination of three factors:

(a) *The under-resourcing of the Charity Commission*, meaning that it is constantly struggling to maintain an effective service even to "normal" charities which are operating properly – let alone to those charities giving regulatory concern. As a result relatively little action appears to be taken except in the most serious cases, and much of the advisory and guidance work of the Commission to encourage charities to comply has had to be cut. By way of example, diligent charities can

[1] I must disclose that two of the research projects I have led or co-led in the last five years were funded by the Charity Commission, but these studies were concerned with the public benefit requirement, rather than directly with any of the powers addressed by the Draft Bill. My books are on the responsibilities of charity treasurers and on charitable incorporated organisations (both published by the charity Directory of Social Change). Over the years I have also served as charity trustee of various charities.

devote massive effort to producing accounts and trustees' reports which comply with the detail of the Charities SORP[2], whilst other charities may well 'get away with' substantial abuses such as unauthorised payments to trustees which the Commission has no time to address. For anything that has to go beyond the "First Contact" team, charities not infrequently face huge waits for Commission decisions which can hinder their ability to operate for the purposes intended. It is extremely hard for anyone to communicate with the Commission except through poorly designed web forms.

(b) *The Register of Charities omits vast swathes of charities which are either exempted or excepted from registration with the Commission*.[3] This is due to an extraordinary legal framework – partly as a combination of history, partly due to the resourcing issues above – which means that many charities in England and Wales do not have to register with the Commission. (This is unlike the systems in Scotland and Northern Ireland where charity registration is effectively compulsory, and an organisation cannot claim to be 'a charity' without being registered with the relevant regulator.[4])

Much of the attention focuses on registered charities causing concern, but serious abuses of charitable status also occur amongst excepted and exempt charities. Many excepted charities are churches or religious organisations connected to the main Christian denominations – it seems extraordinary given the Government's equalities agenda that charities are excepted from registration with the Commission simply because of their links to specific Christian denominations. Indeed Christian religious organisations have featured prominently in recent inquiry reports from the Commission. Most of the exceptions from registration were recently extended to 2021![5] Also, there are many organisations which should be registered with the Commission[6] but which have omitted to do so and it is extremely rare for such organisations to face any sanctions.

(c) *An extraordinary reluctance by Government to implement many straightforward and uncontroversial changes to charity regulation* – many of which are *already* on the statute book and simply need secondary legislation to implement (see my comments below for some examples). Despite the perceived political importance of charities under both the current and previous governments, the charity law team in the Cabinet Office appears to be even more under-resourced than the Commission. The result seems to be that resource can be found for a Protection of Charities Bill because of a perceived link to the anti-terrorist agenda but not for

[2] *Accounting by Charities: Statement of Recommended Practice* – the current version is published by the Charity Commission (2005), though new SORPs (Charity Commission & OSCR 2014) have recently been issued to take effect from 2015. Apart from the smallest charities preparing receipts and payments accounts, compliance with the SORP is intended to be mandatory.
[3] Charities Act 2011, s30(2).
[4] See Charities & Trustees Investment (Scotland) Act 2005, s.13 and Charities Act (Northern Ireland) 2008, s.16(2). In Northern Ireland, existing charities are registering over a period of years.
[5] Charities (Exception from Registration) (Amendment) Regulations 2014.
[6] I.e. Organisations with charitable aims, more than £5K annual income and not falling within the definition of excepted or exempt charities. Some of these even describe themselves as charities, but unless they claim the title 'registered charity' they are not committing an offence under charity law in England and Wales.

implementation of much more straightforward issues that would be immensely beneficial.

## 3. General Comments on the Draft Bill

Many of the provisions in the Draft Bill make sense and for the most part will strengthen the Commission's powers in logical ways – though see section 4 of my comments below for some concerns on issues of detail.

However, I would make three general observations on the Bill:

(a) If Parliament is minded to make time for a new Charities Bill, *I am surprised that what is proposed by the Cabinet Office is so modest*. There are many other reforms to the framework of charity regulation which could usefully have been included in a Bill, including other significant recommendations in Lord Hodgson's Review of the Charities Act 2006.[7] Nick Hurd MP (when Minister for Civil Society) consulted on the priorities for implementation of Lord Hodgson's recommendations. I would have expected that *all* of Lord Hodgson's recommendations that needed primary legislation – where there was general consensus on taking them forward – would have been included the next time a Charities Bill was prepared. Some of his recommendations are deregulatory and would support the government's agenda of removing unnecessary red tape on businesses including third sector organisations; others could allow better resourcing of the Commission's work.

I highlight three examples from his recommendations, which this Bill might have addressed (paraphrased slightly from his wording):

- Sanctions for non-submission of accounts might include limitations on the right to reclaim tax under gift aid.
- Development of a fair and proportionate system of charging for filing annual returns with the Commission and for the registration of new charities – subject to a commitment by HM Treasury that funds raised would be incremental to the Commission's existing resources.
- Schedule 6 to the Charities Act 2011 should be removed and the jurisdiction of the Tribunal reformulated on the face of the legislation to give a right of appeal against any legal decision of the Commission and a right of review of any other decision of the Commission.

(b) Secondly – as noted above – *there are other reforms which could be achieved purely through secondary legislation to implement existing provisions* enacted in the Charities Act 2006 (now in the Charities Act 2011). It seems odd to make time for new legislation when existing legislation remains yet to be implemented.

I would suggest the following be considered as priorities:

[7] Lord Hodgson (2012). *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).

- Implementation of the power in the 2011 Act[8] to reduce the £100,000 registration threshold for excepted charities to the £5,000 level as for other charities. This would immediately remove all the anomalies related to excepted charities in sectors such as the churches, scouts/guides and (leaving only the very smallest charities under £5,000 income excepted and hence creating a level playing field across all fields of charity).

- Implementation of the provision in s.228 of the Charities Act 2011 (first enacted in the 2006 Act) allowing a charitable company to convert to a charitable incorporated organisation (CIO). CIOs are now the most popular structure for the formation of new charities, and the simple structure of a corporate body governed solely by charity law makes them simpler for the Commission to regulate than other forms of charity. (The equivalent provisions in Scotland were implemented in 2012 and have been well used.)

- Many charitable abuses relate to fundraising – an issue not addressed in the Draft Bill. However, extensive powers for regulation of fundraising were enacted in the Charities Act 2006 and remain largely unimplemented – including powers for the Charity Commission to authorise major collections.[9] I welcome the Government's encouragement of self-regulation through the Fundraising Standards Board in terms of fundraising as a whole, but on the specific issues of public collections, I think it would be very effective for the Charity Commission to take on this power as provided in the 2006 Act (subject to appropriate resourcing).

(c) There is a lack of joined up thinking with regard to the regulation of charities in the UK, especially between matters of charity law and tax law, which the Draft Bill does nothing to address. The Draft Bill is also very hard to follow, as it makes numerous amendments to provisions in the Charities Act 2011 which are themselves complex and confusing. The 2011 Act is largely just a consolidation of the Charities Act 1993 as amended by the Charities Act 2006, and many provisions, particularly in relation to the powers and directions of the Charity Commission derive from much earlier legislation. Although the Cabinet Office has helpfully published a version of the 2011 Act as it would stand if the Protection of Charities Bill were passed, the end result is still very cumbersome.

Moreover, as the Commission has made clear in its own submissions to Parliament, there are complications between its own powers and those of HMRC when charities are suspected of tax abuse.

I would make the case for a new more broad-ranging *Regulation of Charities Bill which would:*

- *repeal* all the relevant provisions concerned with the Charity Commission's regulatory and investigatory powers in the Charities Act 2011

[8] The power in s.32 of the Charities Act 2011 allows the Minister to amend the £100,000 limit in s.30(2)(b).
[9] Charities Act 2006, ss.51-57.

- *repeal* those provisions in the Finance Acts granting specific powers to HMRC in relation to charitable abuses (particularly with regard to the "Fit and Proper Persons" test built into the tax definition of charity in Schedule 6 of the Finance Act 2010 which have the potential to conflict with the provisions for disqualification of trustees in the 2011 Act as the Finance Act refers to "managers" not just trustees)

- enable Parliament to consider from first principles what powers should be available to the Commission (and likewise to the charity regulators in the devolved administrations) and to clarify the boundaries with HMRC

- consider from first principles when misdemeanours in charities should be subject to civil or criminal remedies

- consider whether to go further than the present regime, by enabling the Commission to act as a prosecuting authority in cases where criminal sanctions may be appropriate.

Whilst the implementation of a new framework on these lines would mean additional costs for the Commission there could be some economies through transfer of resources from HMRC. For example, an HMRC gift aid audit and a Charity Commission review of a charity's records and accounts start from totally different starting points in law, but a poorly-run charity is likely to raise issues which relate to both. An ability to combine the inspection regime could be beneficial both to the charity sector, and to the public finances in use of regulatory resource.

## 4. Comments on Specific Provisions in the Draft Bill

Within the parameters of the Bill as drafted I would make the following overview comments on specific clauses – though my comments focus on the policy intent rather than the detailed drafting. I am encouraged that the government is *not* proceeding with some of the more controversial additional powers suggested in the Cabinet Office consultation of December 2013.

However, on the drafting I stress that a new *Regulation of Charities Act*, restating the Commission's powers in separate legislation would be much clearer than the amendment of the 2011 Act as proposed by the Draft Bill.

- *Clause 1 – Official warnings by the Commission.* It makes sense for the Commission to issue warnings to charities where appropriate – though I am not sure it needs primary legislation to permit this. However, if the Commission is given the power as proposed to publicise these warnings there must be a right of appeal to the Tribunal. A charity's reputation could be seriously harmed if the Commission issued a warning incorrectly. The consultation document mentions that the issue of warnings would be subject to judicial review (JR) but the whole idea of the First-Tier Tribunal (Charity) is to avoid the process of JRs in relation to the exercise of the Commission's powers.

- *Clause 2 – Investigations and power to suspend.* No specific concerns.

- *Clause 3 – Range of conduct to be considered.* No specific concerns.
- *Clause 4 – Power to remove trustees following inquiry*. No specific concerns.
- *Clause 5 – Power to remove disqualified trustees.* No specific concerns.
- *Clause 6 – Power to direct winding up.* No specific concerns – this would be a helpful tidying up of existing powers.
- *Clause 7 – Power to direct property to be applied to another charity.* No specific concerns – this would be a helpful tidying up of existing powers.
- *Clause 8 – Automatic disqualification of charity trustees.* In broad terms the extensions proposed make sense, but I think the powers may go too far, particularly in the interaction with terrorist asset-freezing and it is possible that trustees of perfectly normal charities working in dangerous parts of the world may be caught unintentionally if, for example, a charity can only get aid to a specific location by using a proscribed organisation to help with local transport. There is a particular sense that Muslim charities are disproportionately likely to be targeted, and I urge the Committee to review this. I hope the Committee will seek evidence from those with more specific expertise in these issues.[10]
- *Clause 9 – Power to disqualify from being a trustee.* Broadly speaking these provisions make sense but the wording and procedures are very cumbersome, especially in relation to suspension pending disqualification. However, in relation to the proposed power to be added in new section 181A(4)(C) to be added to the 2011 Act – allowing disqualification of someone who has been found by HMRC not to be "fit and proper" I am concerned about the interaction between charity law and tax law. The regulation of charities must offer a more joined-up approach between the two systems (see comments above). In particular, if someone is found by HMRC not to be "fit and proper" there must be a simple appeal process to *one* Tribunal.
- *Clause 10 – Records of disqualification or removal.* No specific concerns, but the various documents of this kind which the Commission is required to publicise are incredibly hard to find with no links from its home page on the gov.uk site.
- *Clause 11* - No specific concerns – this would be a helpful tidying up of existing powers.
- *Clause 12 – Reviews of the operation of the Act.* The terms proposed for the review are helpful, but they go well beyond the specific provisions of the Draft Bill and seem similar to the requirements of the Independent Reviewer (Lord Hodgson) appointed under the Charities Act 2006. So I would argue that this clause should create a five-yearly review of charity legislation *as a whole*, similar to the provision under the 2006 Act.

[10] I have not yet examined it in detail, but the recent report published by the think thank Claystone: Belaon, Adam (2014) *Muslim Charities: A Suspect Sector* may be useful to the Committee (www.claystone.org.uk).