

Written evidence submitted by the Directory of Social Change

DSC evidence submission to the House of Commons DCMS Select Committee enquiry

The Charity Commission's performance

Executive Summary

In this document we present and analyse:

- DSC's historical and current views about the Charity Commission, and its importance for the charity sector and wider society;
- How the Commission's current top-level strategy and public messaging is deeply flawed and too often not based on the law or robust evidence;
- A problematic shift in the Commission's understanding and application of its role vis-à-vis the public, the charity sector, and Parliament;
- The damage the current approach may be doing to the charity sector overall, and in particular to voluntary trusteeship, without which operating charities is impossible;
- Operational problems at the Commission and a growing sense in the charity sector that the delivery of its core functions and day-to-day responsibilities are deteriorating;
- 10 questions we suggest that the Committee investigate or ask of the Charity Commission's leadership.
- References to further reading and supporting documents.

This submission has been jointly composed by DSC's Chief Executive Debra Allcock Tyler and Director of Policy and Research Jay Kennedy, together with DSC's Policy Trustee, Dr Andrew Purkis, who has also been Chair or Deputy Chair of seven charities and is a former Board Member of the Charity Commission (2006-2010).

1 The Directory of Social Change and the Charity Commission

- 1.1 The Directory of Social Change has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society. Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide. DSC's CEO co-founded the Small Charities Coalition and DSC was the incubator for the first 5 years of its work, hosting it in our premises and providing back office support.
- 1.2 DSC is deliberately not a membership body and we are primarily self-financing. We believe that there are sufficient representative bodies in the sector doing good work representing their members. We believe our strength lies in the fact that we do not need to please members or funders and our public commentary and the policy positions we take are based on clear principles, are independent, and are informed by the contact we have with the thousands of charities we engage with every year.
- 1.3 DSC is a strong supporter of the role of the Charity Commission in upholding the public interest in a thriving charitable sector and believes the Commission has a vital role to play in the health and impact of charities. The Charity Commission's staff, for the most part, carry out excellent and important work every day, often with little public recognition of the importance of their work to wider civil society.
- 1.4 DSC has always worked very closely with the Commission in order to access and analyse data to facilitate our research work and to understand the latest regulatory developments so we can inform charity staff and trustees via our many courses, events and publications. However, over the past several years our attempts to engage with the Commission's leadership at a strategic level, both publicly and privately, have been unsuccessful. We do not believe this situation is unique to us.
- 1.5 Notwithstanding this, DSC will continue to engage constructively in Charity Commission policy consultations and will continue to advocate for more resources for the Charity Commission from the Treasury, to help them perform their role effectively, because it is so important to the charity sector. A well-run Charity Commission supports well-run charities, which support well-run society.
- 1.6 In this document we outline the challenges we, and the thousands of charities we engage with, have experienced with the Commission's current approach and

performance, particularly about the current messaging and approach of the Commission's leadership (as expressed principally by the Chair and Chief Executive), and the quality and consistency of the regulator's day-to-day services and activities.

2 The Charity Commission's current strategy, messaging and leadership

2.1 The Commission claimed, in the Foreword to *Trust in Charities 2018* (see references section below) that 'It is incumbent on us as regulator to represent the public'. We cannot find any evidence or source as to why the Commission has assumed this role. It is not written into law, nor, so far as we are aware, is it a specific role set by Parliament as part of its scrutiny of the Commission. We believe that this position fundamentally misunderstands the Commission's role and the source of its authority. The Commission is a Non-Departmental Public Body, reporting to Parliament. Its Board is unelected by the public and therefore cannot claim legitimacy as representative of the public. The role of the Commission is to regulate according to the laws and mandates that Parliament has set for it.

2.2 Further, whilst the Commission may feel that opinion polls and focus groups can inform it about the context in which it operates, these cannot be a proxy for public representation. Parliament, not regulators, represent the public; the Commission derives its authority from Parliament and the law. The Commission therefore appears to be annexing the work of Parliament, without permission or legitimacy.

2.3 Starting from this flawed premise, it appears from the public statements by the Chair and the CEO, and the latest iteration of the Commission's strategy that the Commission has developed a theory of what 'the public' in general expect of 'charity'. There are a number of issues with this:

2.3.1 They do not define charity as distinct from charities – it is the role of the regulator to regulate charities not 'charity' which is a concept and open to interpretation by individuals as they see fit.

2.3.2 This lack of clarity leads them to regularly repeat that charities in general must 'change' or 'behave' in certain ways – frequently without specifying exactly what this means – in order to meet the expectations that the Commission had decided the public want. This wrongly assumes that over 168,000 charities are a homogenous group and that public views about 'charity', 'change', and 'behaviour' are uniform.

2.4 This approach has led to the Commission in effect appointing itself as the interpreter and arbiter of what the ‘the public’s’ expectations of charities are. This has meant that in recent years the overwhelming emphasis in the Commission’s public statements is not on the requirements of charity law, or demonstrating public benefit as the Charities Act requires, nor on the things that are unique to registered charities, but on this nebulous and untested theory, which is not based in law or precedent.

2.5 Some examples from recent statements to illustrate include:

*“Charities should be **distinct** from other types of organisations in their **attitude** and **behaviour**, in their motivations and methods. The public rightly expects this.”*

(Charity Commission Press Release on the investigation into Save the Children, 5 March 2020, quoting Chief Executive Helen Stephenson).

*“Ultimately, charities are the vehicles, the bodies. **Charity is the spirit** that should guide them and emanate from them, whatever their individual purposes and activities....It is that **spirit that the public expect** to recognise when they look at charities...”* (Charity Commission Press Release, 12 December 2019, quoting Chair Baroness Tina Stowell).

*“When people come into contact with charities...this is what they are looking and checking for: leaders demonstrating through their actions that they share **a common understanding of what charity means**”* (speech by Baroness Stowell)

2.6 It may be true, and often is true, that charities are distinct from other organisations and types of endeavour, but those distinctive characteristics are neither universal, unique to charities as a legal form, or a robust basis for regulatory decision-making.

2.7 Finally, it is a source of great and continuing concern that the Commission’s Board does not contain people with extensive experience of the sector that they regulate, nor broadly speaking, of the very law and regulation which the Charity Commission is charged with upholding. This is a serious problem which amplifies rather than corrects the current leadership’s flawed strategy and misinterpretations about its remit and role. An equivalent situation would be the Financial Conduct Authority not containing anyone with experience of finance, accounting, economics or markets – which would be clearly unacceptable.

3 Problems with the Charity Commission's current theory and approach

- 3.1 The Commission's own research does not support the proposition that the public expects charities to have higher standards of general behaviour or practice than other sectors doing similar work. More worryingly, the Commission's public messaging around the research often goes beyond the findings into polemical, personal, or unsubstantiated conclusions and views about what charities should and should not do, or what the public think or expect. Often the narrative treats all charities as if they are the same, when in fact they are inherently different and hugely diverse.
- 3.2 The level of public consciousness about the Charity Commission is also low, to say nothing of how informed the general public is about what its powers or legal role properly are. It is therefore worrying that the Commission has based its current strategy on what the public supposedly thinks about charities; this is likely to lead to poor decision-making by the Commission's leadership and mistakes in determining the appropriate priorities and deployment of its limited resources.
- 3.3 As illustrated above, the Commission's current narrative frames the charity sector as unique and distinct from other sectors in behaviour and values. Concepts like 'selflessness', 'altruism' and 'respect for others' may very well apply to charity (and often do) but are equally valid in other sectors. For example, they are enshrined in the Nolan Principles of Public Life which apply to almost the entire public services sector. They are also manifest in the majority of civil society organisations that are not registered charities. They, and more broadly the 'spirit of charity', are seen in the love of families, friends and neighbours, and are absolutely not confined to registered charities in particular. We believe that it is unhelpful and misleading to suggest otherwise.
- 3.4 The sector relies on some 700,000 voluntary trustees to run charities and support vulnerable causes and communities. Without trustees the sector cannot function effectively. They deserve respect, fair and judicious treatment, clear guidance, and accessible support and advice. Sadly, the Commission's statements too often come across as utterly condescending to trustees – who are also a significant slice of 'the public' which gives time and effort, and risks legal liability for the causes they serve. In charity law it is trustees, not the Charity Commission, who decide what a charity's priorities, values and behaviours should be, to the charity's long-term impact.
- 3.5 The Commission's current narrative is also characterised by extrapolating from specific (usually negative) examples to 'all charities'; an automatic assumption in press statements of wrong-doing rather than withholding judgment until the facts are fully

investigated; and a tendency to conclude that trustees 'should have known better' in hindsight, when decisions made at the time might have been difficult or not clear-cut.

3.6 The current direction of travel heaps ever more burdens and unrealistic expectations on to charity trustees, and risks making trusteeship increasingly unappealing. It also constitutes a considerable power grab over the responsibilities and decisions that belong to trustees. If left unchecked, the consequences for the public and the state could be profound; it is already challenging to find trustees as it is.

3.7 Fundamental requirements of regulation in any sector are precision and clarity, so that the regulated know what is expected of them. But the Commission's current language around 'charity' is vague and unhelpful. In claiming to be representatives of the public and issuing prescriptions for how charities should collectively behave, the Commission is moving away from its core expertise and authority. These are: a combination of registration and reporting as charities, observance of charity law, independence, voluntary trusteeship, typical (not universal) use of charitable funds, and the public benefit requirement. The Commission should focus on its legally constituted areas of expertise, legitimacy and authority.

3.8 Part of the Commission's current approach seems to be to publicly 'call out' bad behaviour, in order to influence other charities but also to show the public that the Commission understands and champions their expectations. This can be necessary and appropriate, but has sometimes been applied at the expense of fairness and balance – most notably in the case of the investigation into Oxfam GB. Separate analyses by both Andrew Hind, former Chief Executive of the Commission, and Andrew Purkis as a former Board member, concluded that the messages being broadcast by the leadership of the Commission about the case were unjust and clearly unsupported by the actual findings of the investigation itself (see references below for more detail).

3.9 Parliament set out a very clear mandate for the Commission in the 2011 Charities Act. However, the Commission's 'Statement of Strategic Intent' only mentions the existence of the objectives and functions set out in the Act, without even saying what they are, and invents a series of different objectives. This makes it difficult to track performance against the objectives set by Parliament. For example, there is no mention of the Charitable Resources Objective (to promote the effective use of charitable resources) nor aspects of the Accountability Objective (accountability to beneficiaries as well as donors and the general public), nor to the Public Benefit Objective. Public Benefit has disappeared from the Charity Commission's narrative, despite its great importance as an integral part of the duties of trustees and registered charities. In our view the Charity

Commission's current interpretation of its objectives set out in the Charities Act 2011 are overly focussed on the Public Trust and Confidence objective at the expense of the other four objectives.

3.10 Finally, it is undeniably part of the Commission's mandate to interpret and encourage good practice in charities relating to the objectives and functions defined by Parliament. This must be independent of the charity sector, but based on experience and understanding of the sector of it. The Charity Commission must be willing to engage constructively with the sector it regulates to enable charity trustees to play their role effectively.

4 Operational performance of the Charity Commission

4.1 In addition to the problems in the top-level strategy and messaging from the Charity Commission's leadership, there are growing concerns in the charity sector about the regulator's ability to effectively deliver its day-to-day responsibilities. In our view, the two problems are connected; a misunderstanding of the Commission's responsibilities has been accompanied by a lack of focus and standards in delivering the Commission's basic functions.

4.2 It should be noted that over the past year at least four experienced senior executives at the Charity Commission have left the regulator. These include the Deputy Chief Executive and Head of Operations, the Director of Strategy, Policy and Communications, the Director of Investigations, Monitoring and Enforcement, and the Head of Guidance and Practice. This represents a substantial loss of expertise at the top level of the Commission and there is no clear sense of how and when these roles will be replaced.

4.3 At the operational level, DSC's trainers and staff report that they are increasingly fielding queries and frustrations about the Commission's ability to deliver their core statutory obligations in a timely and effective manner. We believe this is in large part due to the under-resourcing of the Commission but also potentially a lack of focus and clear leadership on the right areas. We explore some questions we think the regulator needs to answer in the following section.

5. Suggested questions for the DCMS Committee to explore

5.1 On what basis does the Commission determine what the 'public expects' and what is in the public's best interest?

- 5.2 What level of support and trust does the charitable sector have in the Commission?
Does this matter to the Commission, and how would they know?
- 5.3 Does the Charity Commission believe it needs the support of charities in order to do effectively carry out its functions?
- 5.4 On average, how long does it currently take to register a new charity? How does this compare to past performance?
- 5.5 How is the Commission managing the serious incident reporting process to ensure it is not unduly burdensome for charities?
- 5.6 How does the Commission triage the reporting of serious incidents to determine which are the highest priority, so they can be dealt with effectively and appropriately?
- 5.7 How does the Commission communicate with charities that have reported serious incidents, and does it do so in a timely manner? What are the service standards?
- 5.8 Does the Commission give a higher priority to serious incidents or other cases that gain media coverage? If so, why? How is this decided?
- 5.9 How is the Commission ensuring that it is delivering on the full range of its duties (for example the Charitable Resources Objective) as laid out in the legislation and in accordance with its powers?
- 5.10 What data does the Commission track about its own operational performance, how does current data compare to previous trends, where is it published, and how can the public and charities evaluate this?

6. References

Trust in Charities, 2018: Charity Commission research into public trust and confidence in charities. Accessible at www.gov.uk

What does the Charity Commission's research into public expectations actually show?
Blog by Andrew Purkis, published at <http://andrewpurkis.wordpress.com>, 8 January 2020

If you want to make statements about "charities" stick to what they have in common

Blog by Andrew Purkis, published at <http://andrewpurkis.wordpress.com>, 29 November 2018

The Charity Commission's mandate

Blog by Andrew Purkis, published at <http://andrewpurkis.wordpress.com>, 28 January 2020

Andrew Hind: An alternative perspective to the regulator's inquiry report on Oxfam

Article in Civil Society Media, 18 September 2019

Andrew Purkis: Let's not draw the wrong lessons from Oxfam

Article in Civil Society Media, 19 June 2019

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