

**Strengthening charity regulation in England and Wales?
The Charities (Protection and Social Investment) Act 2016
and the impact of academic witnesses**

MORRIS, Debra and MORGAN, Gareth G <<http://orcid.org/0000-0002-4429-4835>>

Available from Sheffield Hallam University Research Archive (SHURA) at:

<https://shura.shu.ac.uk/15528/>

This document is the Accepted Version [AM]

Citation:

MORRIS, Debra and MORGAN, Gareth G (2017). Strengthening charity regulation in England and Wales? The Charities (Protection and Social Investment) Act 2016 and the impact of academic witnesses. *Voluntary Sector Review*, 8 (1), 89-106. [Article]

Copyright and re-use policy

See <http://shura.shu.ac.uk/information.html>

Strengthening Charity Regulation in England & Wales?

The Charities (Protection and Social Investment) Act 2016 and the Impact of Academic Witnesses

Authors' Final Version as accepted by
Voluntary Sector Review February 2017

Published version available in:

Voluntary Sector Review, Volume 8, Number 1, March 2017, pp. 89-106

DOI: <https://doi.org/10.1332/204080517X14883750672200>

Gareth G Morgan^a & Debra Morris^b

^aEmeritus Professor of Charity Studies, Sheffield Hallam University Gareth.Morgan@shu.ac.uk

^bProfessor of Charity Law & Policy, Liverpool University Debra.Morris@liverpool.ac.uk

Acknowledgements

The authors wish to thank participants at the Society of Legal Scholars Conference (University of York, September 2015) for comments on an earlier version of this paper.

**Strengthening Charity Regulation in England & Wales?
The Charities (Protection and Social Investment) Act 2016 and the Impact
of Academic Witnesses**

ABSTRACT

Research on charity regulation is frequently triggered by charity law developments. However, it is often unclear what impact such research has on policymakers and parliamentarians shaping charity regulation.

Both authors of this article were called to give evidence to the Joint Parliamentary Committee examining the draft Bill which led to the Charities (Protection and Social Investment) Act 2016. We review the possible impact of our evidence on the ultimate Act and on charity regulation more broadly.

Introduction

The regulation of charities has received extensive examination in recent years by legal scholars, social scientists and many others, across a wide range of charity law jurisdictions. See, for example: Garton (2009); McGregor-Lowndes & Halloran (2010); Phillips and Smith (2011); and Harding et al (2014). Themes have included the definition of charity, the role of charity regulators, new legal forms for charities, the requirements for charity accounting and reporting, the regulation of charity fundraising, interaction between charity law and other legislation (in particular, equality law) and the functioning of tribunal systems to challenge regulators' decisions.

In many cases these studies have been triggered, at least in part, by developments or proposed developments in charity law in the jurisdictions concerned, with new Charities Acts in almost all the major charity law jurisdictions in the last decade, ranging from the Charities and Trustee Investment (Scotland) Act 2005 and the New Zealand Charities Act 2005 to the Charities Act (Northern Ireland) 2013 and the Bermuda Charities Act 2014.

Much attention has been focused on England and Wales as the oldest such jurisdiction, not least in the light of the various developments arising from the Charities Act 2006 (now largely consolidated in the Charities Act 2011).

However, notwithstanding the publication of numerous papers, books and reports arising from these studies, it is often¹ unclear what impact such research has on policymakers. In particular, it may be appropriate to consider whether research on charity regulation has any impact on parliamentarians responsible for shaping or at least reviewing proposed new legislation in the field of charity regulation. This question is particularly relevant in the light of the growing attention that is being paid to the impact of academic research. For example, in the UK, the last major assessment of academic research undertaken by the Higher Education Funding Council for England (HEFCE) in 2014 sought, for the first time, to assess not only the quality of academic outputs but also the impact of academic research through the submission of impact case studies (REF, 2014).

The Draft Protection of Charities Bill: Pre-legislative scrutiny

A convenient opportunity to examine a specific instance where academic research may have impacted charity regulation arose in the UK when a new piece of legislation concerning the regulation of charities in England and Wales was under consideration. To become law, a Bill must be approved by members of both Houses of Parliament at Westminster (the elected Members of Parliament in the House of Commons and the second chamber, the House of

Lords, whose members are known as peers). Bills go through a very similar process in both Houses.² Some Bills, like the one in question here, are subject to an additional layer of scrutiny when they are in draft form. The Draft Protection of Charities Bill was published in October 2014 (Cabinet Office 2014) and submitted for pre-legislative scrutiny by a Joint Committee containing representatives from both Houses. Both authors of this paper were invited to give evidence to the Joint Committee, and the focus of this paper is a self-review of the possible impact of our evidence on the ultimate Act of Parliament which was the end product, after the Bill had been considered and amended, and on any related developments in charity regulation.

Much of the UK Parliament's work takes place in various committees which examine issues in detail, from government policy to proposed new laws. Some Joint Committees have been set up on a permanent basis (e.g. the Joint Committee on Human Rights). Others, like the Joint Committee on the Draft Protection of Charities Bill, are established only for a limited period for specific purposes, such as examining a draft Bill. It is common for such committees to seek written or oral evidence to assist in their scrutiny role and to publish a report referring to evidence that has influenced the committee's conclusions. The report will then be considered by Government which will either accept or reject the committee's conclusions when finalising the wording of the Bill which, following the normal parliamentary processes, ultimately becomes legislation. It can be seen, therefore, that giving evidence before such a committee provides a significant opportunity to influence legislation.

The Charities (Protection and Social Investment) Bill (as it was ultimately called) drew heavily on the draft Bill, but took some account of the recommendations of the Joint Committee. This real Bill led to extensive debates in both Houses of Parliament, during which a wide range of amendments were tabled both by the Government and other political parties. It finally became law on 16 March 2016 as the Charities (Protection and Social Investment) Act 2016.

Hence, by considering the final Act in comparison with the draft Bill and noting recommendations in the Report of the Joint Committee it is possible to make at least some assessment of whether or not our evidence had any impact. Insofar as our evidence draws on our respective academic research, it is possible, therefore to draw some tentative conclusions regarding the extent to which research has influenced legislation. However, our conclusions can only relate to the substance of the legislation. Even though the Bill has now reached the statute book, at the time of writing its substantive provisions have not long been in force, so it is too soon to determine whether our evidence will have any impact on its application.

Before we turn to our input into the pre-legislative scrutiny, the first part of this paper will give a brief summary of the background which culminated in the publication of the draft Bill in October 2014.

Part 1 Background to the Publication of the Bill

The background to the Bill lay in the Charities Act 2006, which provided a new regulatory framework for charities and contained a provision (section 73) requiring a review of the operation of the Act within five years of becoming law. A wide ranging Review was led by Lord Hodgson of Astley Abbotts and it made over 100 recommendations (Hodgson 2012, Appendix). It highlighted some gaps in the powers of the Charity Commission, the regulator for charities in England and Wales. This, together with evidence which the Charity Commission had given to various reviews of its activity by Parliamentary Committees (PASC 2013; PAC 2014) and by the National Audit Office (2013a), was amongst the key factors which prompted the Draft Protection of Charities Bill. The Draft Bill contained the Government's response to both the Hodgson Review and the Public Administration Select Committee Report (PASC 2013), largely accepting all the points made about the Charity Commission's powers and role (Cabinet Office 2013a). The Charity Commission (2014), in its response to the Public Accounts Committee Report (PAC 2014), had called for adequate funding and stronger legal powers to meet Parliament's expectations that it would strengthen its approach to tackling the most serious cases of abuse and mismanagement in charities.

Integral to these developments, some high profile cases of abuse of charitable status had also led to critical reports on the Charity Commission's work. Criticism had focussed upon its compliance and enforcement work, including its perceived reluctance to use the powers available to it, and its perceived lack of focus on dealing with serious wrongdoing. Alongside the reports considered above, the Charity Commission had also come under the spotlight for its inability to regulate tax evasion involving charities.³ The exposé of the scandal of the Cup Trust was particularly damaging. Although the Cup Trust's accounts for March 2010 and 2011, as filed with the Commission, showed income of £176 million, only £55,000 had been allocated as grants to charitable causes, while the Cup Trust had claimed Gift Aid charitable tax relief of £46 million (PAC 2013, p.3). In June 2013, the House of Commons Public Accounts Committee (PAC) concluded that the Cup Trust was set up specifically as a tax avoidance scheme, and expressed dismay at the Commission's handling of the case. The PAC asked the National Audit Office (NAO) to review the Commission's effectiveness as a regulator and report back to Parliament (PAC 2013, p.11). This led to the NAO report mentioned above and a further damaging report (NAO 2013b). As well as recommending that the Charity Commission should make better use of existing statutory powers, the NAO's recommendations included that the Cabinet Office should assist the

Commission in securing legislative changes to address gaps and deficiencies in the Commission's powers.

The Charity Commission's performance has also been considered against a backdrop of recent enhanced attempts to combat extremism and terrorism. Concerns around the role of charities have been identified in both these areas in the UK, and it has been suggested that strengthening the Charity Commission's powers would assist in preventing such abuse of charitable status (Extremism Task Force 2013, para 3.2 and Home Affairs Committee 2014, para.134).

At the same time that the Charity Commission's regulatory performance has attracted considerable public and Parliamentary interest recently, it must be recognised that the Charity Commission has had its resources reduced significantly so that between 2007-08 and 2015-16, with the number of registered charities remaining reasonably static,⁴ the Commission's annual budget has fallen by 48 per cent in real terms to £20.4m (National Audit Office 2013a, para.1.12).

Part 2 Our Role in the Pre-Legislative Scrutiny

It is not surprising that this intense interest in and concern about charities and their regulation by the Charity Commission led to the publication of the Draft Protection of Charities Bill (Cabinet Office 2014). Shortly after it was published, the Joint Committee set up to scrutinise the Bill was appointed.⁵ Due to the proximity to the end of the Parliamentary session, the timetable set for scrutiny was tight. Nevertheless, there were 13 evidence sessions held in two months, during which evidence was given in person.⁶ In addition, in response to a general call for evidence, 35 submissions of written evidence were also received during the scrutiny period.

The role of witnesses at Committees undertaking pre-legislative scrutiny is explained in the Joint Committee's Report:

The process allows interested parties from outside Parliament to engage at the earliest stage with Parliamentary scrutiny and helps to inform members at the outset of the likely consequences of implementing proposals.⁷

The Committee's brief was not so much to scrutinise the draft Bill line by line (as would happen at Committee stage with a real Bill) but rather to look at the policy intentions behind the Bill and the extent to which the Bill would address them.

We were each approached by the Clerk to the Joint Committee inviting us to appear before the Committee to give evidence in one session on 25 November 2014. We were sent a short list of broad questions which we were told would probably frame the discussion for our particular evidence session and we were also given the opportunity to submit a written paper before the session. Gareth Morgan submitted a paper, which was later published as part of the Evidence submitted to the Committee,⁸ but Debra Morris did not do so.

The session lasted approximately one hour and was recorded and transcribed.⁹ Members of the Committee raised a total of 44 questions with us, focused on the subject matter of the questions that we had been sent in advance. Our responses to the questions of the Committee and our written submissions drew extensively on our own respective experience of researching issues of charity regulation. We referred to our studies, at least in passing, in our oral and written evidence. Upon invitation by the Committee, we both provided further written responses following the oral session.¹⁰ We each referred to at least one of our academic journal publications in our written submissions,¹¹ and drew heavily on work we had undertaken in our research in framing both our written and oral evidence.

The Joint Committee's report, in formulating its recommendations to Ministers, made reference on fifteen occasions to specific arguments presented by one or both of us in our oral or written evidence.¹² The Committee gave its broad support to the Charity Commission's call for additional powers, but recommended greater clarity on the operation of some of the proposed powers, and in several cases additional safeguards to ensure that charities and their trustees are treated fairly by the Commission.

The Government's response to the Joint Committee report (Cabinet Office 2015) accepted many of the Joint Committee's recommendations. Following the general election in early May 2015, the Government announced in the Queen's Speech that there would be a Charities (Protection and Social Investment) Bill put before Parliament. This real Bill (as opposed to the earlier draft Bill) eventually became law in March 2016 (following various amendments) as the Charities (Protection and Social Investment) Act 2016.

The 2016 Act includes provisions regarding the powers of the Charity Commission which are based heavily on the draft Protection of Charities Bill. It also included powers recommended by the Law Commission (2014) to allow charities to make "social investments" – i.e. investment that generates both a social and a financial return. In addition, during its passage through Parliament some powers were added related to the regulation of fundraising practices in the light of the Etherington Review (Etherington et al. 2015). However, these additional provisions were not in the draft Bill and did not therefore undergo pre-legislative scrutiny and we thus had no opportunity to influence those provisions. Our focus in this paper is thus

primarily on the issues of charity regulation first proposed in the draft Bill – where they were accepted these provisions were enacted as sections 1-12 of the 2016 Act.

Analysis

The discussion above evidences many instances¹³ where the Report of the Committee referred to our evidence, and the chairman made further statements (Guardian 2015; Hillar 2015) in which, without naming us, he referred to our evidence on the specific issue of excepted and exempt charities and the need for the Charity Commission to be more proactive in its approach to regulation.

It is clear, therefore, that the Committee (and the Committee staff preparing the Report) considered our evidence to be relevant to the issues facing the Committee in scrutinising the draft Bill.

In the remainder of this section we each offer comments on the experience of the process, and the extent to which we consider our respective evidence had an influence on the framework of charity regulation.

Reflection by Gareth Morgan

My primary field of research has been as a social scientist exploring the impact of charity regulation (rather than as a lawyer) – so I was encouraged that a Parliamentary Committee chaired by a distinguished lawyer (Lord Hope) wished me to give oral evidence.

At the outset, the Committee's call for evidence¹⁴ made clear that members wished to explore broader issues regarding the extant regime of charity regulation and the effectiveness of the Charity Commission, rather than simply the specific provisions in the draft Bill. In particular, the Committee wished to know about the extent of misconduct and mismanagement in the charity sector, and whether the proposed additional powers for the Commission would address this. This fitted well with my expertise.

I focused my initial written evidence on this broader question, arguing that charity regulation in England and Wales was in a 'state of crisis' and that the draft Bill was simply 'tinkering around the edges'.¹⁵ I argued that the crisis was due to a combination of three factors: the under-resourcing of the Charity Commission, the omission of 'vast swathes' of charities which are exempted or excepted from inclusion on the Register of Charities,¹⁶ and the reluctance by Government to implement existing provisions in charity law which are already enacted. I was given the chance to restate these concerns in oral questioning.¹⁷ Both Debra

Morris and I concurred that whilst the additional powers in the Bill were a useful ‘tidying up’ they did little to address more fundamental problems.¹⁸

The concerns I had raised around excepted and exempt charities seemed to resonate with the Committee and, citing my comments, two full pages of the Committee’s Report are devoted to this issue.¹⁹ The Committee concludes this section of the Report with the recommendation:

We recognise that the draft Bill is not the correct vehicle to address this issue. We therefore urge the Government to consider whether all charities should be brought within the requirement to register with the Commission in the next substantial review of charity law. We hope that the effects of the Commission’s new investment in digitisation will help these registrations to be carried out without undue additional resource.²⁰

Clearly this was not going to be taken forward in the specific Bill under consideration, and the Government’s response to the Committee’s Report (Cabinet Office 2015, para.3) mentioned the resource implications of requiring all charities to be registered with the Commission but added: ‘We accept the Committee’s recommendation that the position of excepted and exempt charities should, however, be reviewed in any substantial future review of charity law.’

The Committee also took note of a number of less fundamental issues I raised such as ‘problems with the Commission’s website’,²¹ and the argument that the Commission already had the power to issue warnings to charities.²² They also picked up on some of my less critical points such as my comment that a number of provisions the draft Bill ‘made sense’ or represented a ‘helpful tidying up of existing powers’.²³

More fundamentally, I raised a number of broad concerns about the provisions in the draft Bill designed to prevent charities being used for terrorist purposes being potentially damaging to many legitimate charities. I said ‘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.’²⁴ I echoed this point in oral questioning.²⁵ These concerns were raised in the Committee’s Report,²⁶ though a number of other witnesses with more direct experience of the issue had made similar points.

On the specific provisions, I raised concerns both in writing and in oral examination on the proposal in clause 9 of the draft Bill²⁷ allowing disqualification of someone from being a

trustee who has been found by HMRC not to be ‘fit and proper’ and said, ‘I am concerned about the interaction between charity law and tax law’. I argued that anyone so disqualified should be able to appeal to one tribunal rather than having to challenge the issue both under charity law and tax law.²⁸ My concerns are reflected in the Committee’s Report²⁹ alongside some related (but slightly different) points from other witness. The Committee concluded:

We are concerned ... that there are significant misgivings over the move to apply tax law, expressed by a number of witnesses in the context of the HMRC test. At present we would not support its inclusion in the Bill. We therefore recommend that, before finalising any provision on a “fit and proper person” test, there should be further discussions between the Charity Commission, HMRC and the Cabinet Office, with a view to addressing the concerns raised.³⁰

The Government response on this issue said:

The Government will review the concerns raised with the Charity Commission and HMRC. However, our starting position remains that if HMRC has made a finding that a person is not “fit and proper” to manage a charity’s tax affairs (a finding which can be appealed), this fact should be available to the Charity Commission as a trigger to enable them to consider whether the person is also unfit to serve as a charity trustee. A finding from HMRC that a person is not “fit and proper” for the purposes of tax legislation would not automatically result in disqualification from charity trusteeship. The Commission would still need to apply the test of fitness and consider the relevant facts in each case. (Cabinet Office 2015, para.54).

In the end no substantive change was made to the draft Bill on this issue, and the provision has been carried into what is now section 10 of the Charities (Protection and Social Investment) Act 2016. The Joint Committee’s comments on this issue were not taken up in the Lords Committee stage debate on the actual Bill.

On a broader issue, I argued that the provision in clause 12 of the draft Bill³¹ requiring a five-yearly review of its operation should be broadened into a requirement for a general review of charity legislation along the lines of the Hodgson review which was a statutory requirement in the 2006 Act.³² My comments were fully accepted by the Committee which stated as one of its recommendations:

We agree that a wider review of charity legislation would be more valuable than a narrow review focussing solely on the provisions of this Bill. The timing of the review should take into account the passage of this Bill, assuming it is introduced in

the new Parliament, and the implementation of any reforms based on the Law Commission's ongoing charity law project.³³

However, the Government response rejected this, saying:

The Government does not believe that there is a pressing need for a wide review of charity legislation. In 2012, Lord Hodgson undertook his wide-ranging statutory review of the Charities Act 2006, and the Public Administration Select Committee undertook its review of charity regulation. In the last two years there have been reviews of the Charity Commission undertaken by the National Audit Office and Public Accounts Committee. The Law Commission is currently undertaking its charities project on certain matters of charity law reform. (Cabinet Office 2015, para.66).

The Government's rejection of recommendations such as this from the Committee seem to be motivated by a wish to keep the Bill as simple as possible and to avoid committing to anything which would lead to wider changes in charity law.

There was a further stage when we had the opportunity of input in late 2015/early 2016 when the real Bill was under consideration by the Public Bill Committee in the Commons and (somewhat unusually) the Commons Committee issued a call for evidence which might assist its deliberations.³⁴ In response, I made a written submission restating some of the concerns from my earlier evidence and suggesting a couple of possible amendments including one to deal specifically with the issue of exempt and excepted charities. But, whilst this evidence was published by the Committee,³⁵ it does not appear to have had any impact on content of the final Bill.

So – what was the overall impact of my evidence? The initial report from the Draft Protection of Charities Bill Committee took clearly on board many of the issues I had raised and called for the Government to act on these concerns, notwithstanding the fact that other witnesses, particularly from the Charity Commission and Cabinet Office argued that nothing more than the draft Bill was needed. So, as judged by the Parliamentarians on the Committee, it seems the arguments in my evidence, which were largely based on my academic research, were almost all accepted. But on almost all these issues, the Government response to the Committee's Report rejected what the Committee was seeking.

There is just a possibility that the concerns I raised on excepted and exempt charities may be addressed in a future review of charity law, given the focus which the Committee gave to this, but this issue seemed too broad to progress in a Bill specifically on the protection of

charities. In the end, however, some provisions well outside the original remit of the draft Bill were added to the real Bill as a result of amendments both in the Lords and the Commons. A rare opposition amendment carried in Lords (though subsequently reversed in the Commons) would have added a clause requiring the Commission to ‘ensure that independent charities are not compelled to use or dispose of their assets in a way which is inconsistent with their charitable purposes’.³⁶ A late Government amendment, which became part of the final Act,³⁷ introduced a major new provision on the regulation of fundraising following issues raised in the Etherington et al (2015) review. We can hypothesise that an amendment to start the phasing out of excepted and exempt charities – perhaps on the lines I proposed in my further evidence³⁸ – could similarly have been carried if there had been sufficient will from peers or MPs acting on the Joint Committee’s Report.

However, as it stands it is hard to argue that my evidence has led to any direct changes in charity regulation – at least not through the Bill processes which led to the 2016 Act. This is partly a consequence of the fact that even a Parliamentary Committee scrutinising a Draft Bill can only make recommendations which the Government can choose to reject. This limits the impact of any evidence the committee has received whether from academics or other witnesses. But the endorsement of many of my arguments in the Joint Committee’s Report on the draft Bill, which remains on the public record, may help to take forward those arguments at a future date. Even where my evidence did not lead to specific changes in the Bill, the endorsement of key arguments by a Parliamentary Committee may well influence charity regulation in the future.³⁹

Reflection by Debra Morris

I was very honoured to be asked to give expert evidence (as only one of two academics to appear before the Committee). As a Professor of Charity Law & Policy, perhaps I was an obvious choice for the Committee. As one of the members of the Committee noted, both myself and Gareth Morgan ‘have long careers in this field.’⁴⁰ However, at first sight, it might appear that the impact of my evidence on the Committee’s Report (and ultimately the 2016 Act) was limited. This is because the general thrust of my evidence was that any problems relating to regulation by the Charity Commission were mainly not as a result of the Commission’s lack of powers, but rather due to its failure to use those powers that it already has in a robust and effective manner. I emphasised that, whilst much of this was due to the culture within the Commission (which is gradually changing), it was also partly due to lack of resources. Yet, what the Bill ultimately did was to give the Charity Commission more powers. Although the Committee’s Report does refer, on several occasions, to the issues of resources, this was not addressed in the Bill. There is indirect reference to my evidence, when

the Committee notes that ‘a number of witnesses suggested that the Charity Commission’s principal difficulty was a lack of resources rather than of legislative power.’⁴¹ It concluded:

It remains the case that the Commission will be unlikely to live up to the increased expectations of it, which include continually improving its non-regulatory functions, without additional resource.⁴²

The Government’s response (Cabinet Office 2015, para.6) noted the Committee’s comments on the Commission’s resources and observed (Cabinet Office 2015, para.5) that the Charity Commission has to strike a difficult balance in delivering its different functions with limited resources.

My evidence generally was to the effect that the additional powers were not necessary. Yet it is clear that the Charity Commission’s evidence to the Committee, emphasising the Commission’s perceived need to prevent what was acknowledged⁴³ to be a very small risk of significant fraud and abuse, was paramount in the final views of the Committee. The Committee concluded that ‘there remains an overall case for legislative gaps in [the Charity Commission’s] regulatory armoury to be addressed now’.⁴⁴

Nevertheless, there is significant evidence to suggest that my views were influential upon the Committee.

A subtle point that I made about the messaging that the Commission should adopt in relation to its proposed new powers was picked up by the Committee. When considering the discretionary trustee disqualification powers, contained in what was clause 9 of the draft Bill,⁴⁵ my point that if the Commission made sure that the right messages reached the public, then the use of these powers could bolster public trust and confidence in the Commission, was included in the final report.⁴⁶ I made this comment because, on personal reflection based on experience, I felt that the Commission had not always previously reported its activity in a way that would best improve public trust and confidence in it.

There are also a number of specific examples of my evidence feeding in directly to the Committee’s report and (sometimes) the Government’s response to it.

Whilst the draft Bill did not deal with general issues around the Charity Tribunal’s jurisdiction, I was asked specifically by Lord Hodgson whether I thought that the Tribunal was helping to develop charity law and I responded positively.⁴⁷ I agreed to submit further written evidence⁴⁸ to support this and within this written evidence I referred specifically to my academic writing on the workings of the Charity Tribunal (Morris, 2010). I also raised in

my oral evidence the confusion around the Tribunal's jurisdiction, which will only increase due to the fact that the exercise by the Commission of some (but not all) of the new powers in the Bill is subject to appeal to the Tribunal. I suggested that it would be more desirable if the jurisdiction of the Tribunal, now contained in a complex table in Schedule 6 to the Charities Act 2011, were widened so as to give a right of appeal against any legal decision of the Commission.⁴⁹ The Committee's report referred to the fact that the Law Commission's project on charity law includes looking at 'certain powers' of the Charity Tribunal and the Committee stated:

Although its terms of reference do not include Schedule 6 to the 2011 Act, we suggest that greater clarity over the formulation of Schedule 6 should be a part of its work in due course.⁵⁰

The Government's response, however, was a rather stark one:

The Government notes the Committee's conclusions. The Law Commission has already published its Charities Project consultation paper. There are no plans to widen its terms of reference to include providing greater clarity in the formulation of schedule 6 to the 2011 Act. (Cabinet Office 2015, para.68).

Further to this, I had argued that the exercise of the Charity Commission's new statutory power to issue warnings should be appealable to the Charity Tribunal (a point also mentioned by Gareth Morgan in his written evidence⁵¹). This was not accepted by the Committee, but it did lead to the recommendation, accepted by Government (Cabinet Office 2015, para.17), that there should be more detail about the use of this power on the face of the Bill:

Although we note the arguments by some that the issue of a warning should be subject to appeal to the Tribunal, we see the practical difficulty this would present to the Commission as disproportionate to the benefits of doing so. On the assumption that the Government agrees to our recommendation that the necessary details be added to the face of the Bill, we are satisfied that the issuance of a warning does not need the further safeguard of an appeal beyond the ability to seek judicial review.⁵²

As a result, clause 1 in the Bill proper specified that the Commission may issue a warning to a charity trustee 'who it considers has committed a breach of trust or duty or other misconduct or mismanagement in that capacity' and provisions relating to notice were also added. These words now appear in section 1 of the Act.

On the particular provisions, I made a number of comments about the proposed discretionary powers of the Charity Commission to disqualify a person from acting as a trustee in clause 9

of the draft Bill.⁵³ I raised concerns about the power to disqualify on the basis of a person having accepted a caution, noting that there are various reasons why somebody might accept a caution, including the inability to fight their case due to lack of resources. My evidence is directly quoted in the Committee's report on this point⁵⁴ and, whilst not wholly accepted, the Committee did recommend that 'the circumstances (including when the caution was accepted) which will give rise to a caution for a disqualifying offence need to be made clear either on the face of the Bill or in detailed guidance which is needed for this provision.'⁵⁵ The Government responded reasonably positively to this suggestion:

We will consider whether additional factors narrowing the circumstances of accepting a caution for a disqualifying offence could be included on the face of the bill as a trigger for the Commission to consider disqualification. (Cabinet Office 2015, para.56).

I had raised strong reservations over the proposed discretionary power permitting the Charity Commission to disqualify a person cautioned or convicted of an offence under the law of a country or territory outside the United Kingdom where the act which resulted in the caution or conviction would have constituted a disqualifying offence had it been done in the UK. My concerns were largely around the potential for lack of equivalence in terms of standards of evidence and justice. Having quoted directly from my evidence, the Committee expressed its concern as to the possible ramifications of this provision and consequently did not support it.⁵⁶ The Government accepted the Committee's recommendation not to include overseas cautions in the Bill and undertook to reconsider this provision in relation to overseas convictions (Cabinet Office 2015, paras.57 and 59).

Some of the Committee's recommendations about the discretionary disqualification provisions resulted in modifications to the wording of the Bill,⁵⁷ and some have been addressed in a policy paper published by the Charity Commission (2015). For example, the Commission policy paper states:

When considering an overseas conviction the commission would take account of any concerns raised about any court or other legal processes, their compliance with right to a fair trial (including evidence submitted) and whether the standards of evidence and justice would not be accepted in a UK or European court. (Charity Commission 2015, p.3).

These are clear examples where my evidence appears to have had a direct impact on the final Act. We cannot be sure that the Committee would not have come to the same conclusion without hearing my evidence. However reference by the Committee to the evidence and then

changes to the wording from the draft Bill to the final version, suggest to me that this is the case, and that the existence of the evidence helped the Committee to strengthen its argument

One important observation on the impact of my evidence (as compared to that of my colleague, Gareth Morgan) is that it appears that there is a greater chance of influence – at least upon the Committee - if oral evidence is preceded by the submission of written evidence. I did not submit a written paper in advance of appearing before the Committee in person which meant that I only had the chance in that session to respond to the questions that were asked, rather than to make any other important points. Members of the Committee had read Gareth Morgan's written evidence in advance of the oral session and specifically engaged with its contents in their questions to him.⁵⁸ This allowed him to influence the content of those questions. His written evidence is then referred to on ten occasions in the Committee Report, whereas my oral evidence is referred to on four occasions.⁵⁹

As a further observation, it would be interesting to know more about the process of how experts are chosen to give oral evidence. It is becoming more common for parliamentary scrutiny committees to invite academics to become involved in this way. Sometimes this is as a result of academics having submitted written reports in advance of Committee hearings,⁶⁰ but with the Draft Protection of Charities Bill, this was not the case. Both of us were contacted soon after the Committee was formed without us having approached the Committee.

The presence of many who appeared before the Committee (e.g. the Charity Commission, NAO, HMRC) is easily explainable. The reason for the absence of others is not as obvious. For example, Lord Phillips of Sudbury, who submitted written evidence which was later referred to in the Committee Report,⁶¹ told a journalist that he was 'mildly miffed' at not having been called to give oral evidence to the Committee, given his experience in charity law (Third Sector 2015). A life peer, Andrew Phillips is a long term practitioner of charity law who is described as 'one of the great names and leading lights in the sector' (Chambers, 2011). He featured heavily in the parliamentary debates during the passage of the Charities Act 2006.

Conclusions – Is this evidence of the impact of research?

Whilst we have highlighted where the Report of the Committee and further statements by its chairman referred to our evidence, which may then have had some impact on the final legislation, we cannot at this stage draw any conclusions on the impact of the 2016 Act in practice. Moreover, of necessity, we cannot offer an objective assessment of a process in

which we were participants with fundamental interests in the issues being examined by the Committee.

However, as evidenced above, it seems that there are some clear instances where points we made, especially from the evidence of Debra Morris, seem to have affected the wording of the (real) Bill presented to Parliament which were accepted and which became law in the 2016 Act. In other instances it seems that the Committee's emphasis on points we made – such as the arguments from Gareth Morgan regarding exempt and excepted charities which he had initially raised in the written evidence he submitted in advance – has been sufficient to prompt responses from the Government, even if they are not taken forward in the final Act. We were given a unique opportunity to engage in debate with law makers about the regulation of charities. Despite being given quite specific outline questions to consider in advance of the oral session, the actual discussion became a rather wide-ranging and broad debate, which was not necessarily linked to the narrow provisions in the Bill. For example, two of the questions that we were asked could be described as 'moral maze' style questions which allowed us to discuss the general difficulties for charities working in war zones and how to raise confidence in the charity sector and its regulator.

So we conclude that although our impact was modest, the input of our academic research has led to some limited strengthening of charity regulation in England and Wales. There are, of course, many other ways in which research findings can influence the development of charity regulation, ranging from conventional responses by academics to Government consultations (which both of us have undertaken on other issues) to direct lobbying of ministers. We could also have chosen to engage more actively at subsequent stages, for example by seeking to persuade peers or MPs to table amendments to the (real) Bill on issues where the Government had not fully accepted the recommendations of the Joint Committee. But once academics become lobbyists it could be argued that academic independence is compromised. Our only subsequent involvement was Gareth Morgan's submission to the Public Bill Committee as noted above.

This paper has only explored one specific case of the application of academic research in the development of charity legislation. But, by investigating the way in which academic evidence has fed into the conclusions of a Parliamentary Committee involved in the pre-legislative scrutiny of charity regulation, we offer some findings which we suggest are useful in understanding the processes involved.

When a Parliamentary Committee specifically seeks to examine academic witnesses, drawing on their research experience in relation to a specific Bill, after which the Government is

required to respond formally to the Committee's recommendations, and a draft Bill subsequently becomes an Act, the impact trail can be followed very closely.

Notes

¹ Exceptions to this include at least one piece of work linked to each author, in particular: (a) work undertaken on charity mergers within the Charity Law & Policy Unit at Liverpool University (Morris 2001) which clearly links into the provisions on merger in the Charities Act 2006 (see now Charities Act 2011, Part 16 (ss.305-311)); and (b) work undertaken at Sheffield Hallam University (Morgan 2011) on the framework for scrutiny of charities accounts which led to extension of the independent examination regime to include charitable companies (powers in s.77 of the Charities Act 2006 and s.1175 of the Companies Act 2006 now implemented in s.145 of the Charities Act 2011).

² Although the Bill was legislation of the UK Parliament at Westminster, it was specific to England and Wales and it was therefore considered under the scheme known as 'English Votes for English Laws'. This meant that Members of Parliament from Scotland and Northern Ireland were unable to vote at a key final stage in the Commons. It was the first time an entire Bill had been subject to this process which prompted considerable debate (House of Commons Hansard 26 Jan 2016 cols 226-230).

³ The regulation of charity tax reliefs is handled by HMRC under the various Taxes Acts, not by the Charity Commission.

⁴ There are currently over 164,000 registered charities with a combined annual income of £61.4bn (Cabinet Office 2014, foreword).

⁵ By the House of Commons on 6 November 2014 and by the House of Lords on 10 November 2014. There was a key precedent for publishing charity legislation initially as a draft bill for pre-legislative scrutiny – this had happened in 2004 with the draft Charities Bill which eventually led to enactment as the Charities Act 2006 (Milburn 2004).

⁶ Apart from ourselves, those invited to give oral evidence were representatives from: the Office for Civil Society, the Charity Commission, the National Audit Office, the general charity sector; specific elements of the charity sector, charity law practitioners, other regulators, the Independent Reviewer of Terrorism Legislation, the Police, the National Crime Agency and HMRC.

⁷ Joint Committee on the Draft Protection of Charities Bill – Report, HL Paper 108/HC 813 (25 February 2015) www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/108.pdf p.5 para.2 (hereafter *DPOCB Report*).

⁸ Draft Protection of Charities Bill - Evidence Volume, pp.300-306. www.parliament.uk/documents/joint-committees/draft-protection-of-charities/evidence-volume-protection-of-charities.pdf (hereafter *DPOCB Evidence Volume*).

⁹ Ibid. pp.307-323 (Questions 107-151).

¹⁰ Ibid. pp.324-330.

¹¹ The publications we specifically cited were Morgan (2009) and Morris (2010).

¹² DPOCB Report . pp.21, 24, 25, 34, 35, 43, 44, 49, 52, 63, 64, 67, 69, 74, 75. There are numerous other occasions where our views are referred to but are not directly attributed to us. Sometimes these are references to 'a number of' or 'many' witnesses or similar phrasing, and on other occasions, reference is made to another witness whose views correspond with our own evidence.

¹³ Ibid.

¹⁴ DPOCB Report pp.89-90 Appendix 2.

¹⁵ DPOCB Evidence Volume p.300 para.2.

¹⁶ Charities Act 2011, s.30(2).

¹⁷ DPOCB Evidence Volume p.308 Q107.

¹⁸ Ibid. pp.308-309 Q109-Q110.

¹⁹ DPOCB Report, pp.20-22, paras.38-44.

²⁰ Ibid., para.44.

²¹ DPOCB Report, p.25 para.55.

²² Ibid., p.34 para.89.

²³ Ibid., p.43 para.134, p.49 para.167 & p.74 para.276.

²⁴ DPOCB Evidence Volume p.305 comment on clause 8 of the draft Bill.

²⁵ DPOCB Evidence Volume p.318 Q139.

²⁶ DPOCB Report, p.52 para.178.

²⁷ Now Charities (Protection and Social Investment) Act 2016, s.10.

²⁸ DPOCB Evidence Volume p.305 & p.321 Q146.

²⁹ DPOCB Report, p.63 para.219.

³⁰ DPOCB Report, p.63 paras.221-222

³¹ Now Charities (Protection and Social Investment) Act 2016, s.16.

³² Charities Act 2006, s.73.

³³ DPOCB Report p.75 para.281.

³⁴ House of Commons Public Bill Committee ‘Have your say on the Charities (Protection and Social Investment) Bill’ (News announcement 3 Dec 2015) www.parliament.uk/business/news/2015/december/have-your-say-on-the-charities-protection-and-social-investment-bill/

³⁵ House of Commons Public Bill Committee - Charities (Protection and Social Investment) Bill [Lords] Committee: Written Evidence (London: The Stationery Office) pp.21-23
www.publications.parliament.uk/pa/cm201516/cmpublic/charities/memo/charitiesconsolidated.pdf

³⁶ Charities (Protection and Social Investment) Bill, clause 9 as amended on Report stage (Lords).

³⁷ Now Charities (Protection and Social Investment) Act 2016, s.13.

³⁸ See n.35.

³⁹ It should be noted that changes to the regime of excepted and exempt charities can be made by the Minister by means of secondary legislation made under s.23 & 32 of the Charities Act 2011. So the omission of any specific provisions on this in the 2016 Act does not mean that the issue is lost.

⁴⁰ DPOCB Evidence Volume, p.311 (Q116).

⁴¹ DPOCB Report p.26 para.62.

⁴² DPOCB Report p.28 para.67.

⁴³ DPOCB Report p.16 para.24.

⁴⁴ DPOCB Report p.24 para.51.

⁴⁵ Now Charities (Protection and Social Investment) Act 2016, s.10.

⁴⁶ DPOCB Report p.69 para.246.

⁴⁷ DPOCB Evidence Volume, p.312 (Questions 117).

⁴⁸ DPOCB Evidence Volume pp.328-330.

⁴⁹ DPOCB Evidence Volume, p.320 (Questions 144).

⁵⁰ DPOCB Report p.76 para.284.

⁵¹ DPOCB Evidence Volume, p.305; also restated in evidence to the Public Bill Committee, see n.35.

⁵² DPOCB Report p.37 para.104.

⁵³ Now Charities (Protection and Social Investment) Act 2016, s.10.

⁵⁴ DPOCB Report p.64 para.227.

⁵⁵ DPOCB Report p.66 para.234.

⁵⁶ DPOCB Report p.67 para.239 and p.68 para.241.

⁵⁷ See now Charities (Protection and Social Investment) Act 2016, s.10. For example, section 10 now specifies that the person must have been cautioned for a disqualifying offence ‘against a charity or involving the administration of a charity’.

⁵⁸ See e.g. DPOCB Evidence Volume, pp.312-313 (Questions 120-121).

⁵⁹ See above at n.12. Gareth Morgan’s oral evidence is also referred to three times.

⁶⁰ See e.g. House of Lords European Union Committee, 12th Report of Session 2014–15, ‘The Review of the Balance of Competences between the UK and the EU’ 25 March 2015, London: The Stationery Office Limited, HL Paper 140 which refers heavily to evidence provided by colleagues from the University of Liverpool.

⁶¹ DPOCB Report p.27 para.63.

References

Cabinet Office (2013a). *Government Responses to: 1) The Public Administration Select Committee's Third Report of 2013-14: The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006 2) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities*, Cm 8700, September 2013 available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/237077/Response-charities-legal-framework.pdf

Cabinet Office (2013b). *Consultation on extending the Charity Commission's Powers to Tackle Abuse in Charities* (December 2013) available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/263248/Consultation-on-Extending-the-Charity-Commissions-powers_4-December.pdf

Cabinet Office (2014). *Draft Protection of Charities Bill – Presented to Parliament by the Minister for the Cabinet Office* (Cm 8954) www.gov.uk/government/publications/draft-protection-of-charities-bill

Cabinet Office (2015). *Government response to the Joint Committee on the Draft Protection of Charities Bill - Presented to Parliament by the Minister for the Cabinet Office* (Cm 9056) www.gov.uk/government/uploads/system/uploads/attachment_data/file/418029/government_response_to_the_joint_committee_on_the_draft_protection_of_charities_bill_Cm_9056_print.pdf

Chambers (2011) *Chambers Guide to the UK Legal Profession 2012* (London: Chambers & Partners Publishing)

Charity Commission (2014). *Commission Chairman calls for adequate funding and stronger powers*, Press release 10 April 2014 available at: www.gov.uk/government/news/commission-chairman-calls-for-adequate-funding-and-stronger-powers

Charity Commission (2015). *Proposed disqualification power*, May 2015 available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/430644/proposed_disqualification_power.pdf

Etherington, S.; Leigh of Hurley, Lord; Pitkeathley, Baroness and Wallace of Saltire, Lord (2015). *Regulating Fundraising for the Future* (London: NCVO)

www.ncvo.org.uk/images/documents/policy_and_research/giving_and_philanthropy/fundraising-review-report-2015.pdf

Extremism Task Force (2013). *HM Government, Tackling extremism in the UK*, December 2013 available at:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/263181/ETF_FINAL.pdf

Garton, J. (2009). *The Regulation of Organised Civil Society* (Oxford: Hart Publishing)

Guardian (2015). *If the public is to support charities, they must be well regulated* (The Guardian 25 February 2015) www.theguardian.com/voluntary-sector-network/2015/feb/25/if-the-public-is-to-support-charities-they-must-be-well-regulated.

Harding, M., O'Connell, A. and Stewart, M. (eds) (2014). *Not for Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press).

Hillar, A. (2015). *Government responds to report of draft bill committee chaired by Lord Hope* (Third Sector 27 March 2015) www.thirdsector.co.uk/government-responds-report-draft-bill-committee-chaired-lord-hope/governance/article/1340621

Hodgson, Lord R. (2012). *Trusted and independent: giving charity back to charities - review of the Charities Act 2006* (London: Cabinet Office) available at: www.gov.uk/government/consultations/charities-act-2006-review

Home Affairs Committee (2014). *Counter-terrorism*, 9 May 2014, HC 231 2013-14 available at: www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf

Joint Committee on the Draft Protection of Charities Bill (2015). *Report* (HL Paper 108/HC 813) available at: www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/108.pdf

Draft Protection of Charities Bill (2015). *Evidence Volume* available at: www.parliament.uk/documents/joint-committees/draft-protection-of-charities/evidence-volume-protection-of-charities.pdf

Law Commission (2014). *Social Investment by Charities. The Law Commission's Recommendations* (September 2014) at:
http://lawcommission.justice.gov.uk/docs/cp216_charities_social_investment_recommendations.pdf

McGregor-Lowndes, M. and O'Halloran, K. (eds) (2010). *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham: Edward Elgar Publishing).

Milburn, A. (Chair), 2004. *House of Lords/House of Commons Joint Committee on the Draft Charities Bill* Report issued 30 September 2004 3 vols (HL Paper 167-I, HC 660-I) (Norwich: TSO).

Morgan, G G (2009). *Churches and Charity Regulation: 1993-2009* (Public Money and Management 29(6) 355-361).

Morgan, G.G. (2011). *The Role of Independent Examiners in the Accountability of UK Charities* Public Money & Management 31(3), May 2011, 183-192.

Morris, D. (2001). *Legal Issues in Charity Mergers* (Liverpool: Charity Law Unit).

Morris, D. (2010). *The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a Case of Davies Versus Goliath* (Civil Justice Quarterly 89-108).

National Audit Office (2013a). *The Regulatory Effectiveness of the Charity Commission*, HC 813, Session 2013–14 (December 2013) (London: NAO) available at www.nao.org.uk/wp-content/uploads/2013/11/10297-001-Charity-Commission-Book.pdf

National Audit Office (2013b). Report by the Comptroller and Auditor General, *Charity Commission The Cup Trust*, 4 December 2013, HC 814 2013-14 (London: NAO) available at: www.nao.org.uk/wp-content/uploads/2013/11/10299-001-Cup-Trust-Book1.pdf

PAC (House of Commons Committee of Public Accounts) (2013). *Charity Commission: the Cup Trust and tax avoidance, 4 June 2013, HC 138 [Incorporating HC 1027 of Session 2012-13]* available at:
www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicacc/138/138.pdf

PAC (House of Commons Committee of Public Accounts) (2014) *The Charity Commission (Forty-second Report of Session 2013-14)* HC 792 (February 2014) available at www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/792/792.pdf

PASC (House of Commons Public Administration Select Committee) (2013). *The role of the Charity Commission and “public benefit”: Postlegislative scrutiny of the Charities Act 2006* (Third Report of Session 2013–14, May 2013) HC 76 available at www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/76.pdf

Phillips, S. and Smith, S.R. (eds) (2011). *Governance and Regulation in the Third Sector: International Perspectives* (Abingdon: Routledge)

REF (2014). *Research Excellence Framework 2014: The results* available at: <http://www.ref.ac.uk/media/ref/content/pub/REF%2001%202014%20-%20full%20document.pdf>

Third Sector (2015). *Charity Commission needs more lawyers, not more powers, Lord Phillips says* (Third Sector, 16 January 2015) www.thirdsector.co.uk/charity-commission-needs-lawyers-not-powers-lord-phillips-says/governance/article/1329543