The Charities White Paper and the Regulation of Charities in England and Wales

NEVILLE McCLURE
Student-at-Law, Ontario

I Introduction

This paper is a descriptive overview of the recent English White Paper *Charities: A Framework for the Future.*[1] While the current system of charities regulation in England and Wales differs considerably from that of most other jurisdictions, an examination of the English experience may be of value at the present time when reforms in this area are being discussed in Ontario. The White Paper raises questions about the attitude of governments towards charity and government-charity relations which merit consideration in any jurisdiction where there is interest in creating a regulatory environment conducive to the growth and health of the charitable sector. Although it has been almost two years since the White Paper was published, its implications for the supervision of charities and the attitudes it displays towards the regulation (or "deregulation")[2] of charities have seldom been discussed in the charities law literature.

II Background to the White Paper

i) The current system of charity regulation in England and Wales

While some minor changes were introduced in the *Charities Act 1985*,[3] the extensive changes set out in the White Paper amount to the first major review of English charities law since the passing of the *Charities Act 1960*,[4] the statute which established the existing regulatory regime for charities in England and Wales.

Charities regulation has a long history in England.[5] The origins of the modern Charity Commission may be traced to the *Charitable Trusts Act 1853*,[6] a statute which empowered the Crown to appoint four Commissioners, one of whom held office during the pleasure of the Crown and three of whom held office during good behaviour. Two of the three Commissioners holding office during good behaviour had to be barristers of over 12 years' standing, and one Commissioner was by custom a Member of Parliament. Today there are only three Charity Commissioners, though the Secretary of State may, with Treasury approval, appoint two additional Commissioners who need not have legal qualifications. The Commissioners continue to be deemed civil servants "for all purposes".

A staff of approximately 330 persons is divided between the Commission's London and Liverpool offices and is organized into a number of divisions with different responsibilities. The registrations division is responsible for routine preliminary work relating to applications for charitable status. Most of this work is performed by non-legally trained staff members, though applications which cannot be processed using precedents will be referred to lawyers.[7] There are five charities divisions responsible for providing advice and general assistance to registered charities. This advice includes preparing *cy-près* schemes and informing charity trustees as to their powers and duties. The consents division deals with applications made to the Commissioners to dispose of property under s.29 of the *Charities Act 1960*. The legal consultant's division provides legal advice to the Commissioners. The investigations division is responsible for investigating complaints made against charities or their trustees or officers and for following up information suggesting trustee misbehaviour which is revealed when accounts are scrutinized or information is provided to the Commission by Inland Revenue. There is also an Official Custodian's division, the largest in the Commission, which holds investments for almost 40,000 charities.

The main functions of the Commissioners are set out in broad terms in s.1 of the *Charities Act 1960*[8] which specifies that the Commissioners:

> ... have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity, and by investigating and checking abuses.

Section 1(4) specifies that it is the general object of the Commissioners:

> ... to act in the case of any charity (unless it be a matter of altering its purposes) so as to best promote and make effective the work of the charity in meeting the needs designated by its trusts; but the Commissioners shall not themselves have power to act in the administration of a charity.

The balance of the *Act* sets out provisions intended to give effect to the broad aims set out in s.1 of the *Act*. The specific duties of the Commissioners include:

a) Maintaining a register of charities;

b) Receiving and auditing accounts from charities and making them available for public inspection;

c) Exercising jurisdiction and powers concurrent with the High Court with respect to making schemes and orders affecting charitable property and appointing or removing charity trustees;

d) Giving charity trustees formal advice and authorizing dealings with charity property;

e) Consenting to land transactions;

f) Providing an Official Custodian of land and investment for charities;

g) Investigating abuses;

h) Taking action to protect charities.

a) The register of charities

With the exception of exempt charities[9] and charities with annual incomes of less than 15 pounds, all charities are required to register with the Charity Commission. The central registry maintained by the Commission is open to the public and contains details about the objects of the charity, its estimated income, and the names and addresses of its correspondents. A copy of the governing instrument of the charity is also available for inspection. Registration does not indicate that the Charity Commission endorses the purposes of the charity, but merely that the charity met minimum conditions for registration and that the organization is charitable at law. Registered status is valuable to charities for fund-raising purposes as registration is conclusive proof that an organization is charitable at law.

b) Receiving and auditing accounts

Any registered charity must submit its accounts on request. With the exception of charities specially excepted from this obligation, charities having permanent endowments are required to submit their accounts annually. These accounts are maintained in the register of charities and may be inspected by members of the public.

c) Exercising jurisdiction and powers concurrent with the High Court

Under the *Charities Act 1960*, the Commission has jurisdiction and powers concurrent with the High Court with respect to making schemes and orders affecting charitable property and may appoint or remove charity trustees. Trustees may apply to the Commission to have these powers exercised on behalf of their charities, or they may be exercised by the Commission on its own initiative under its mandate to protect charitable property from misapplication.

d) Giving charity trustees formal advice and authorizing dealings with charities' property

An extremely important function of the Commission involves responding to trustees' enquiries regarding actions they propose to take on behalf of the charitable organizations for which they are responsible.

e) Consenting to land transactions

Section 29 of the *Charities Act 1960* requires charity trustees to obtain the consent of the Commission prior to engaging in certain transactions involving the disposition of property forming part of the permanent endowment of a charity. Consent is required before such property may be mortgaged or used in any other manner as security for the repayment of money borrowed. In addition, if the land in question is located in England or Wales, it may not be sold, leased, "or otherwise disposed of" without the consent of the Commission.

f) Providing an Official Custodian of land and investment for charities

The Charity Commission is responsible for designating one of its officers to act as the Official Custodian for Charities, a corporation sole having perpetual succession. The principal function of the Official Custodian is to hold property in trust for charities for the purpose of ensuring its safe custody. The existence of an Official Custodian also makes it more administratively convenient for charities to change their trustees as it is not necessary to transfer trust property from retiring to new trustees because legal title to such property is vested in the Official Custodian.

The Official Custodian does not manage the property held and is not liable for any losses to the property unless such loss is occasioned by the wilful neglect or default of the Custodian or a person acting for him or her. Land, money, or securities may be transferred to the Custodian on the request of the administering trustees of a charity and may also be so transferred by the Charity Commission as a consequence of a scheme. The Official Custodian also buys and sells investments (in his or her name) for charities on the instruction of their trustees and informs trustees whenever investments held on their behalf become due for redemption, eligible for conversion, or carry a right which calls for a decision on their part. Cash balances are held when no instructions have been received from trustees.

g) Investigating abuses

An important function of the Charity Commission is to investigate abuses by charity trustees. The investigatory powers of the Commission (contained in s.6 and s.7 of the *Charities Act 1960*) are quite broad. Section 6 gives the Commission the general power to institute inquiries "with regard to charities or a particular class of charities, whether generally or for particular purposes". The Commissioners may conduct inquiries themselves, or appoint a person to conduct inquiries and report to them. At the inquiry, the Commissioners or their appointees may require any person whom they are investigating to furnish accounts or statements in writing with respect to any matter in question and to appear and give evidence or produce documents relating to any matter in question. Such testimony may be made before the Commission under oath or declaration. A person destroying or concealing documents is guilty of a

summary offence and subject to fine or imprisonment. When the Commission completes its inquiry, it may publish its findings or bring them to the attention of those who wish to make representations to the Commission regarding what action is to be taken.

Section 7 further expands the investigatory powers of the Commission by granting the Commissioners or their appointed officers the power to call for documents and search records and to keep any copy or extract furnished to them without charge. (Under Section 7 the power to call for documents and examine records is not related to a broader investigation.)

h) Taking action to protect charities

The Commission also has powers under s.20(1) of the *Charities Act 1960* to act for the protection of charities where, as a result of an inquiry conducted under s.6, the Commissioners are satisfied:

(a) that there has been in the administration of a charity any misconduct or mismanagement; and

(b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of any property coming to the charity.

Once these conditions have been met, the Commissioners may remove any charity trustee, officer or agent responsible for, or privy to, misconduct or mismanagement, or remove the property of the charity from the hands of the trustees by making an order transferring it to the custody of the Official Custodian. The Commission also has the power to freeze bank accounts and order any person holding money or securities for a charity not to part with it without the prior approval of the Commission and may restrict the nature and amount of payments which may be made in the administration of the charity, regardless of anything in the charity's trusts. The power to remove a trustee under these circumstances includes the power to suspend a trustee for a period no longer than three months pending consideration of removal. The Commissioners may also act on their own motion to remove or replace incompetent, unwilling, or absent trustees and, if necessary, add extra trustees.

ii) Criticisms of the current regime—the NAO, CPA and Woodfield Reports

In the last half of the 1980s, three reports—one by the National Audit Office (NAO),[10] one by the Committee of Public Accounts (CPA), and one by the Woodfield Committee—expressed the opinion that significant changes needed to be made to the way in which the Charity Commission fulfilled its mandate. The White Paper is informed by the findings of all three bodies, in particular by the Woodfield Report, which it adopts to a significant degree.

The NAO Report detailed the results of a survey of a sample of 300 registered charities conducted by the National Audit Office in 1987. It found that the

register of charities (a manual system) was poorly maintained and that there were serious deficiencies in enforcement by the Charity Commission of the requirements relating to the filing and scrutiny of accounts under the *Charities Act 1960*. Analysis of the allocation of Commission resources to various Commission duties revealed that the Commission was devoting most of its attention to quasi-judicial and advisory functions while few of its resources were being applied to monitoring and control. Of the 122 permanently endowed charities (required to submit annual accounts):

> ... only 23 (19 percent) had submitted any accounts within the last five years. Of the 162 non-permanently endowed charities examined only 87 (54 percent) had submitted accounts within the last five years. Only 9 percent of those not submitting had been sent reminders, and none had been approached for an explanation of their delay. Of the accounts supplied over the last five years, only 32 percent had been professionally audited and only 4 percent of the accounts submitted had been examined by the commission.[11]

The emphasis the Commission placed at the time on its advisory functions was remarkable. Of the 330 members of the Commission's staff at the time of the 1987 NAO survey, "only eight were employed on the examination of accounts and investigation of abuse, with another five shortly to be added". In part, this reflects the Commission's policy of focusing on prevention rather than subsequent investigation and control.

In the opinion of Sir Gordon Downey, the Comptroller and Auditor General responsible for preparing the NAO Report, these flaws in the monitoring procedures of the Charity Commission were linked to "disturbing evidence of growth in the extent of charity-related fraud and abuse,[12] including the finding that 22 per cent of the charities examined had administrative expenses of 60 per cent or more.[13] Under the circumstances the report concluded that more intensive scrutiny of charity expenditures is needed.[14]

The 1988 CPA Report on the Charity Commission involved further analysis and comment on the NAO's findings. The Committee expressed its concern with the poor state of the register and account-monitoring procedures, noting the lack of a convenient sanction to apply to charities failing to submit their accounts as required under statute. It expressed the opinion that the Commission should adopt a more active investigative role.

The most important of the three reports was the 1987 "Efficiency Scrutiny of the Supervision of Charities" (The Woodfield Report).[15] Jointly commissioned by the Home Secretary and the Economic Secretary of the Treasury in response to growing evidence of inefficiency and abuse in the charitable sector, it contained recommendations covering a number of issues relating to the duties and functions of the Charity Commissioners. The government accepted the

Woodfield Report in late 1988 and most of its recommendations were subsequently adopted by the drafters of the White Paper.

The Woodfield Report recommended that all charities be required to submit accounts annually, on a graded system depending on the size of their annual income, and that such submissions include a report and update on the particulars of the charity's trustees and designated correspondents. It further recommended that public knowledge of the activities of charities and public accountability be enhanced by requiring charities to make copies of accounts available to members of the public on payment of a suitable fee. The Committee suggested that the Commission should be able to deregister a charity as a penalty for failing to submit accounts and should require registration as a pre-condition for dealing with a registerable charity. Once again it was recommended that the charities register be computerized.

The Woodfield Committee also recommended that those convicted of offenses involving fraud or dishonesty, or previously removed as charity trustees by the Commission, should only be permitted to serve as charity trustees after receiving Commission approval. Among substantial changes to the s.20 powers of the Commission, the Report recommended that after inquiry had revealed mismanagement, misconduct, or a need to protect charity property, the Commission should be able to exercise its scheme-making powers without an application from the trustees, and should be able to wind up a charity and transfer its property to another charity. It was also recommended that the requirements of public notice preceding the exercise of these s.20 powers be repealed and that the power of the Commission to call for documents and to search records be expanded to permit it to require explanations.

The Committee echoed to some extent the Nathan Committee's recommendations that the composition of the Commission be broadened to include representatives from the charitable sector as well as expert lawyers and civil servants. It suggested that two additional Commissioners be added, that the Commission should engage in secondments of staff with other departments and, possibly, effect exchanges of staff with charitable organizations.

Additional suggestions included encouraging application of the *Charities Act 1985* by increasing its monetary limits and allowing the Commission to make schemes on its own initiative under certain circumstances. The Committee recognized the value of the "educational" aspect of the Commission's function, and made several recommendations designed to encourage it at low administrative cost—for example, by having the Commission prepare model governing instruments for use by people founding charities, and encouraging the production of educational materials. These steps would presumably permit the Charity Commission to follow the Committee's recommendations that the staff resources devoted to "consents" work be reduced. The Committee further recom-

mended that the consent to official land transactions required under s.29 of the *Charities Act 1960* should be dropped and replaced with streamlined statutory procedures for trustees to follow. Trustees would be able to purchase land as an investment without having to obtain an order of the Commissioners.

Other recommendations which merit mention include: divestiture of the Official Custodian for Charities, and a proposal that the Commission offset expenses and discourage frivolous applications by charging moderate fees for its services. The Committee also made a number of recommendations relating to fund-raising practices.[16]

III. Contents of the White Paper

While many of the Woodfield Report's recommendation on procedure and management were "already being put in hand" shortly after the report was accepted by the Government in late 1987,[17] the Committee's recommendations affecting the powers of the Commission require legislative intervention.[18] The White Paper, which was presented to Parliament by the Secretary of State for the Home Department in May of 1989, was intended "to translate the recommendations of the Woodfield Report into legislative proposals" in the form of a new *Charities Bill* sometime in 1990.[19] Although the government has been distracted by other developments, there is no indication that it has abandoned its effort to implement the proposals, and the major changes to the law of charities proposed in the White Paper should be regarded as pending.[20]

Though its drafters frequently deviate from the Woodfield Committee's suggestions, and also take the opportunity to deal with a number of other charities-related issues not addressed by the Woodfield Committee,[21] the real philosophy behind the White Paper emerges in paragraphs 1.18 through 1.22:

> 1.18 The Government's overall objective in approaching legislation for charities is to achieve a balance between on the one hand proper control by the Charity Commission and proper accountability by charities, and on the other the freedom and corresponding responsibilities of individual organizations to develop and do business. ...
>
> 1.19 The new legislation proposed will ... not be sufficient by itself. It will need to be matched by parallel improvements in the capacity of the charitable sector to regulate its own affairs ... there are encouraging signs that self-regulation is gathering pace and becoming more effective.

These policy goals are implemented through changes to the following:

a) The Register of Charities

The proposed reforms are designed to make the Register function as a means of providing "potential donors and other interested members of the public with access to basic information on the existence of registered charities, their

purposes and their administrative structure". The computerization of the Register is one practical proposal which is already being implemented.

Reforms to the registration system are linked to a requirement that the annual filing of accounts include an Information Return. As recommended by the Woodfield Committee, the White Paper suggests no penalties for failing to register. (After registration penalties for failure to submit an annual return come into effect.)

The White Paper also proposes to change the class of charities which are not bound by the registration requirement. It retains the exception for exempt charities,[22] and expands the class of charities falling within the exception in s.4(4)(c) by "requiring the registration of any charity with an income of over 1,000 pounds a year from whatever source".

Though there is no indication in the White Paper how many charities this would affect, the change would still leave a considerable number of charities outside the ambit of the registration requirement. According to a 1970 classification of charities according to income provided to the Expenditure Committee by the Charities Commission in 1986,[23] only 14 per cent of all registered charities had incomes over 1,000 pounds per year. The figure for charities founded after 1960 was substantially higher: 31 per cent of these charities had incomes in excess of 1,000 pounds. Taking into account the significant growth of the charitable sector since 1970,[24] the effect of inflation on charity incomes, and the continuing "squeeze out" of small charities, the precise number of charities which would remain unregistered is anyone's guess. It can only be said with certainty that the figure would be lower than the 100,000 charities the White Paper estimates are currently excluded from the requirement to file.

b) Charity Accounts

Under the present legislation, annual accounts are not required of charities without permanent endowments. Recognizing an accelerating movement towards non-permanently endowed charities, the White Paper proposes that, in future, all registered charities should be automatically required to submit an annual statement of account to the Commission; however it proposes a graded account-submission procedure requiring less rigourous accounting by small charities. While no specific formula is set out, the White Paper proposes that charities be grouped into three reporting categories: charities with an income (or receipts) of less than 5,000 pounds (small charities); charities with an income of between 5,000 pounds and 25,000 pounds (intermediate charities); and charities with an income of over 25,000 pounds (large charities).

The White Paper takes a more constructive approach to the problem of non-compliance than the Woodfield Committee proposals. Rather than removing the charity from the Register as Woodfield recommended, the charity's entry

in the Register would simply be marked to indicate that it had not submitted its annual accounts:

> Appropriate publicity would be given to these default markings. The marking, and its attendant publicity, would make it clear that trustees had not complied with their statutory obligations and should both alert those with an interest in the proper conduct of the charity and warn potential donors.

The White Paper also proposes that persistent failure to comply with submission requirements would be taken by the Commission as an indication of mismanagement of the charity warranting the use of the Commission's investigatory powers and its power to act for the protection of charities.

To make charity accounts more available to the public, the White Paper transfers the obligation to furnish copies of accounts from the Commission to charities themselves. (The charities could charge a fee to cover costs.)

This change seems unnecessary since the existing arrangement gives the public access to accounts and, as both the information in the Register and the accounts information would presumably be stored in the same data base it would seem to be sensible to make it possible for the public to get both types of information from one source.

This proposal does shift the expense and administrative inconvenience of responding to requests and supplying accounts to the charities and the public. It may also have been thought that if members of the public were encouraged to request accounts, charities might be subject to a desirable random check; however, since all charities would be required to file annual accounts, it would seem much more sensible to maintain the existing system whereby accounts are available from the Commission.

c) Powers to Deal with Abuses

The Commission's s.6 investigatory powers and s.20 charity protection powers (under the *Charities Accounting Act*) would be considerably strengthened by both preventive and interventionist proposals in the White Paper.

On the preventive side, the White Paper adopts the Woodfield Report recommendation that persons convicted of offenses involving "theft, fraud, forgery, or financial misappropriation" or those previously removed as trustees by the Commission be required to obtain Commission approval prior to acting as charity trustees.[25] Failure to obtain such permission would be a criminal offence, and disqualified persons who knowingly acted as charity trustees without approval would be required to refund any remuneration or expenses received from the charity at the discretion of the Commission. Interestingly, the White Paper states that the Government "can see no reason why these provisions should not extend to charities which are exempt from the Charity

Commission's jurisdiction". Though no change is suggested in this respect in the White Paper, the Government "would welcome views".

The White Paper also endorses the Woodfield Report's recommendation that the Commission have the power to require that the number of trustees responsible for the administration of a charity be brought up to three. This proposed power would operate regardless of contrary provisions in the charity's trust instrument. Trustees would be given a similar power to bring their own numbers up to three.

In addition, the White Paper proposes a number of substantive changes in the Charity Commission's powers of intervention which are designed to enable the Commission to act in cases where misconduct is suspected but not yet proven. (Under the existing s.20 provisions, the Commission had to be satisfied that there had been mismanagement or misconduct, and that it was necessary or desirable to act to protect charity property.) In order to allow the Commission to take action when misconduct or mismanagement is merely suspected, the White Paper divides the proposed new powers of the Commission into two classes: "temporary and protective" powers, and "permanent and remedial powers".

"Temporary and protective" powers under the new s.20 are the power to vest property in the name of the Official Custodian and the power to freeze bank accounts and transactions. These powers are currently available to the Commission under s.20(1)(ii) to s.20(1)(iv) of the *Charities Act 1960*, but can only be exercised in more limited circumstances. The White Paper proposes that temporary and protective powers be exercised when the Commission is satisfied that only one of the two preconditions under s.20(1) have been met. Furthermore, the Commission could exercise these powers without having to conduct a preliminary s.6 inquiry, as is currently required under s.20(1). The requirement that trustees be notified before any intervention would be scrapped.

In the exercise of "permanent and remedial" powers, the White Paper proposes that Commissioners still be required to be satisfied as a result of a s.6 inquiry that the conditions of s.20(1)(a) and s.20(1)(b) have been met. These powers include the removal by the Commission of " ... charity trustees, officers, agents or servants of the charity who have been responsible for or privy to. ... misconduct or mismanagement, or [one who] has by his conduct contributed to or facilitated it". Also included in this classification are the powers recommended in the Woodfield Report, which would permit the Commissioners to exercise their scheme-making powers without application by the trustees, and which would enable the transfer of trust property to other charities at the Commission's discretion.

d) Scheme-making Powers

Currently, the Commissioners are able to exercise their scheme-making powers only on application of the trustees. Where there is no properly constituted body of trustees to apply for such a scheme, the Commission must first appoint willing trustees or may, in the case of small charities, act on the application of "interested persons". The White Paper proposes to simplify the scheme-making powers by allowing the Commissioners to make schemes on their own initiative when a charity does not have properly constituted trustees.

A much more dramatic proposal would allow the Commissioners a reserve power "to establish a scheme should trustees neglect or unreasonably refuse to apply for one, without the need to refer the case to the Secretary of State". It is important to note that this is different from s.20 powers, which at present can only be exercised where there is maladministration. The White Paper is, in effect, encouraging the Commission to interfere with the purpose and administration of charities where no maladministration or misfeasance has been shown. In the *Charities Act 1960* the power to interfere in this manner is so qualified that, in effect, it is confined to out-of-date charities since:

> ... the Commissioners shall not have power in a case where they act by virtue of this subsection to alter the purpose of a charity, unless forty years have elapsed from the date of its foundation.

The removal of restrictions proposed in the White Paper raises serious questions. Was this an oversight or does the government intend to abolish the 40-year restriction as well as the requirement for approval of the Secretary of State? Removal of the restrictions seems to be at variance with the Government's avowed intention of encouraging self-regulation and responsibility on the part of trustees. It is also at variance with the Commission's own 1986 Report which says it is not the function of the Commission:

> ... to police the work and activities of all charities—including those where there is no reason to suspect mismanagement. There is a misconception abroad that because charities have in total a large income, and enjoy tax and rating concessions, they should be "controlled" as if they were government bodies or quangos. They are not. They emanate from the voluntary world of private impulse and sometimes eccentric purpose. Any abuse or incompetence must of course be corrected. But there is a danger of exaggerating the blemish.[26]

e) Fees

The impact on charities of the decision by the drafters of the White Paper to reverse the policy of successive governments by implementing user fees for the services of the Commission is less important than what it reveals about the attitude of the current government towards the charitable sector. Paradoxically, this move, which is designed to help the Commission "fulfil the more active

supervisory role envisaged for it", is likely to make greater supervision necessary by discouraging charities from seeking information and advice before action is taken. The authors of the White Paper make an unconvincing argument from historical precedent to justify their decision to impose these new fees, noting that:

> Section 16 of the *Charitable Trusts Act 1869* authorized the making of a scale of fees for any business done by the Commissioners. In the event no general scale was established, though charges were imposed for recording deeds under section 29(4) of the *Settled Land Act 1925* and other Acts.

The fact that the schedule of fees was never established would seem to be evidence that charging fees is without precedent rather than otherwise. In any event, it seems a specious argument to say that policy decisions today should be justified by provisions contained within a 120-year-old *Act* (long since replaced by legislation setting up a very different charities supervision regime). The authors of the White Paper proceed to make the claim that "the Woodfield Report found that there was not evidence to suggest that a policy decision has ever been taken to provide a free service". ... [27] Given the opinions of the Geddes and Nathan Committees and the content of the *Charities Act 1960*, the decision of the Charity Commissioners to offer services without charge cannot be considered an inadvertent slip permitted by default by a succession of absent-minded governments. Indeed, the question of using fees to deter "frivolous" applications was considered by the Nathan Committee in its 1952 Report:[28]

> ... a charge for a public local enquiry might perhaps be justified as an exception on the ground that it would act as a deterrent to frivolous or absurd applications, but we reached the conclusion that it would on balance be a mistake since in the case of small trusts the fear of incurring costs might well deter the trustees so effectively as to negative the right to an enquiry.

In any event, the White Paper drafters are too busy counting the anticipated income from fees to pay much attention to the consequences of imposing costs on small charities. An additional incentive seems to be an opinion that stifling such charities encourages the "efficient" amalgamations which will be facilitated through the use of the expanded scheme-making powers proposed for the Commission.

The White Paper estimates that levying a flat-rate fee of 25 pounds for registration, and charging additional fees for consents work, submissions of accounts, schemes and orders, public inquiries and Charity Commission leaflets, could produce an annual income "in the region of 0.75 million pounds—that is, about 10 per cent of the Commission's present costs". To forestall charges of stinginess the drafters remind us that "[t]he remaining 90

per cent of the Commission's costs would continue to be met direct from the Exchequer".

f) Changes to the Charities Act 1985

Though the *Charities Act 1985* is very limited in scope, it is important since it is directed primarily to local charities for the relief of poverty, a class of charities described as particularly ineffective and poorly administered by the House of Lords Select Committee on the Parochial and Small Charities Bills in its 1984 Report.[29]

In essence, the *Act* was an attempt to increase the accountability to the community of trustees, to encourage efficiency, and to reduce administration costs by encouraging the dissolution of small and inefficient charities. It strengthened the accounts-submission requirements applicable to local charities for the relief of poverty, and provided for increased scrutiny and accountability to the public. The *Act* permits local anti-poverty charities over 50 years old to modify their objects on the unanimous vote of the trustees and the giving of public notice. Such alterations are subject to approval by the Charity Commission and must be, in the trustee's opinion, "not so far dissimilar in character to those of the original charitable gift that this modification of the charity's trusts would constitute an unjustifiable departure from the intention of the founder of the charity, or violate the spirit of the gift". Almost identical requirements are set out in s.3 to allow trustees of registered charities having incomes of less than 200 pounds a year to transfer the property of their trusts to charitable trusts having similar objects. Finally, Section 4 of the *Act* permits trustees of "very small charities" (endowments of 25 pounds or less and incomes of less than 5 pounds per annum) to spend their endowments, subject to unanimous approval by the directors and the consent of the Commission.

The Woodfield Committee recommended that the *Charities Act 1985* "should be amended to increase its use, by extending its application, increasing its monetary limits and simplifying its procedures". The Woodfield suggestions have been adopted and expanded in the White Paper. S.2, permitting the transfer on approval of the endowment of old local charities for the relief of poverty to other charities with similar purposes, was expanded to apply in future " ... to all charities with an income of less than 1000 pounds a year ..., without distinction of age, locality, or purpose", excepting those holding land for the purposes of charity. Charities covered by s.3 of the 1984 *Act* would now be subject to identical limits and procedures. The class of charities covered by s.4 of the 1985 *Act* would also be expanded to include those with incomes of less than 250 pounds a year, though Commission approval and public notice are now required in addition to the unanimous approval of the trustees. The White Paper also includes various provisions for streamlining the administration of trusts by providing that such procedures may be altered by trustees.

Because of its limited scope, the *Charities Act 1985* was of marginal importance, but the changes to it contemplated in the White Paper would have significant consequences. Despite the deference paid to the "sanctity in charity trust law of the concept of the permanent endowment", the White Paper's proposal to empower the trustees of charities with incomes under 250 pounds per year to spend capital as income is a significant reversal of traditional legal policies which have been designed to encourage charitable giving by providing donors with some guarantee that their gifts will be used in the manner they intend. The impact of this change will depend on the number of such small charities and the degree to which small donors will now direct their gifts to the larger charities.

g) Divesting the Official Custodian for Charities

The White Paper greatly reduces the importance of the Official Custodian by removing its investment-holding function. The Official Custodian will, however, continue to hold property transferred to it on order of the Commissioners following inquiries under s.6 of the *Charities Act 1960*, and will maintain its land-holding function.

The White Paper offers two reasons for this reduction in powers. First, by obliging trustees to manage their own investments, the divestiture is in line with the White Paper policy of having trustees take "greater responsibility" for the management of charity affairs. Second, eliminating the primary functions of the Official Custodian "is consistent with the redirection of Commission resources towards monitoring and investigative tasks". With a staff of approximately 80 at the time the White Paper was drafted, the Official Custodian's division accounted for almost a quarter of the Commission's total staff. The reduction in the responsibilities of the Official Custodian is expected to enable the Commission to perform its new policing duties without adding staff.

This may prove to be a false economy. For example, depriving the Official Custodian of its investment-holding and custodial functions will make it more difficult for unsophisticated trustees to fulfil their responsibilities, and may deter some from acting as trustees at all. Small charities may find it necessary to obtain professional assistance with their investment portfolios. Lacking confidence in their ability to manage investments and unsure of their responsibilities and liabilities, many unsophisticated but hard-working volunteers may decide not to offer their services to charity. The White Paper's argument that trustees of "small charities could be tempted to rely unduly on the Official Custodian, neglecting their own duties in consequence" is not persuasive.

Forcing small charities to rely on their own resources to select and monitor appropriate investments of their trust properties will entail a wasteful duplication of effort which seems at odds with the concern for efficiency which is

voiced throughout the White Paper. If the drafters were genuinely concerned with efficiency rather than saving government funds by shifting costs to relatively inefficient trustees, they would sustain the Official Custodian's present duties.

The Official Custodian's investment function eliminated the need for land titles and investments to be transferred on the appointment of new trustees. The difficulty of transferring title between old and new trustees of a charitable trust is one of the reasons why the corporate form has become so attractive to the founders of charitable organizations and those who serve in them. Again, trustees of large trusts, with their greater resources and presumably higher degree of sophistication, can probably handle this but it poses an additional expense to the trustees of the small trust. This could be avoided if the Official Custodian retained the investment-holding function. The proposals seem designed primarily to further the "shakeout" of small charities which the drafters of the White Paper seem to desire.

IV. Assessing the Contents of the White Paper

In essence, the White Paper embodies three kinds of proposal: first, are neutral commonsense proposals for improving the regulation of charities which seem valuable and are unlikely to be controversial; second, proposals designed to encourage the Charity Commission to perform the functions originally set out in the *Charities Act 1960*; and finally, a number of overtly "deregulatory" reforms.

Neutral or commonsense proposals include the recommendation that the Register be computerized: the current delays in registration and substantial noncompliance with the registration requirement under the *Charities Act 1960* call for action. Other proposals falling into this category include the proposal that the Commissioners be empowered to vet certain persons before they may act as charities' trustees and the proposed power to increase the number of trustees of a charity. While changes of this nature are undoubtedly of value, their impact on the general system of charities regulation in England and Wales would be minimal since they are really just corrections of oversights in the earlier legislation rather than substantive reforms.

Under the guise of recalling the Charity Commission to the functions and duties envisioned for it under the 1960 *Act*, the White Paper, in other proposals, is simply pursuing deregulation. It is, for example, very selective about the provisions of the 1960 *Act* it directs the Commission to re-embrace. While the *Charities Act 1960* certainly includes a policing role for the Commission, by criticizing the Commissioners for failing to discharge their supervisory responsibilities adequately, the drafters of the White Paper are, in effect, reading into the *Charities Act 1960* a focus on policing which is absent from legislation. In fact, the Charity Commission, as the body responsible for enforcing the *Act*,

has discretionary power to make this kind of decision, and it is not improperly exercised when the Commission focuses its attention on advice-giving rather than policing. Cracknell observes that "[it] was explained when the Charities Bill was before Parliament [that] the Commissioners are not subject to ministerial control or direction in the discharge of their duties."[30] While calling for increased policing may have some merit, the White Paper is wrong in suggesting the Commission has been delinquent.

Furthermore, the requirement that the Commission focus attention on the policing role envisaged for it in the *Charities Act 1960*, read in the context of a White Paper whose preamble stresses the importance of self-regulation, becomes more than a mere requirement that the Commission attend to its legislatively mandated supervisory functions.

Despite the avowed commitment to "self-regulation" by charities in the White Paper, changes like the perhaps onerous accounts-submission procedures and the expanded supervisory powers of the Commission seem to suggest a more active government role. The monitoring, investigatory, and scheme-making powers of the Commissioners are increased while specific statutory restrictions to safeguard trust property are removed and broad discretionary powers are put in their place. In short, the emphasis is away from prevention and assistance and towards detection and punishment.

Encouragement of "self-regulation" may, in fact, arise from a recognition that even a significantly strengthened Commission will be incapable of monitoring the huge charitable sector completely. Increasing the powers of the Commissioner may be a substitute for the more intensive supervision envisioned under the earlier *Act*. On the other hand, the White Paper may be doing nothing more than making excuses for continuing to provide the Charity Commission with inadequate resources to fulfil its mandate under the 1960 *Act*. As one critic has observed:

> If one starts from the position that the Commission is allocated a stated number of employees of a stated rank by the Treasury and goes on to consider how it allocates those fixed resources one arrives at the unstartling conclusion that it cannot allocate equal time and attention to them all and has to make a choice. If one adds the fact that much of its work is demand-led, concerning enquiries about setting up new charities, advising trustees, making schemes and orders and generally giving time to every enquiry however minor, one can see why other work may be squeezed out.[31]

Since they were set out in s.1 of the *Charities Act 1960*, these activities are arguably more important functions of the Charity Commission than registration and account supervision. Calls for self-regulation and exhortations to the Charity Commissioners to devote more resources to regulatory scrutiny may not be enough to provide the government with the budget-saving benefits of a healthy charitable sector.

V. The White Paper's Impact on Government Attitudes Towards Charity and Government-Charity Relations

There are three principal reasons why implementation of the proposals in the White Paper would effect a radical transformation of the relationship between government and charities in England and Wales.

i) Policy Costs

The regulatory functions of the Commission have clearly been neglected; however, in shifting the activities of the Commission away from advice and assistance to policing, the White Paper drastically alters the character of the regulatory environment in which charities operate.

The White Paper has an unusual view of the effects of policing strategies on voluntary effort. Chapter 1 presents the government's view that deregulation will stimulate the charitable sector by encouraging greater initiative and voluntary spirit. It is difficult to understand how this could happen as potential volunteers and donors are, in effect, being told that the government will leave them to their own devices without much direction but will punish them if they break the rules.

There are two possible routes which regulators might take to encourage volunteerism in the charitable sector. Punitive sanctions might be reduced,[32] or volunteers could be better informed of the nature of their duties and powers so they would not fear inadvertently running afoul of the authorities. The White Paper proposes the worst combination of education and sanctions. The refusal to expand the Commission's staff at the same time that new punitive powers are conferred exposes trustees to the threat of punishment without the relief of assistance. This can only discourage potential volunteers from putting themselves at risk.

The impact of policing on volunteerism will be particularly felt by small charities whose trustees are presumably least knowledgeable and least able to obtain outside legal assistance. Charities with innovative purposes or structures will also suffer, as involvement with such organizations will be especially risky for the now well-policed but ill-informed potential trustee. These deterrents are at cross-purposes with the "innovation and enterprise" the government claims to be anxious to encourage.

In addition to discouraging volunteer efforts, the White Paper's policing strategy may also fail to achieve its goal of increasing public confidence in charities. By having the Commission withdraw from its advice-giving functions to take up a policing role, the government is making an unstated assumption that, in the absence of either regulation or advice, more charity funds would be misapplied through fraud than through mistakes or confusion on the part of charity trustees. While fraud is of greater public concern at present, it should

be remembered that under the present system the Commission's advice prevents many incidences of the second type of problem.

By permitting occasional scandals to occur and catching and punishing the offender afterwards, the policing strategy is almost guaranteed to create a series of unedifying public spectacles which are unlikely to increase public confidence in the charitable sector. Furthermore, the donating public is unlikely to differentiate between injuries caused to trusts by the misapplication of funds through fraud and the merely inadvertent misapplication of funds or breach of trust.

It is worth noting that charity frauds are currently subject to investigation and prosecution by the Inland Revenue (tax) and criminal authorities. If Commission records were improved to assist them in their investigations, there seems little reason not to continue to rely on these remedies.

The advice-giving function of the Commission is, however, to remain intact. For this reason, despite their apparent importance, the increasing police powers proposed in the White Paper may be of little practical significance in the short term. While the powers of the Commission have been significantly increased, if the Charity Commission resists exercising them, they may have little effect.[33] As long as the Commission does not have enough funding and staff to attend to all of the tasks set out for it in the *Charities Act 1960*, whether in its present form or as amended by the adoption of the White Paper proposals, decisions will still have to be made as to how to allocate its limited resources among its various functions. Thus, its behaviour may change less than the White Paper would suggest.[34]

ii) Free-Market Thinking Misapplied

The phrase "charities are big business" recurs frequently in committee reports, journal articles and newspaper stories about the Charity Commission. Collecting and spending more than 10 billion pounds a year, holding assets of approximately 2.5 billion pounds, and enjoying tax and other privileges worth a similar amount, charities "collectively make an important contribution to public welfare, that would probably cost twice as much to replace by the government even if that were possible".[35] Thus, in a colloquial sense, charities are indeed "big business".

Vincent notes further that charities "have many of the hallmarks of conventional businesses—constitutions, internal and external regulations, bank accounts, chains of command and so forth". Like businesses, they succeed when managed by competent and experienced individuals capable of carrying out their purposes in an efficient and practical manner: "[t]he chances are that a successful director of a charity will have had experience of running a business in some capacity or other before joining the charity". The similarity between

charities and businesses is most pronounced in the case of charitable corporations, but is also notable in charitable trusts and foundations.

There is little argument that the public benefits when responsible trustees or managers conduct the affairs of the charity in a well-organized, "businesslike" fashion. However, it is one thing to recognize the need for "businesslike" practices in charity management and quite another for the government White Paper to treat charities as businesses, for example, paras. 1.18 and 1.7 are particularly laden with free-market jargon. The former states that the overall objective of the Government is to balance proper control and accountability with "the freedom and corresponding responsibilities of individual organizations to develop and do business". In the latter, the government declares that it seeks to promote "enterprise" on the part of the voluntary sector which will have the ability to "respond swiftly and flexibly to changing needs and circumstances" and the "capacity to innovate". The paragraph concludes with a declaration that "enterprise and voluntary activity go hand in hand".

The value of the innovative characteristics of the charitable sector is indisputable. It is less obvious that deregulation of charities is necessary to stimulate these qualities. Since the Charity Commission currently receives an excess of "innovative" applications, the challenge for regulators would seem to lie in weeding out new initiatives which overstep the boundaries of charitable purpose rather than having to stimulate them.

Despite its contention that charities are like businesses which flourish in a free enterprise system, the White Paper still recognizes that:

> [t]he conduct of trustees and directors of charitable organizations is not subject to the traditional profit and loss constraints of the marketplace or the scrutiny of shareholders and investors. ... the direct and ultimate beneficiaries of charities—the poor, the disadvantaged, the handicapped and the general public—are often incapable of protecting their own interests.[36]

However, the White Paper sees the Commission only as a sort of *parens patriae* shareholder intervening to correct and punish misbehaviour by otherwise "free" charitable actors. The great achievement of the *Charities Act 1960* was that its drafters saw the government-charity relationship as involving more than mere regulation. Instead, recognizing the unique nature of charitable activity and the general goal of advancing the public interest which both government and charity shared, they recast the relationship to provide charitable donors and volunteers with the broad support they often need to effect their purposes.

Withdrawing active advisory involvement by the Commissioners on the grounds that charities should be left alone to exercise their enterprising potential overlooks the nature of the Commission's historic involvement with charities. That role has never been one of constraining private initiative, but

rather facilitating it by providing private actors with the assistance they need to channel their creative energies into activities which count as valid charitable purposes at law. As noted, the charitable sector has never lacked individual initiative. Rather, the problem has been to ensure that such initiatives accord with the requirements of charities law.

iii) The Inefficiencies of Cost-Shifting

Since many public services currently provided by governments were once provided almost exclusively by charities, the catalogue of purposes considered charitable in law now to a large extent overlaps what we have come to think of as government services.[37] In recent years, though governments in Britain and elsewhere have attempted to reverse this trend and to "push back the frontiers of state" by cutting back on services in the interest of budgetary restraint. Britain's Conservative government has done so with such success that:

> ... in fields such as community care for the mentally handicapped, the relief of poverty through the Social Fund, operations for children in cash-strapped hospitals and even entry to higher education for poor students, charity now has a central place.[38]

The attitude of the present British government towards the charitable sector is illustrated by its efforts in the mid 1980s to "bring charities back into the mainstream of the welfare state" by having voluntary bodies take over homes and services for the elderly, handicapped, and children in care:

> The key element in the relationship would be the negotiation of written contracts between authorities and charities. In some cases, the contracts would be put out to tender—much as private firms are asked to bid for work.[39]

While this alteration of the relationship between charity and government is described as bringing charities under the supervision of local government, what it really amounts to is a shifting of responsibility for services from the state to charity, albeit with at least temporary government support. Deere also notes that, in its most general terms, the scheme strongly resembles the proposals contained in the White Paper—a withdrawal of government involvement in the day-to-day operation of charity affairs and the adoption of a more distant supervisory role:

> What...the social services secretary has in mind is that, over a period, local government departments would become much less involved than at present in providing services directly and, instead, would assume a "strategic" role of supervising voluntary and private enterprise. ...

Charities were justifiably suspicious of such arrangements. While the ministers responsible for this scheme "pledged that there would be no cuts in funds"

many charities were "uncertain about how long they [could] rely on grants" after undertaking responsibility for providing these services. Sensitivity to these concerns presumably prompted the government to declare in the White Paper that the importance of the voluntary sector:

> ... does not lie just in its capacity to deliver services funded by the government; nor is it any part of the Government's policy to place on voluntary organizations the burden of delivering the essential services for which it is right the Government remain responsible.

This assurance is of little value, since nowhere in the White Paper does the government indicate what it regards as "essential" services, nor what the "burden of delivering" means.[40]

Whether government likes it or not, the public continues to expect that certain services of a "charitable" nature will be made available to the public. Relief of poverty, health care and education are provided through public contributions, whether those contributions are voluntary contributions collected by charitable organizations, or involuntary contributions collected by the tax authorities. Given the increasing interdependence of charities and public authorities in the provision of various services, the funds are coming in some sense from the same source. Our society has come to regard these services as essential—even the drafters of the White Paper would like to see them continued, though funded more exclusively from voluntary sources. The object of charities regulation, they say, should be to see that they are provided at minimum cost.

The goal of providing better services will certainly be furthered in part by encouraging efficiency in charitable organizations, but it also requires an efficient allocation of the responsibilities of service provision between government and charity. While hiring more staff to enable the Charity Commissioners to perform supervision and control tasks obviously counts as a government expense, that expense may be more than offset by the whole sector's more efficient operation thanks to the Commission's effort. The elimination of the Official Custodian's investment-holding function, for example, is almost certainly an inefficient move. While the Government saves the expense of hiring extra staff members to perform monitoring and investigation tasks, the 40,000 charities which have investments held by the Official Custodian will very likely experience higher costs as each of them is required to make other arrangements for the management of its investments. One of the chief virtues of the Charity Commission is that centralization of certain functions such as investment holding and maintenance of the Register provides economies of scale which produce administrative savings for the entire charitable sector. The White Paper is shortsighted in its elimination of these administration cost-saving mechanisms, particularly given the rising costs to individual charities of

carrying out administrative functions. In their 1981 Report, the Charity Commissioners announced that the preceding year had been:

> ... difficult for charities generally. The costs of administering charities and of carrying out charitable purposes rose with inflation while at the same time the real value of income from investments fell. This coupled with the recession tended to discourage charitable giving.

These economic conditions persist and the harmful consequences for charity of inefficient cost-shifting are severe.

A net loss to service-provision may occur not only because charities will have higher administrative and legal costs, but because of the dampening effect of the new government attitude towards charity. Trustees and donors are less likely to make contributions or participate as volunteers when they fear the consequences of errors and face discouraging administrative expenses. The innovation and initiative which are said to come from the charitable sector might best be encouraged, not by deregulation, but by continuing to provide resources which will help the inexperienced and ignorant improve their performance.

Admittedly, preventing abuses is extremely important but shifting resources from services to policing is an exercise in putty-squeezing—whether the losses in one area outweigh the gains in the other is anyone's guess. The emotional appeal of a call for "law and order" should not divert attention from the valuable role the Charity Commission has played since the introduction of the *Charities Act 1960*. The efficient solution, unpleasant though it may be for governments in an era of budgetary restraint, will come through facing up to the fact that the Charity Commission has never been given enough resources to carry out its duties properly. Achieving genuine efficiency in the provision of charitable services may require increased government expenditure rather than the misapplication of the free-market parsimony of the current British government to this inherently non-market activity.[41]

VI. Conclusion

In fairness to its drafters, *Charities, A Framework for the Future* is in some respects a legitimate response to definite weaknesses in the existing system of charities regulation in England and Wales. Clearly, many charities are not complying with the registration and accounts-submission provisions of the present *Act*, and the Commission should be empowered to enforce these statutory obligations. Existing delays in registration will only lengthen as the number of charities seeking registered status continues to expand and they must be addressed if new charities are to be registered expeditiously. Some of the new powers proposed in the White Paper would undoubtedly simplify current procedures for making schemes and appointing charity trustees. The proposed

requirement that persons previously convicted of offenses involving fraud be approved by the Commission before being allowed to act as trustees also seems eminently reasonable regardless of what view one takes of the proper role of regulation in the charitable sector.

Nevertheless, the underlying deregulatory agenda of the White Paper makes it a threat to Britain's charitable sector because of the shift in government attitude towards charity which it represents. The White Paper fails to confront the true source of the problems which currently beset the regulation of charities under the *Charities Act 1960*. This is not delinquency on the part of the Charity Commission, but rather a lack of adequate resources which makes it impossible for the Commissioners to fulfil their mandate:

> The truth is, with nearly a quarter of a million charities in being, and nearly 4000 a year going on the register, plus a gradual increase in the activity and throughput of the whole sector, the statutory obligations on the Charity Commission on the one hand to regulate, and on the other to give advice and guidance, is not containable within existing resources.[42]

> ... many people have pointed out the impossible task that the Charity Commissioners have supervising over 150,000 registered charities with a staff of only 300.[43]

Rather than avoiding the issue by eliminating the valuable advisory functions of the Commission and cutting back on services, the government would do better to respond to the admitted shortcomings of the Commission[44] head on by taking steps to provide the Commission with the resources it needs. Whatever benefits deregulation might have for other private sector activities, its inapplicability to the charitable sector makes the self-regulatory solution to charities regulation unrealistic and potentially harmful to the interests of the public and possibly costly, in an indirect manner, to the government itself.

However, though the deregulatory strategies contained in the White Paper are attributable in part to the free-market ideology of the current British government, the White Paper was also drafted in response to genuine pressures on public spending which must be taken into account in formulating a credible alternative to its proposals. Thus, practical solutions to the problems of charities regulation under the current system would probably include a combination of increased government spending, internal reallocation of Commission resources, and adoption of the White Paper proposals of the "neutral" variety as well as some of the "deregulatory" proposals which might be valuable if applied on a limited basis. For example, the desire of the White Paper drafters to have charities take more responsibility for their own affairs often makes sense in the case of large charities. Partial divestiture by the Official Custodian of the assets of large charities which should be able to take responsibility for managing their own resources might be warranted and could

free up some staff members for monitoring and investigation purposes. User fees for Commission advice might also be justified in the case of the richer charities.

As these suggestions make plain, adequate resources could be provided to the Commission without government bearing the entire cost, or even most of it. As was suggested in the previous section, such costs as are borne by the government would likely be less than the costs which deregulation would entail by discouraging voluntary effort and losing economies of scale in the combined government/charity provision of public services. Whatever solution is adopted, it is vital to the health of the charitable sector that the necessary changes not be achieved at the cost of sacrificing the supportive relationship which currently exists between the Charity Commission and the voluntary sector it serves.

FOOTNOTES

1. U.K., H.C., *Charities: A Framework for the Future*, Cm. 694 (1989). ("White Paper")
2. The term "deregulation" is used in this paper in a broad sense to indicate reduction of government involvement with, and responsibility for, the affairs of charitable organizations on a day-to-day basis. As will be explained in Part V, deregulation in this sense does not necessarily entail reducing the type and extent of regulatory requirements placed on charities as such requirements may be added to the law relating to charities to facilitate a more general withdrawal by the government from involvement with their daily operation.
3. *Charities Act 1985* (U.K.), 1985, c. 20. This *Act*, the first charities legislation since 1960, was "of a modest form affecting only small charities and designed to stimulate the more effective use of resources". See "Charities in 1985", 136 *New Law Journal* 549 at 550.
4. *Charities Act 1960* (U.K.) 8 & 9 Eliz. 2, c. 58, hereinafter *Charities Act 1960*.
5. For brief descriptions of the function and duties of the Charity Commissioners, see C. Arthur Bond, "The Charity Commissioners for England and Wales" (1988), 7 *Philanthrop.* No. 3; Owen D. Tudor, *Tudor on Charities*, 7th ed. by S.G. Maurice and D.B. Parker (London: Sweet and Maxwell, 1984) at 308-311; Hubert Picarda, *The Law and Practice Relating to Charities*, (London: Butterworth's, 1977) at 434-444.
6. *Charitable Trusts Act* (U.K.) 16 & 17 Vict., c. 137. (*"Charitable Trusts Act 1853"*)
7. Elizabeth Cairns, *Charities: Law and Practice*, (London: Sweet and Maxwell, 1988) at 26-27.
8. *Supra*, footnote 4.
9. Exempt charities are charities which are not subject to any of the supervisory powers of the Charity Commission. They are listed in the Second Schedule to the *Charities Act 1960*, and for the most part include universities, museums and churches. The rationale for the exemption is that they are sufficiently supervised and protected by other legislation. The *Charities Act 1960* also provides for the creation of excepted charities which are bodies which have been excepted from certain obligations under the *Act* at the discretion of the Charity Commission or under regulations made by the Home Secretary. The obligation to register may be excepted by order of the Commissioners under *Charities Act 1960* s.4(4)(b). Excepted charities are otherwise subject to the Commission's authority. See Picarda, *supra*, footnote 5 at 4-7.

10. For an overview of the findings of the National Audit Office in U.K., H.C., "Report of Comptroller and Auditor General on the Charity Commission" No. 380 (1986-87), and comments on U.K., H.C., "Sixteenth Report from the Committee of Public Accounts: Monitoring and Control of Charities" No. 116 (1988), see H.W., Wilkinson, "Brother, Can You Spare? Monitoring and Control of Charities" (1988), 55 *Conveyancer and Property Lawyer* 163.

11. *Ibid.*, NAO Report at 166.

12. Mark Ellis, "Charity Commission: Concerns over Rise in Fraud", *The Times* (3 June 1987) 3a.

13. John Craig, "Hurd Cracks Down on Fraud in Charities", *The Sunday Times*, (20 Dec. 1987) 2f.

14. Fund raising seems to be the area of charities-related activity where the most flagrant abuses occur: "[T]he findings shown in the NCVO Report on Malpractice in Fundraising (1986) [revealed] that fundraisers can retain as much as 80 or 90 per cent of receipts as remuneration for their services. ... " Susan Bright, "Taking the Lid off Charities Fraud", 139 *New Law Journal* 711.

15. U.K., *Efficiency Scrutiny on the Supervision of Charities (The Woodfield Report)* by Sir Phillip Woodfield, Graham Binns, Richard Hirst and David Neal, (London: H.M.S.O. 1987). ("Woodfield Report")

16. As fund raising can be done for non-charitable organizations or purposes, fund raising is not, strictly speaking, a charities law issue. However, the close association in the mind of the public between charitable organizations and public collections seems to have influenced the drafters of the Woodfield Report and the White Paper, as both groups dealt with fund-raising problems such as the retention of excessive remuneration by fund raisers, and disclosure to the donating public of what proportion of funds raised by collections, services, or sales actually goes to the charity on whose behalf they are solicited. (See Woodfield Report at paras. 123-133; White Paper at paras. 10.1-10.15.) Rationales for protecting money raised in charity appeals are similar to some of those for protecting charitable property more generally, even if the money has not yet been transferred from fund raiser to donee and could not be said to be held in trust. Such property can be said to have been effectively dedicated to charity (if not on specific trusts), and thus monitoring by the Commission and the courts, or alternatively, protection of the donor's intention can be invoked. However, as donative intention is protected under trust law, the "dedication to charity" is probably the preferable rationale for jurisdiction of these bodies over funds and fund raisers connected with charity appeals. There are problems with this as well. It is worth noting that the jurisdiction of the courts in relation to charities stems from the fact that they *are* charities, not trusts. This point is discussed in *Liverpool and District Hospital for Diseases of the Heart* v. *Attorney General*, [1981] 1 All E.R. Ch. 994 at 1009-1010. Slade J. concluded that the jurisdiction of the court in this case stemmed not from the assets of a charitable corporation being held on strict trusts, but from the existence of "a person or body who is subject to an obligation to apply the funds to an exclusively charitable purpose, and against whom the court can act in personam". Nevertheless, in the case of a fund raiser, can it be said that there is the kind of "legally binding obligation" to which the Court is referring? A charitable corporation, regardless of whether it holds its property on specific trusts or for the purposes specified in its

memorandum, is under a legal obligation to apply such property to charitable purposes. A fund raiser's obligation to do so is much less clear. In some cases it may be necessary to raise a trust by implication or law to create the "obligation" which invokes the jurisdiction of the court. The real reason that fund raising is included in the Woodfield Report and the White Paper is probably just that it seemed to the drafters of both documents to be a convenient opportunity to deal with the problem. As the changes proposed in the White Paper will be instituted by legislation, the question of "finding jurisdiction" to deal with fund raisers is interesting but probably not important.

17. See, "Woodfield Accepted" (1988), 138 *New Law Journal* 52. The Charity Commission has taken a number of steps to answer the criticisms of the NAO, CPA and Woodfield Reports before further action by the government, perhaps with the intention of making the case for new charities legislation seem weaker. For example, in 1989 the Commissioners "promised an investigation into political campaigning by Oxfam, a move seen by some in the charities world as evidence of the Commission's desire to show a tough line in advance of legislation". (Phillip Webster, "Waddington to Press for Early Charity Legislation", *The Times*, (21 May 1989) 5a.)

18. In the fall of 1988, it was reported that "21 of the reform recommendations made by Sir Phillip Woodfield's scrutiny committee have been put in place. The other 25...need Parliamentary legislation....The over-stretched investigation staff has been increased from 14 to 34 [the investigation division had been increased from 8 to 14 staff members in 1987]. For the first time there is a qualified accountant to help them and another is being recruited. The computerization program, first proposed in 1975, is at last under way. ... " (Peter Wilsher, "Charity Begins at a Down-to-earth Level", *The Sunday Times*, (20 Nov. 1988) H3 d.)

19. Andrew Phillips, "Charity Law in Turmoil," 138 Supp. *New Law Journal* ii.

20. The new charities legislation appears to be stalled due to pressures on the Parliamentary agenda rather than by having been abandoned by the government: "Although Mr. Waddington [Hurd's successor as Home Secretary] failed during the preliminary cabinet discussion on the next Queen's Speech to win a guaranteed legislative slot for a bill, he is expected to make another attempt soon to get it into the program. If it is not in the November program, ministers are certain that it could be introduced in the following session". (Phillip Webster, *supra*, footnote 17.)

21. White Paper, para. 1.15. The "basic issues of charities law" which the authors of the White Paper go on to discuss in Chapter 2 concern what constitutes a valid charitable purpose. The White Paper responds to concerns which have been expressed that the classification of charitable purpose which has been developed from the preamble to the *Charitable Uses Act 1601* and from Lord Macnaghten's "four heads of charity" are no longer adequate to meet the public perception of what is charitable. Extending charitable status to political purposes and removing it from religious "cults" are both discussed and rejected. The drafters of the White Paper recognize the weaknesses of the present classification of charitable status, but regard the present system as the best compromise between clarity and flexibility. There has been some criticism of the White Paper on the grounds that its drafters missed an opportunity to address problems in this controversial area of charities law, e.g., Susan Bright, *supra*, footnote 14.

22. As against the Expenditure Committee's recommendation that all be brought under the jurisdiction of the Charity Commission "with the sole exception of very small

charities". ("Report of Comptroller and Auditor General on the Charity Commission", No. 380 (1986-87) paras. 103-4, cited J.M. Fryer, "The Charity Commission: Expansion of Jurisdiction?" 137 Supp. *New Law Journal* iv at v.)

23. The Commission's 1970 figures are reproduced in J.M. Fryer, "The Charity Commission: Annual and Registration Fees", 136 Supp. *New Law Journal* 9.

24. For example, "the number of charities ... increased by some 3500 yearly, from 122,715 in 1976 to 154,135 in 1985". (Wilkinson, *supra*, footnote 10 at 164.)

25. There are currently almost no restrictions on who may act as a charity trustee. As a general rule, anyone with the capacity to act as the trustee of a private trust is qualified to act as the trustee of a charitable trust. (See Picarda, *supra*, footnote 5 at 329.) This would exclude those unqualified to hold property in their own right, *viz.* minors, mentally incapacitated persons, and unincorporated associations. (See A.H. Oosterhoff and E.E. Gillese, *Text, Commentary & Cases on Trusts*, 3rd ed. (Toronto: Carswell, 1987) at 120-121.)

26. *Report of the Charity Commission for England and Wales*, 1986, quoted in Wilkinson, *supra*, footnote 10 at 168.

27. The Woodfield Report deals with the subject of fees in Part 11, paras. 113 through 122. Paragraph 115 states that "[the] first argument [against charging fees] is that it would be contrary to the long standing policy of successive governments that the free service is part of their contribution to the voluntary sector. It certainly is such a contribution, but we have not seen any authoritative statement that the free service is a considered policy decision".

28. U.K., *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Nathan Report), Cmd. 8710 (1952).

29. House of Lords Select Committee on the Parochial and Small Charities Bills in its 1984 Report. For the background to the *Charities Act 1985*, see D.G. Cracknell, "Charities Bill: New Life for Old", 129 Supp. *Solicitors' Journal* 21. See also D.G. Cracknell, "Charities Act 1985", 129 *Solicitor's Journal* 439.

30. D.G. Cracknell, *Law Relating to Charities*, (London: Oyez Publishing, 1973) at 58.

31. Wilkinson, *supra*, footnote 10 at 164.

32. The increasing prevalence with which the corporate form is used as a vehicle for carrying out charitable purposes may suggest that trustees are more likely to volunteer their efforts when they are exposed to lower standards of duty. [Whether directors of corporations do have lower standards than trustees is a matter of debate. See, for example, Professor Donovan Waters, "Case Comment: *Re Centenary Hospital*" (1990), 9 *Philanthrop.* No. 1.]

33. The Commission, for example, already possesses a power under 2. 18(6) to change the objects of certain charities "in their best interest", on application to the Secretary of State. This power, at the time of preparation of the White Paper, had not been invoked even once in the almost 30 years since the *Charities Act 1960* was introduced. Changing this power so the approval of, and reference to, the Secretary of State are not required is unlikely to change the attitude of the Commission.

34. Charity Commissioner Robert Venables commented at the conclusion of a recent article that "contrary to some recent reports, the Charity Commission has not given up its function of advising trustees", a remark suggesting Commission resistance to pressures

on it to abandon its customary advisory role. (Robert Venables, "The Charities Contract Trap", 134 *Solicitors Journal* 948.)

35. Robert Vincent, "Charities and Business", 138 Supp. *New Law Journal* iv.

36. Robert B. Abrams, "Regulating Charity—The State's Role", 35 *The Record* 481 at 486-487.

37. Picarda, *supra*, footnote 5, provides a list of charitable purposes in Part I which is a useful guide to the extent to which governments have taken over from charities in the provision of services. It is more detailed than the "four heads of charity" usually quoted from Lord Macnaghten's judgment in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*, [1891] A.C. 531. Picarda lists as charitable purposes: the relief of poverty; the advancement of education; the advancement of religion; the promotion of health; recreational facilities; municipal betterment and the relief of the tax and rating burden; gifts for the benefit of a locality; certain patriotic purposes; protection of human life and property; social rehabilitation; the protection of animals; and other miscellaneous purposes beneficial to the community. With the exception of religious purposes, the protection of animals, and certain of the miscellaneous purposes of public benefit, this list practically duplicates government initiatives and funding. The point of listing these purposes is not to say that government has entirely taken over the field of charitable purpose, but to suggest what we have come to expect from government in this regard.

38. David Walker, "Charity Out in the Cold?" *The Times*, (28 December 1988) 12b.

39. Brian Deere, "Welfare State Gets Charity Boost", *The Sunday Times* (21 April 1985) 5a.

40. The government congratulates itself in the White Paper, para. 1.5 for having established an "increasingly close and productive partnership" with the voluntary sector: "Central Government grants directly to voluntary organizations amount to almost 293 million pounds in 1987/88—an increase of 91.6% in *real* terms since 1979/80". Since many of these direct grants are presumably paid to charities to fund "privatized" government services, it is questionable whether any net gain to the public resulted from this outpouring of government largesse.

41. In the White paper, efficiency seems a matter of shaking out small charities, encouraging their consolidation into larger bodies which presumably enjoy economies of scale. This shakeout is encouraged by making it easier for the Commission to consolidate the assets of charities on its own initiative, by imposing more onerous accounts and registration requirements on small charities, and by making it more difficult for small charities to obtain legal advice both when they are founded and on a continuing basis. Divestment of the Official Custodian is another example of a move which would discourage small-scale charitable activity.

42. J.M. Fryer, "The Charity Commission: Delays in Registration", 137 Supp. *New Law Journal* 14.

43. Robert Vincent, "Financial Reporting by Charities", 137 Supp. *New Law Journal* 9.

44. Dennis Peach, the Chief Charity Commissioner at the time of the NAO report, did not dispute the Report's findings when questioned by M.P.s over the results of the NAO Committee, but argued that the Commission could only examine "a fraction of accounts" as "[t]o do others would require an army of staff". (Mark Ellis, "The Big Business with Too Few Rules", *The Times*, (30 Jul. 1987) 4g.)