Research Paper

The Voluntary Sector and the UK Constitution

Lucy Atkinson

THE CONSTITUTION SOCIETY

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About the Author

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Executive Summary

Certain assumptions are fundamental to the functioning of the United Kingdom (UK) constitution. They include the notion that government – at local, devolved and central levels – is responsible for the delivery of services on behalf of the public; and that it is held accountable for its performance of these functions by democratically elected representatives. It is also generally understood that there are certain legal and constitutional standards to which all public agencies are subject, and that all citizens enjoy equal rights with respect to public policy delivery. Within this framework of governmental provision and democratic accountability, a number of outside organisations – some of them part of the so-called voluntary sector - play an important role in scrutinising the government and making proposals for policy. They also contribute by carrying out discrete functions of their own; and it is important to their role that they are independent of public authority, though subject to legal regulation.

All of these assumptions, however, become more complex when one considers the actual nature of the relationship between the 'voluntary' sector and the public sector.[1] There is a longstanding tendency for a blurring of the boundaries between the two sectors. The extent of voluntary sector involvement in the delivery of public services in recent decades is such that a reassessment of some of the basic constitutional principles set out above is appropriate.

1 This term is used with caution. For a more detailed examination of terminology see Introduction.

A further difficulty involves the legal definition by which the sector is delineated. It encompasses a wide range of different types of organisations with varied aims, and is in some senses an historical accident. The general public might not recognise some of these organisations as actually performing tasks that are commonly attributed to a charity. Yet all organisations fitting within the legal definition of charity are subject to the same regulatory framework. Though it imposes certain special requirements upon them, it also exempts them from some forms of accountability, not to mention their involvement in quasi-government activities.

Against this background, this paper considers the following questions: Does the third sector have a constitutional role? What are the responsibilities of the state in relation to the sector? How do voluntary organisations fit into the current system of UK governance? What can the state realistically and legitimately expect from voluntary sector organisations? Does the expanding role of the sector – particularly in the delivery of public services – challenge or complement the authority of the state? Has the relationship between the state and sector changed in recent years? And if so, how, and what are the constitutional implications of this?

The UK government has an extensive history of working in tandem with voluntary and community groups. Voluntary organisations have long provided the empirical evidence and the inspiration for developments in state policy-making; indeed, a considerable number of major initiatives have their origins in the voluntary sector.

Increasingly, these contributions have been recognised by leading government figures, as shown in the Big Society venture rolled

out by the coalition government in 2010.[2] Since then, the sector has continued to be incorporated into the workings of present-day government agendas. Yet this relationship has received relatively little attention from academics on either state or sector side.

This paper aims to complement existing studies by examining the key points of interplay between voluntary sector organisations and the UK state. Based on first-hand accounts by practitioners and a secondary literature review, it offers a new approach to the discourse, exploring the relationships between the state and sector from a constitutional perspective.

It is suggested that the voluntary sector plays a vital role in the maintenance and growth of the UK constitution. Sector organisations serve as forums for debate and engagement – particularly through campaign and advocacy work – thereby offering members of the public with an additional layer of democratic representation, whilst also enhancing government agenda-setting. They also have a part to play in democratic transparency, promoting key issues such as inclusivity, equality, and community engagement.

There has always been an overlap in the boundaries of state work and parameters of the sector organisations. However, the adoption of contracts and commissioning has revolutionised this field. More and more organisations are now involved in the provision of public services and support systems on behalf of the state, particularly for marginalised communities and 'hard-to-reach' groups. They are active in areas that the government cannot, will not, or should not, be, to ensure that social needs are met.

2 Cabinet Office, 'Building the Big Society', 2010 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78979/building-big-society_0.pdf (07/12/17)]

The last few years have also seen a number of controversies which have threatened to damage the reputation of voluntary organisations. The demise of the Kids Company, the suicide of Olive Cooke, and the passing of the Lobbying Act 2014 all pushed charities into the headlines. Within this context, the need to consider questions about the accountability of certain practices, the constitutional and legal framework surrounding delivery, and the quality and uniformity of services, has become even more pressing.

This picture is further complicated by the numerous areas of state-sector interaction that remain undefined and ambiguous. The legal and conventional demarcation of sector responsibilities is not always clear: Should a greater degree of separation be maintained between state and sector organisations? Does the role of the government in decision-making for grants and contract-based funding represent a legitimacy problem, as in the case of the National Lottery?

Difficulties in legal definitions and eligibility rights for tax exemptions – often raised in discussions about think tanks and faith schools – are also problematic. Political involvement is another grey area: To what extent should voluntary groups be allowed to engage in political discussions? Are the necessary mechanisms in place to ensure that charities do not stray into the political and party political arenas? And is the current regulatory framework in place sufficient to deal with such episodes?

Although the blurring of the boundaries between state and sector provides a degree of leeway, it can also result in overlaps in services, difficulties in terminology – problematic for the implementation of legislation –, and practical problems with inconsistency in approach and access to complaints procedures. More importantly

still, ambiguity obscures lines of accountability and the demarcation of responsibility.

Moving forward, then, there is a case for a renewed focus on cross-sector partnership and collaborative working. Respondents explained practical difficulties in the context of 'mutual incomprehension' and the absence of the sector in the decision-making processes. Is the current state infrastructure conducive to cross-sector collaborations? Developments in regional devolution – such as the establishment of metropolitan mayors – have the potential to offer opportunities for better working relations.

Conversely, others bemoaned the current level of state 'interference' in sector activities. Critics also complained of state (over)reliance on the voluntary sphere, as demonstrated in instances of charities taking on state responsibilities in the wake of cuts to funding and local services. There are convincing arguments for a higher degree of separation, not least to minimise the risk of partisan influence in advocacy work.

This papers also calls for better enthusiasm and commitment within the Office for Civil Society and government departments. In order to be effective, the Compact – the document setting out the ground rules for interactions between government and the sector – needs to be rejuvenated. An independent and critical body is needed to help promote transparent and accountable state-sector relations. It could also resolve current problems with inconsistent governance and regulation of the sector, and remedy alleged inadequacies in sector representation.

To address legislative concerns, a greater clarity is needed in the terminology used in existing and future legislation. Where possible,

greater attention should be given to the possible implications on the work of sector organisations during deliberations. A more-comprehensive summary of recommendations can be found in the conclusion of this paper.

Introduction

This paper investigates the relationship between government at different levels in the UK and the voluntary sector.[3] It attempts to establish the constitutional significance of this relationship, and of the work undertaken by voluntary and community organisations operating within or in conjunction with government. Drawing on existing literature and interviews conducted with practitioners from the sector and governmental organisations, it examines the various points of interaction between both sides.

The voluntary sector has been the subject of renewed interest over the last few years, in wake of a number of high-profile scandals regarding the governance of certain organisations. The collapse of the Kids Company in 2015, and the revelation that its special relationship with the Cabinet Office had resulted in a considerable amount of public money being spent on a single body, sparked renewed concerns about the role of the state in the funding and oversight of the sector. Calls for greater accountability and transparency in the management of voluntary organisations – particularly those with charitable status – were made. At the same time, the growing importance of the sector in the provision and delivery of public services has seen separate concerns raised by sector practitioners about the level of government interference and control.

3 For a discussion of terminology used in this report, see below.

This paper considers how some of these issues reflect the broader responsibilities of the state. Using desk-based qualitative research of existing literature, together with expressions of the opinions of present-day practitioners with experience working in both sides, this report examines where the voluntary sector stands within the uncodified UK constitution. It establishes the main points of interaction and engagement, and asks questions about the juxtaposition of responsibilities that have become increasingly blurred, in light of shifts in government policy and changing directions for public services and initiatives.

The development of the voluntary sector in the UK

There is an extensive history of voluntary organisations in the UK. The earliest records trace them back to the pre-modern era.[4] As such, they have a well-established part to play in the make-up of British society. However, the types of work adopted by the sector has been subject to change, and responsibilities have shifted in response to changes to political and social environments.

This paper dispels some of the common misconceptions; most significantly, the premise that the issues that have dominated the discourse over the last decade represent *new* developments. Interaction between the state and the sector can be traced back for centuries. Work in the latter nineteenth century in particular saw a myriad of relationships developed in the wake of the establishment of voluntary hospitals and schools. Another myth is the assumption that some of the problems dealt with in this paper are peculiarly British. Again, this is not the case. Debates about the dynamics of state-sector relations, the involvement of the sector in the delivery

4 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 5.

of public services, and the regulatory and legal framework under which they can operate can also be found in a number of other countries. There is thus an international dimension to the problems addressed in this paper.

In order to understand the characteristics of the voluntary sector in operation today, it is worth considering the development of the sector from the mid-twentieth century – often considered a turning point in the state-sector relations. Although charities have provided support to the people of Britain for centuries, it wasn't until the late nineteenth century that charities took on an established and recognised role in the delivery of care and support. The two world wars cemented the work of voluntary organisations, and by the end of the Second World War, the sector began to take its present-day shape. Academics have associated the establishment of the National Health Service – and the services that started to be delivered on the periphery of this development – with a shift in the identity of the sector. Charitable organisations began to include political campaigning for rights, legislative change, and awareness into their scope of work. Organisations began to redefine its role and embark on political advocacy and campaigning that has come to become an established part of its remit.[5]

Since the 1950s, the sector has continued to evolve in line with developments in public health and social policies. Changes to practice connected to the rise of the welfare state, the so-called re-discovery of poverty in the 1960s, the emergence of rights movements in the 1970s addressing the treatment of minority populations and discrimination, and the emergence of a human rights agenda, all played a part in the transformation of sector practice. The 1980s

5 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 8.

is often associated with the 'radical development' in the role of government, with the extrication of the state from the provision of public services and utilities.[6] By the 1990s, disquiet was beginning to heighten amongst practitioners, with claims that the sector was increasingly 'at risk' of being included within the machinery of Government, and taken advantage of.[7] New Labour policies more formally incorporated the use of the sector within the general remit of government. A report published in 2009 claimed that since 1997, sector policy has been through a period of 'hyperactive mainstreaming'; a time of unprecedented policy development and transformation.[8] This has been linked to the devolution agenda and consolidation of the devolved authorities from the late 1990s.[9]

In the first decade of the twentieth-first century, government sought to increase the role of the third sector in the provision of public services. This period also witnessed a growth in the use of the third sector for the delivery of public services. At the same time, income from the public sector as a proportion of the overall income of the third sector rose significantly. Records kept by the National Council for Voluntary Organisations (NCVO) in the 1990s and 2000s revealed that 'public sector income grew from 28 per cent of

6 W. Plowden, 'The Compact: Attempts to regulate relationships between Government and the voluntary sector in England', *Forum*, 2003, p. 415.

7 NCVO, *Meeting the challenge of change: voluntary action into the 21st century*, London: NCVD, 1996, p. 45.

8 J. Kendall, 'The third sector and the policy process in the UK: ingredients in a hyperactive horizontal policy environment', in J. Kendall (ed.), *Handbook of third sector policy in Europe: Multi-level processes and organised civil society*, Cheltenham: Edward Elgar, 2009.

9 P. Alcock, 'New policy spaces: the impact of devolution of third sector policy in the UK', *Social and policy administration*, 46, 2, Apr., 2012, pp. 219-238.

the sector's total income in 1995, to 38.5 per cent, or £10.7 billion, in the financial year 2004-05.[10]

The relationship between the government and third sector has also been influenced by numerous official documents and guidance. The Deakin Commission Report of 1996,[11] set out the framework and guidelines, which have influenced the sector and its relationship with government, and helped framed its development over the subsequent twenty years. In 1998, the 'Compact' was published, outlining the intricacies of how the government and sector could best work together.[12] The Compact is still used as the reference document that outlines the parameters of the relationship, and provides guidelines for both parties. Since its initial publication, local authorities began to set up 'Local Compacts'. 99 per cent of all local areas now provide Compacts specific to their localities. The significance of the Compact was further reinforced in 2006 by the appointment of a Commissioner for the Compact, responsible for the oversight of the implementation of the national and local Compacts throughout the UK. Compacts now work in conjunction with the Office for Civil Society (OCS), which holds formal responsibility for the oversight of the relationship between the government and third sector, together with the Treasury.

The relationship between the state and voluntary organisations has therefore changed significantly, often in line with the ebb and flow of the political and social make-up of the UK's societal

10 NAO, 'Public funding of large national charities', London: National Audit Office, 2007, p. 4.

11 NCVO, *Meeting the challenge of change: voluntary action into the 21st century*, NCVO, 1996.

12 *The Compact on relations between government and the voluntary and community sector*, Compact Working Group, Home Office, 1998.

expectations, norms, and systems of governance. What is clear is the importance of the political landscape – trends, programmes, legislative decisions, and ideologies adopted – on the character of the voluntary sector, and its relationship with the state. Analysis of the constitutional roles performed by the sector thus relies on an understanding of current political ideologies and factors that are influencing state-sector relations. The implications of this on the UK constitution cannot be explored without an awareness of the current political situations that might be influencing these organisations.

Trends and developments

The last two decades are widely depicted as a period of 'rapid and significant change and development' for the voluntary sector, and its relationship with the state. Research undertaken by the BVSC identified three fundamental shifts in practice:

1. An increasing politicisation of the sector and in some cases explicit oppositionalism;

2. An increased dependence on the state as a source of funding and as a consequence of this an increased need to 'target' responses and services;

3. An increased 'professionalisation' in terms of services, structures and management systems.[13]

All three are relevant to the changing relationship between the state and sector, and, by extension, the constitutional significance of these trends. Furthermore, they can both serve to reinforce and to some extent contradict each other. For instance, 'oppositional-

13 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 17.

ism' might come into tension with the pursuit of public streams of income; while 'professionalisation' could be a cause and effect of both politicisation and of increased working with government.

There have also been a number of gradual, seemingly permanent, changes. The legal standing of charities – which form one of the main categories of voluntary organisations in the UK – has been consolidated over the last decade. Until 2006, legislation governing charities in the UK was notably limited. Charities were legally defined in the preamble to 1601 Statute.[14] In 1853, another attempt was made to provide formal supervision of the charity sector, with the establishment of a permanent board of Charity Commissioners. This was introduced in the wake of piecemeal development and proliferation of voluntary organisations in this period. This was followed later by the Charities Act 1960, which set in motion the first modern form of oversight, and later Charities Act 1993.[15] The Charities Act 2006 was the first piece of law that was specifically intended to alter the regulatory framework in which charities operate. It addressed the meaning of 'charity', 'charitable purpose', and included the 'public benefit requirement'.[16] It also outlined the boundaries of the Commission. This has since been followed by the

14 Explanatory notes to the Charities Bill [Bill 83 (2005-06)-EN] in House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 10.

15 Lord Hodgson of Astley Abbotts CBE, *Trusted and Independent: Giving charity back to charities: Review of the Charities Act 2006*, London: Jul., 2012.

16 NCVO, 'Charity Law and regulation' [accessed via: https://www.ncvo.org.uk/images/documents/about_us/media-centre/ncvo_briefing_charity_law_and_regulation.pdf (01/09/17)]

Charities Act 2011, which replaces the Recreational Charities Act 1958, the Charities Act 1993, and the Charities Act 2006.[17]

In terms of finances, in the climate of austerity there has been downward pressure on the amount of central and local government income spent on the charity sector (although the 2017 NCVO Almanac saw an increase in income from the government).[18] State income spend on the charity sector has fallen in absolute terms since the financial year 2009/10 from £7 billion spent by central government and £7.9 billion from local government income. These figures fell in absolute terms each year for three years, with only a marginal increase to £6.8 billion of central government income in 2013/14.[19] The Charity Commission itself has faced budget reductions, which have undoubtedly had an impact on the quality and quantity of support and regulation. This has improved somewhat in the last few years. For the first time in ten years, income from central government is now higher than from local government, estimated at £7.3 billion (central) and £7.1 billion in 2014/15.[20] The sector received £7.4 billion from relationships with local government.[21]

17 The Kubernesis Partnership LLP, 'Charities Act 2011 creates new standard of charity law for England and Wales', York: Kubernesis Charity Bulletin, 2012 [accessed via: http://www.kubernesis.co.uk/wp-content/uploads/KubBulletin2012-01.pdf (01/09/17)]

18 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

19 NCVO, UK Civil Society Almanac 2016: Income from Government, 11 Apr., 2016 [accessed via: https://data.ncvo.org.uk/a/almanac16/income-from-government/ (14/12/17)]

20 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

21 NCVO, UK Civil Society Almanac 2016: Income from Government, 11 Apr., 2016 [accessed via: https://data.ncvo.org.uk/a/almanac16/income-from-government/ (14/12/17)]

Yet it should not be forgotten that these figures are still remarkably similar to state income levels provided back in 2009/10.

Further to this, and perhaps the most notable shift, has been a move from grant to contract-based funding and tighter constraints on commissioning. Over half of all income (£6.1 billion) from the government was granted-based in 2003/04 Whereas £6.1 billion was spent on central government grants in 2003/04, in the financial year 2013/14 the value of grants had been reduced to just £2.8 billion.[22] In the same year, however, government income spent on contracts had risen from £5.8 billion to £12.2 billion.[23] In 2017, 81 per cent of income from the government was contract-based.[24] Medium-sized and small charities have been the hardest hit, often dependent on government funds and unable to compete with larger organisations for public bids.

The reduction of public money available through grants has led to an increase in the expectations on bodies that are successful in securing funding or commissioning to demonstrate the impact of their work. There is now more pressure on charities to be able to show measurable outcomes, and work with more outcome-based objectives. This has been reflected in 'Payment by Results' con-

22 NCVO, UK Civil Society Almanac 2016: Income from Government, 11 Apr., 2016 [accessed via: https://data.ncvo.org.uk/a/almanac16/income-from-government/ (14/12/17)]

23 NCVO, UK Civil Society Almanac 2016: Income from Government, 11 Apr., 2016 [accessed via: https://data.ncvo.org.uk/a/almanac16/income-from-government/ (14/12/17)]

24 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

tracts.[25] The effect of this has been a noticeable decrease in the number of small and medium-sized charities being able to secure contracts. Conversely, the largest charities (with an income of over £100 million) have benefited from the increase in contract-based government funding.

Developments in commissioning and procurement powers have also taken place in conjunction with trends in UK devolution. In line with growing demands for further devolutionary rights, the last ten or so years has seen a dramatic surge in the number of services commissioned outside of central government, and delegated to local authorities. Writing in 2007, the NAO observed that there had been a general shift in government policy. Funds that had previously been ring-fenced by central departments were relaxed, and a loosening of control over local governments led to a more localised approach to the delivery of public services. Local bodies were encouraged to facilitate better working relationships with third sector organisations by the introduction of various policy initiatives. The Local Government White Paper of October 2006 called on councils to overhaul existing methods of service delivery by utilising opportunities for third sector services. This was in conjunction with

25 National Audit Office, *Outcome-based payment schemes: government's use of payment by results*, Jun., 2014 [accessed via: https://www.nao.org.uk/wp-content/uploads/2015/06/Outcome-based-payment-schemes-governments-use-of-payment-by-results.pdf (20/05/17)].; NCVO, *Payment by Results and the voluntary sector* [accessed via: https://www.ncvo/org/uk/images/documents/about_us/media-centre/payment-by-results-and-the-voluntary-sector-april-2014.pdf (20/05/17)]

Local Area Agreements.[26] Other examples include the ChangeUp programme, the establishment of local Compacts, and a number of projects set up by the nine Government Offices for the Regions. Yet it is unclear whether these initiatives have had the desired effect.

The sector, and its relationship with the state, has also been affected by recent negative publicity and scandals. In 2015, the demise of the Keeping Kids Company (Kids Company) became front-page news, after allegations of sexual abuse led to a full-scale inquiry into the practice and funding arrangements of the charity. On the day of closure, it was revealed that government ministers had given £3 million towards an emergency restructure of the charity, despite years of financial chaos and decline. Over the course of its existence, the charity had been provided with over £42 million in grants by successive governments. In the same year, speculation occurred regarding fundraising and development methods employed by the larger national charities operating in the UK. Oxfam, Save the Children, the NSPCC and the RSPCA were among the list of charities that were criticised for allegedly using 'exploitative and unethical fundraising methods.'[27]

Perhaps a response to this, the sector has also suffered from a decline in public trust. According to the Charity Commission, figures show that trust in charities is at its lowest point since levels started

26 Local Area Agreements devolve responsibility for various, previously ring-fenced central government funding programmes to the local level, as explained in NAO, 'Public funding of large national charities', London: National Audit Office, 2007, p. 6.; NAO, *Local Area Agreements and the third sector: public service delivery*, Jun., 2007.

27 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 5.

to be recorded in 2005.[28] It is somewhat ironic that there has been a downwards trajectory in public trust in the sector, at a time when there has actually been a significant increase in the use of the sector to provide public services on behalf of the state.

At the same time, however, figures indicate that a large proportion of people actively contribute to the voluntary sector, in either a financial or voluntary capacity. Surveys carried out by the National Council of Voluntary Organisation's (NCVO), UK Civil Society Almanac, and the Charity Commission have revealed that in 2014-15, 75 per cent of adults in England had given to a charity in the month prior to completing the survey. In the time frame, 47 per cent of adults in England had volunteered at least once a month, either formally or informally. Unsurprisingly, then, approximately £7 billion was received through donations, gifts and legacies by the UK voluntary sector in 2012-13.[29]

Clearly, the sector is not immune from outside factors that might appear removed from voluntary work. The sector was caught up in the referendum campaigning, for instance, amidst concerns from charities that the Charity Commission's initial guidance on campaigning restrictions had placed undue restrictions on the sector's contributions to relevant debates. The decision to withdraw from the European Union will also undoubtedly have an effect on the third sector; not least in terms of funding; it is estimated that the sector currently benefits from around £200 million each year from the European Union, most of it through the European Social

28 O. Bennett, 'Why we've lost faith in charities', *Management Today*, 28 Jun., 2016 [accessed via: http://www.managementtoday.co.uk/why-weve-lost-faith-charities/reputation-matters/article/1369094 (30/06/17)]

29 R. Keen, 'Charities and the voluntary sector: statistics', House of Commons Library, Briefing Paper, Number SN05428, Jul., 2015, p. 3.

Fund.[30] For a number of voluntary organisations, this represents a core part of their work and financial support.[31] The House of Lords Select Committee on Charities recommended that the Office for Civil Society (OCS) should perform an audit of the implications of Brexit for the sector. Other changes to the environment within which voluntary organisations operate include the proliferation of different digital technologies and media opportunities that have aided the work of the voluntary sector, whilst also placing yet further demands on resources and expertise.[32]

Terminology

There are a number of terms that are used to describe the wide-range of organisations that are operating outside of the private and public spheres. Of the most common terms used, there is the 'third sector', the 'voluntary sector', and 'civil societies'. Terminology has also shifted over the years in line with changes to attitudes and trends in practice. Official terminology adopted by the central and local government bodies has changed several times over the last twenty years, in line with shifts in the parties of government.

In 2007, when the House of Commons Public Administration Select Committee (PASC) set up an inquiry into voluntary organisations, it chose the term 'third sector' to describe 'non-governmental organisations that are value driven and which principally invest their

30 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 4.

31 Written evidence from the British Heart Foundation, CHA0152, to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 100.

32 Accessed via: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/ speaking-out-guidance-on-campaigning-and-political-activity-by-charities (30/01/18).

surpluses to further social, environmental and cultural objectives.'[33] This was a deliberately vague definition, chosen to encompass the wide range of organisations that could be placed within this broad categorisation.

Since then, the term 'third sector' has been criticised for implying that the sector plays a subordinate role in comparison to public and private spheres. In official government documents, the sector is now referred to as the 'voluntary and community sector' (VCS). Although charities make up a large proportion of this group, not all voluntary and community organisations (VCO) are charities. VCS is used to include all organisations that are neither part of government (public or state sector) nor the private (for profit) sector.[34] The current government also uses the term 'civil societies' which includes all organisations that are categorised within the bracket of VCS. (Though the type of bodies and dynamics of the sector has shifted considerably since 2007, most noticeably in the proliferation of social enterprises.)

The term voluntary sector is used to describe a multitude of different organisations. The term encompasses a myriad of different bodies. There are thus a number of difficulties when approaching this subject. Respondents traced the use of the 'third sector' back to the Labour Government, when it was intended to be broader than the term 'voluntary', chosen to include other bodies such as social

33 Cabinet Office, 'The future role of the third sector in social and economic regeneration: final report, July 2007 p.5, as quoted in the House of Commons Public Administration Select Committee, 'Public Services and the Third Sector, Jun., 2008, p. 5.

34 'Introduction – 2012 – Charity Commission Guidance for England and Wales', 2012 [accessed via: https://www.gov.uk/government/publications/charities-and-public-service-delivery-an-introduction-cc37/charities-and-public-service-delivery-an-introduction-and-overview (03/07/17)]

enterprises, co-operatives, and trade unions. Similarly, interviewees suggested that 'civil society' was later adopted by the Coalition Government as a means of distancing themselves from Labour politics associated with the 'third sector'. The term 'civil society' has been the subject of academic debates. Some academics argue that 'civil society' cannot be used as a synonym for the third sector, because it has a different history and usage. Awareness of the debates relating to terminology is crucial when studying the development of societies and organisations that make up this sphere.

The author has chosen to use the term 'voluntary sector' or 'voluntary and community sector'. It is used loosely as an inclusive way of broaching what is a notably heterogeneous entity. The author is aware that this term does not fully capture the variety of activity that takes place in the organisations that are placed within this broad category. The types of organisations that are associated with the voluntary sector continue to change and evolve. The term is now used to include an ever-expanding range of bodies. It is an evolving sector. This in itself presents specific challenges with regards to self-regulation, external regulation, communication and legislation. One should therefore be wary of suggestions of a 'collective consciousness.'[35]

It is also important to remember that some organisations have more developed relations with the state than others. This report does not endorse the argument made by the PASC that 'significant elements of the third sector […] do not need to have relations with the State.'[36]

35 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', Newman University College, BVSC, 2012, p. 7.

36 PASC, HC 112-1, Eleventh Report of Session 2007-08, 'Public Services and the Third Sector: Rhetoric and Reality', London: The Stationery Office Limited, 9 Jul., 2008, p. 9.

The evidence in this paper demonstrates the multifaceted nature of interactions. No organisation operating within the UK is immune from the establishment of laws and legislative requirements that have both direct and indirect influences on the sector. Of course, it is worth acknowledging that some organisations have far more points of contact than others.

The term 'government' also needs unpicking. Existing works have often failed to break down what is meant by the word and concept. 'Government' is often used to mean national departments and relevant agencies, including the many organisations making up bodies such as the National Health Service, which are accountable to government departments and officials (in the case of the NHS, the Secretary of State for Health). William Plowden, in his work on The Compact (2003), acknowledged the difficulties in grappling with this subject matter, considering the fluidity of both concepts. Plowden made clear that his use of 'Government' was not confined to central government – meaning the above definition – but also included the near 400 locally elected and nominally independent local authorities that are responsible for providing voluntary sector income and contracts.[37]

The voluntary sector

The voluntary sector has always been extremely diverse, and the extent of this heterogeneity has only increased in recent years, particularly with a noticeable growth in interest in Community Interest Companies (CICs) and social enterprises. According to academics Hilton et al, there are approximately 180,000 charities registered in England and Wales, and an estimated 870,000 total

37 W. Plowden, 'The Compact: Attempts to regulate relationships between Government and the voluntary sector in England', *Forum*, 2003, p. 416.1

'organisations in civil society.'[38] These observations only relate to charities, which encompass just a part of the overall civil society sector. The sector is made up of a many different bodies, all with different needs. There are also considerable regional differences in state-sector relations – most notably in approaches to the delivery of public services. Voluntary organisations in operation in Scotland, Wales, and Northern Ireland are also subject to different legislative requirements. This is discussed in further detail later in this paper.

The sector includes a variety of charities, social enterprises, co-operatives, community groups, religious groups, and other voluntary organisations. Within these broad sub-sets, each sector varies in size, geography, ethnicity, gender, sex, faith, the types of problems they hope to address, the types of people they work with and so on. It is therefore impossible to incorporate every specific type of organisation operating in the UK in a voluntary capacity – although efforts have been made to include as broad a spectrum of opinions as possible. For this reason, some of the respondents to this paper were hesitant to use the term 'sector', citing the dangers with attempts to categorise a wide range of organisations.[39]

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38 Charity Commission, 'About Charities: Sector Facts and Figures' [accessed via: www.charitycommission.gov.uk/about-the-commission/press-office/media-information-centre/about-charities-sector-facts-and-figures/ 29/09/17)].; M. Hilton, K. McKay, J. Crowson, and J-F. Mouhot, 'The Big Society': Civic Participation and the State in Modern Britain, *History and Policy*, 2007.

39 John Hopkins University Centre for Civil Society Studies, 'Comparative Nonprofit Sector Project (CNP) [accessed via: http://ccss.jhu.edu/research-projects/comparative-nonprofit-sector-project/ (06/11/17)]; L. M. Salamon, 'The John Hopkins Comparative Nonprofit Sector Project: Defining the Nonprofit Sector: The United States', John Hopkins Institute for Policy Studies, 18, 1996 [accessed via: http://ccss.jhu.edu/wp-content/uploads/downloads/2011/09/USA_CNP_WP18_1996.pdf (06/11/17)]

Certainly, any generalisation has to be applied with a degree of caution. There is a danger that discussions about the voluntary sector focus on a small part of a broad sphere. It should be remembered that the proportion of organisations that receive public funding are a minority, and of these bodies, the number of those that deliver public services is even smaller. The vast majority of organisations that make up the diverse sector are smaller, community-led and locally-funded groups, of which a significant proportion are left out of 'sector' discussions. This in itself has contributed to practitioners' concerns about sector representation. Respondents pointed to growing dissatisfaction with larger bodies claiming to serve as sector representatives, such as the NCVO. They have been criticised for failing to offer these smaller organisations a voice; for becoming 'hamstrung' by government or commercial sponsorship; and for tailoring advocacy work to suit the needs of financial donors and stakeholders.[40] Some also suggested that the concept of a 'sector' has stemmed from these bodies, which benefit from the notion of the sector being a whole, in order to stake their roles as representatives.

The breadth of the sector poses numerous analytical difficulties. Despite commonalities in approach and scope, the sector covers such a range of extremes, and it would be misleading to treat all organisations formally categorised within this bracket as the same. As PASC pointed out in its 2007 report, 'it can be challenging to find common experience between a multi-million-pound social enterprise such as Café Direct and a small community organisation relying entirely on volunteer time.'[41] This is important to remember

40 D. Billis, Hybrid Organisations and the Third Sector: Challenges for Practice, Theory and Policy, Basingstoke: Palgrave Macmillan, 2010.

41 House of Commons Public Administration Select Committee, 'Public Services and the Third Sector, Jun., 2008, p. 5.

when trying to assess the responses and perspectives of those working for an organisation within the voluntary sector. It is impossible to generalise on the opinions of practitioners. It is similarly not possible to seek the 'position' of the voluntary sector on the various questions that have been raised in relation to the status and future of the organisations involved.[42]

Turning to the general demographics and characteristics of the sector, charities make up the largest type of voluntary and community organisation in the UK. According to the most recent charity register statistics published by the Charity Commission, there are currently 167,000 registered charities in England and Wales.[43] That does not include the 14,000 excepted charities operating in England and Wales.[44] Of those registered, approximately three quarters run on an annual income of under £100,000. Significantly, although a mere 1 per cent earn more than £5 million, this tiny percentage of large charities accounts for 75 per cent of the income of the whole charity sector. There has also been an increase in the number of charities with annual incomes in excess of £100 million – such as the British Red Cross Society, Royal Mencap Society (Mencap) and Leonard Cheshire. 42 registered charities now have an income of over £100 million.[45]

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42 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', BVSC, Newman University College, 2012, p. 2.

43 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

44 The Charity Commission, 'Recent charity register statistics: Charity Commission' [accessed via: https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission (20/05/17)]

45 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

Significantly, this small yet growing number of charities have relied heavily on public income. One such charity, the NCH (since re-named Action for Children), relying almost entirely on funds received from public sources.[46] The last year has witnessed an increase of 17 per cent in income from government, 81 per cent of which comes in the form of contracts – and just 19 per cent from grants.[47]

In terms of focus, of those registered, 18 per cent of charities are currently involved in social services. According to the data analysed in the NCVO's UK Civil Society Almanac (2016), this was followed by culture and recreation at just over 14 per cent, and then religion, at just under 9 per cent.[48] This is closely followed by culture, recreation, and health categories.[49]

The number of social enterprises – businesses trading for a social purpose – has risen in the last few decades, and this trend is set to continue.[50] Similarly, co-operatives – businesses owed by their members who share the profits or benefits of the organisation – have also risen in popularity. This is partly due to government interest

46 NAO, 'Public funding of large national charities', London: National Audit Office, 2007, p. 4.

47 NCVO, 'NCVO's UK Civil Society Almanac 2017', NCVO Data [accessed via: https://data.ncvo.org.uk/ (04/01/18)]

48 NCVO, UK Civil Society Almanac 2016, Figure 1: Voluntary organisations by area of activity (2013/14), in House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 7.

49 NCVO, 'UK Civil Society Almanac 2016: spending' [accessed via: https://data.ncvo.org.uk/a/almanac/spending-4 (14/03/17)]

50 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 44.

shown under David Cameron, specifically in relation to co-operative schools and academies. [51] At the end of the 2016, there were nearly 7,000 independent co-operatives working across the UK. Owned by more than 17 million people across the country, they contribute to more than £34.1 billion to the British economy[52] - up from £26 billion in 2008.[53]

Another evolving sphere of interest has been faith-based organisations. The role and position of faith-based charities has become an area of concern, amidst reports of continuing discrimination against faith-based voluntary organisations.[54] This was initially raised in a Conservative 'Green Paper' in 2007, though recommendations for the development of a new Compact code on the practice and treatment of such charities have so far failed to materialise. Concerns also exist about the part played by religious institutions, particularly in the provision of public services, and the management of these organisations.

Existing literature

The voluntary sector has been the subject House of Commons select committee inquiries and has been a source of interest in both academic and popular circles. There are a number of historical

51 David Cameron, Speech at the launch of the *Breakthrough Manchester* report, 6 Nov., 2007.

52 Co-operatives UK [accessed via: https://www.uk.coop/about/what-co-operative (09/09/17)]

53 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 66.

54 Social Justice Policy Group reports, quoted in The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 77.

accounts, primarily focused on the development of the sector in the context of social change, social theories, and the history of philanthropy in the context of the post-war Welfare State.[55] The 1960s saw the publication of David Owen's *English Philanthropy 1660-1960*.[56] Jane Lewis's *The Voluntary Sector: The State and Social Work in Britain*, published in 1995, charts the historical development of the voluntary sector, providing context for the shape and nature of the sector as it is currently known in the UK. It reveals the importance of voluntary work in the development of social theory and social change. Significantly, Jane Lewis's study demonstrates the constantly evolving nature of the relationships with the state and voluntary sector. Lewis identifies a shift in the meaning of 'partnership' between the state and voluntary sector: from the late nineteenth-century 'separate spheres' ideology, to the 'complementary' relations of the mid-twentieth century, and to current pressure on the sector to serves as alternative service providers. The notion of 'partnership' is significant for this examination of the relationship between state and sector, and this paper follows on from Lewis's work, considering the concept of 'partnership' in the context of present-day practice.

Some work was carried out in the 1990s on the relationship between the voluntary sector and the state, though not from a constitutional perspective. One school of thought claimed that the sector served to mediate between the state and society, helping to address tensions.[57]

55 J. Davis Smith, R. Hedley, and C. Rochester, *An Introduction to the Voluntary Sector*, Abingdon: Routledge, 1994.; W. Beveridge, 'Social Insurance and Allied Services', London: HMSO, 1942.

56 D. Owen, *English Philanthropy, 1660-1960*, Cambridge: The Belknap Press, Harvard University Press, 1964.

57 H. K. Anheier and W. Seibel (eds.), *The Third Sector: Comparative Studies of Nonprofit Organisations*, New York: Walter de Gruyter, 1990, p. 14.

Crucially, in this model, the sector performed roles that could not be undertaken by the state or private sector. Another argument presented the sector as a 'shunting yard for social political problems.'[58] This latter premise still holds sway amongst practitioners and commentators. This paper uses both models presented in these publications to assess the growing responsibilities of the sector, particularly in relation to service delivery.

Jeremy Kendall and Martin Knapp's *The Voluntary Sector in the United Kingdom* offers an international comparative study of the sector's activities, as well as a qualitative study of contemporary perspectives on the role of the sector in education, health, and social services. Their book is a comprehensive study of the development of the sector in the UK, and the scope and scale of operations in the lead up to the millennium.[59] *Sweet Charity: The Role and Workings of Voluntary Organisations*, the collective effort of Chris Hanvey, Christopher Hanvey and Terry Philpot, examines the ways in which the sector operates in the UK, with specific attention to funding, trustees, and the financial market.[60] While this paper refers to existing evidence, as detailed in these texts, a wealth of research has already been conducted in this area, and, as such, these issues will only be discussed at surface-level. For example, this paper briefly sets out the problems associated with public funding opportunities, but does so as part of a broader constitutional agenda.

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58 W. Seibel, 'Government/third sector relationship in a comparative perspective: the cases of France and West Germany', Vol 1, *International Society for Third Sector Research,* May 1990.

59 J. Kendall and M. Knapp, *The Voluntary Sector in the United Kingdom*, Manchester: Manchester University Press, 1996.

60 C. Hanvey, C. P. Hanvey, and T. Philpot, *Sweet Charity: The Role and Workings of Voluntary Organisations*, Abingdon: Routledge, 1996.

Colin Rochester's *Rediscovering Voluntary Action: The Beat of a Different Drum* is perhaps the most relevant study for the purposes of this paper. His work looks at the traditional paradigms of voluntary work, including the role of volunteers and managerialism in the voluntary sector. Rochester argues that existing literature has tended to present voluntary organisations either as agitators for social change, or 'agents of the state', 'whose essential role was to deliver public services on behalf of government in the form and on the terms laid down by statutory agencies.'[61] Instead, Rochester describes present-day voluntarism as a unique set of autonomous activities.

There is a separate theoretical discourse which looks at the inherent characteristics of the 'sector', as well as its historical and international development. Where appropriate, this study refers to these schools of thought and existing literature, but it does not offer an academic account of state-sector relations. Instead, it focuses on current-day issues, and considers existing problems from a constitutional perspective.

Outside of academia, interest in the voluntary sector is published in the form of reports, blogs, and in-house research conducted from within the sector itself. In particular, the Third Sector Research Centre, Compact Voice, Civil Society, the Charity Commission, the Centre for Voluntary Action (BVSC), and the National Council for Voluntary Organisations (NCVO) have contributed to the growing wealth of evidence-based research conducted by sector practitioners. While the wide array of reports covers a wide range of relevant issues relating to sector practice in the UK, a considerable amount of attention has been given to the difficulties all too often

61 C. Rochester, *Rediscovering Voluntary Action: The Beat of a Different Drum*, Basingstoke: Palgrave Macmillan, 2013.

experienced by those within the third sector surrounding funding streams, state-sponsored initiatives, contracts, and public service delivery.

Of particular interest is the BVSC's paper, 'The Voluntary Sector in Transition: changing priorities, changing ideologies', published in 2012. Of particular note is the assessment of the influence of political ideologies on the development of the voluntary and community sector. The authors look specifically at the impact of the Big Society concept introduced in 2010 under David Cameron, and the extent to which this marked a shift in rhetoric and practice. The report also provides a detailed historical overview of the development of the sector, looking at past relations between the state and voluntary organisations.[62] This paper supports their premise that political ideas can permeate the sector. This is a vital component to the ever-changing relationship between state and sector, and is worth considering in relation to the constitutional role of these organisations.

Numerous pieces of research have covered the issue of governance and independence of trustees in wake of the Kids Company scandal of 2015. The report of the House of Lords Select Committee on Charities tackles this topic in great detail. While this paper refers to these arguments where relevant, the minutiae of these discussions are omitted, on the grounds that considerable qualitative and quantitative research has already been undertaken. Similarly, existing literature has already considered proposals for charging charities for regulation by the Charity Commission. While this has direct repercussions for the government – most notably, whether any payments will replace grant funding currently provided by the Treasury

62 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', Newman University College, BVSC, 2012.

– and is a matter of interest for the state, this paper does not cover these discussions.[63] The Commission has announced that it will be taking this up in a formal consultation.

The passing of the Transparency Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (Lobbying Act) prompted a proliferation of works on the impact of the Act, and the involvement of organisations in political campaigning. The Act was met with hostility from the sector, which quickly dubbed the legislation as a 'gagging' Act. Of particular significance was a review conducted by Lord Hodgson of Astley Abbotts – known as the Hodgson Review – in which Lord Hodgson called for a reduction of the scope of the Act to include only activities *intended* to influence voting. Subsequent responses have since been published: the review was well-received by most practitioners, with widespread calls for the immediate implementation of the recommendations; a report was laid before Parliament advocating major changes to the Lobbying Act.[64] The resulting discussions are discussed in this paper in relation to legislative regulation and status of the voluntary sector – though this report does not offer the same level of detailed scrutiny, to avoid unnecessary duplication and overlap in content.

Research has also been published by government organisations, or quasi-state bodies affiliated with the government. The Office for Civil Society (OCS) and the National Audit Office (NAO) have both added to existing literature, offering insight into state-sector

63 NCVO, 'The House of Lords Report on Charities – what you need to know' [accessed via: https://blogs.ncvo.org.uk/2017/03/26/the-house-of-lords-report-on-charities-what-you-need-to-know/ (09/09/17)]

64 Civil Society, 'Hodgson Review recommends key changes to Lobbying Act', 17 Mar., 2016 [accessed via: https://www.civilsociety.co.uk/news/hodgson-review-recommends-key-changes-to-lobbying-act.html (08/09/17)]

relations, and the role of voluntary sector organisations in the conduct of UK governance.

Most recently, the House of Lords Select Committee on charities report entitled 'Stronger charities for a stronger society' was published in March 2017. The Committee focused its efforts on looking at the key challenges and opportunities that are facing the charity sector at this point in time – for example, focusing on charity governance, funding and sustainability. This is in keeping with the majority of existing literature. Most are interested in the problems and areas for improvements to both the charity sector, and the government contribution to this sector. This is representative of another feature of existing literature: research into the sector has largely focused on charities. More specifically, a large proportion of the existing literature has looked at larger charities, most operating on a national or international level. In contrast, this paper widens the scope of inquiry by incorporating the range of organisations and groups that fit into the loose umbrella term 'voluntary sector'. It is hoped that this minimises the possibility of oversight of any key issues that are constitutionally significant, and considers the entirety of different avenues of cross-sector convergence.

There is considerable overlap with the report published by the House of Lords Select Committee, although the emphasis and scope is different. In terms of content, this paper takes inspiration from some of the questions raised in the Committee's report. The discussions reached by the Committee provide interesting insight into some of the present-day issues being discussed in relation to the sector. This paper covers some of the following questions: What is the role and purpose of charities in civic society in England and Wales? What role can charities play in community cohesion

and civic action? What should the role of Government be with the sector? What should be the role of local Government? What should be the role of the Charity Commission? Have these relationships changed? If so, how? How should Government (national or local) focus its resources to deliver its civil society agenda? What is the likely impact of greater local devolution on the charitable sector, or particular types of charity? What are the opportunities and challenges associated with local devolution?[65] The issues presented by the Committee form the basis of much of the themes considered in this paper – albeit applied to the voluntary sector more generally, and focused specifically on the constitutional implications of the results.

Despite this extensive volume of literature that deals with the role of voluntary organisations, the discourse lacks any consideration of voluntary sector contributions in relation to the UK Constitution. Although the research discussed above touches upon the responsibilities of the state and the boundaries of the sector – most noticeably within discussions about the delivery of public services, and the definition of 'charitable status' – any references to democratic accountability or constitutional requirements are done so implicitly. It could be inferred that the decision made by the House of Commons Public Administration and Constitutional Affairs Committee to look into the work of charities, most recently seen with Fundraising in the charitable sector inquiry of 2015, is evidence of interest in

65 Appendix 3: Call for evidence, in the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', HL Paper 133, Mar., 2017, p. 130.

the constitutional role voluntary organisations might perform.[66] Yet, this is hardly formal recognition. There is thus a significant gap in literary discussions.

Methodology and scope of inquiry

The paper seeks to address this oversight. It examines the relationship between the UK government – both central and local – and the voluntary sector from a constitutional viewpoint, exploring the wide variety of points of interaction between the two parties, and the resulting relations which have developed. It looks at the general areas of contention, specifically with regards to arguments advanced over the last few decades. In so doing it opts for a broader oversight of the relationship and implications of interaction, as opposed to a more quantitative and detailed approach. It discusses the possible implications of state-sector relations on the overarching function of the government in the development of the voluntary sector, and how, in turn, they influence the constitutional make-up of British governance. It addresses some of the gaps in the existing literature, and provides a different outlook – centred on secondary and contemporary observations – whilst supplementing the aforementioned studies.

The overall scope of source material for this topic is admittedly limited. There is a dearth of reliable and up to date statistics on the work undertaken by 'voluntary' organisations. As explained in a paper published by the NCIA, this is partly the result of reductions in government funding, and also the product of ambiguity regarding

66 Public Administration and Constitutional Affairs Committee, 'Fundraising in the charitable sector inquiry' [accessed via: https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/inquiries/parliament-2015/fundraising-charitable-sector/ (08/09/17)]

definitions and terminology. Those involved in or associated with the organisations that fall within the broad category of 'voluntary sector' have widely differing profile and perspectives on their roles and objectives.[67]

Further complications to this line of enquiry stem from intrinsic difficulties in constitutional research. In the absence of a written UK constitution, academic and lay opinions differ over what is meant by constitutional work and responsibilities. Unsurprisingly, the majority of respondents to the research conducted for this paper were unsure of any constitutional dimension to voluntary sector roles. Many maintained that the sector does not perform a constitutional role, on the grounds that this suggests an element of formality. However, when presented with examples of the advocacy work undertaken by sector organisations, critiques of government initiatives, and the inclusion of certain sector bodies in the delivery of public services, most then concurred that there was constitutional significance attached to sector activities.

The conclusions and recommendations put forward in this paper are drawn from an extensive literature review of the qualitative and quantitative data published in existing publications, and qualitative data provided by current practitioners involved in either sector. The methodology of this paper primarily rests on a literature review of research, evidence, and arguments made in official, academic, and lay publications detailing developments and trends in the state-sector relations. It analyses existing arguments to examine the

67 L. Ryan, 'Working Paper 5: Outsourcing and the Voluntary Sector', NCIA: May 2014, p. 2. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Outsourcing-and-the-Voluntary-Sector-final.pdf (26/09/17)]

main themes that have emerged in discussions about the role of the voluntary sector over the last few decades.

The decision was made to conduct interviews with practitioners from state bodies and sector organisations, in order to incorporate a multitude of different experiences and perspectives. It is hoped that in doing this, the paper reflects the intricacies and viewpoints of those working in each sector. Representatives of the sector were mainly chosen from the existing literature; known to have been included in previous research, or in some way involved in past evidence submissions and lines of inquiries. The author does not purport that the selection of respondents reflects the diversity of practitioners working for either side. However, efforts were made to include a variety of different opinions, from individuals operating at different levels and in different lines of sector and state involvement. The arguments drawn from the literary data are thus supplemented by the additional knowledge and insight generated from these interviews conducted with contemporary practitioners.

As a result of this methodological approach, the following results are by no means comprehensive or systematic. While this paper aims to include a diverse range of different organisations, it does not claim to reflect the entirety of the various demographic types of people and bodies involved in state-sector collaborations. It does not include an extensive or exhaustive examination of all of the various relationships that are maintained either directly or indirectly between the government and the sector. Instead, it offers a starting point for further discussions about the constitutional relevance of some of the points of contact that take place between the sector and the state, particularly in areas that have been subjected to increasing media and government scrutiny in recent years. It illuminates

a number of additional areas that would benefit from further study, and puts forward questions that remain unanswered.

Although some of the more practical and logistical issues are mentioned, they are referenced as a means of investigating the relationship between the state and voluntary sector from a purely constitutional perspective. By offering a new stance of some of the issues that have defined recent changes and challenges to the sector, it is hoped that the paper contributes to ongoing discussions about the sector's position in the UK, whilst also suggesting priorities for ongoing research, and directions for future government initiatives.

Although some recommendations for future practice are suggested, the main aim of this paper was to look more broadly at the constitutional considerations. It will touch upon problems, looking at past and present arguments, and cases of best and worst practice, in order to make more general points about the UK constitution. Questions are raised about the position of the state, and the legitimacy of current practice with regard to constitutional conventions. It is hoped that these questions will be used as a springboard for further study, and, in some cases, re-evaluations of current practice on both sides.

With this in mind, the paper traces the various points of interaction and possible areas of contention between the state and the voluntary sector. The paper starts with an assessment of the Compact agreement, which serves as the primary reference point for sector and state practitioners. A discussion of the governance and regulation of the sector then follows, which considers the role of the state in the management of sector organisations, and the extent to which this forms a part of the constitutional remit of the government. Specific governance in the form of legislation is then considered,

including an in-depth examination of the difficulties and problems concerning taxation of the sector, and related discussions about the legal definition of 'charitable status' and 'public benefit'. The political contributions of voluntary and community bodies are discussed – which, again, includes questions about the charitable status of certain organisations, such as think-tanks, that operate on the very 'boundaries' of state and sector spheres of interest – as well as advocacy work more generally.

Grants, contracts and the commissioning of organisations are also worth exploring from a constitutional perspective, particularly in the current context of malpractice concerns, and high-profile cases that have revealed state interference; the 2012 Olympics spending scandal, and the Big Lottery Fund debates. The implications of larger-scale contracting out of services have been a particular source of concern amongst practitioners in recent years. This study contributes to existing debates, tackling the issue from a constitutional angle by considering state obligations towards the maintenance and management of smaller sector organisations, and the extent to which current practice should be changed to allow for greater diversity and manoeuvrability. Linked to this is the use of the sector in the delivery of public services. Discussions focus on the premise that the state has become increasingly dependent upon voluntary organisations to provide statutory services, and the extent to which this is constitutionally problematic – most notably regarding accountability and liability. Finally, attention is given to the role of local government organisations in the management of cross-sector work, and the growing significance of devolved powers.

Through qualitative desk research and interviews with current practitioners, this paper uses the above categories to explore the

constitutional implications of the dynamics of the relationships maintained and developed between voluntary sector organisations and the state. By establishing the current roles taken on by the sector, and their contribution to the running of the UK systems of governance, the responsibilities and constitutional expectations of the Government are considered. The following questions are broadly reflected upon:

- What is the constitutional role of the voluntary sector?
- What are the constitutional responsibilities of the state in relation to the voluntary sector?
- How should the nature of the relationship(s) between state and sector be described?
- Has the relationship between the state and sector changed in recent years? And if so, how?
- Who is responsible for the oversight of the voluntary sector?
- How is the sector held to account? And are there any areas that could be improved to increase accountability?

The Compact

The Compact is an agreement that outlines the relationship between the voluntary sector and the state in England and Wales.[68] First published in 1998 in response to the Deakin report, and report of the Independent Commission on the Future of the Voluntary Sector in England (1996),[69][70][71] the Compact sets out the parameters of the relationship. The initial concept called for an agreement that details codes of behaviour and regulation, with regards to funding, consultation, the use of volunteers, representation, and public service delivery. Advocates at the time also hoped that the concordat would put pressure on the government to take the voluntary sector more seriously; to 'increase the voltage running through the relationship at the Whitehall end,'[72] as a NCVO report described. They pitched the idea as a way of cementing existing relations and ensuring state-sector relations had 'real substance.'

68 HM Government, 'The Compact: Accountability and Transparency Guide', London: HM Government, p. 3.

69 NCVO, *Meeting the challenge of change: voluntary action into the 21st century*, NCVO: Jul., 1996.

70 Deakin Commission, *Meeting the challenge of change: voluntary action in to the 21st century*, Report of the Commission on the Future of the Voluntary Sector in England, 1996.

71 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', Newman University College, BVSC, 2012, p. 23.

72 W. Plowden, 'The Compact: Attempts to regulate relationships between Government and the voluntary sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 418.; NCVO, *Meeting the challenge of change: voluntary action into the 21st century*, London: NCVD, 1996, pp. 50, 123.

In the words of one respondent, the Compact is now 'pretty dead'. An initiative was introduced under New Labour, which advocates hoped would introduce some kind of organised and strategic system for state involvement with the voluntary sector. However, the political impetus for this has disappeared, along with the funding. The early 2010s attempts to develop Compact ideals within the government departments were largely abandoned. In fact, some would argue they never really got off the ground to begin with. The local Compacts have survived better in some areas.

The benefits and drawbacks of the use of Compact agreements across the UK have already been discussed at length by a number of research organisations.[73] Meta Zimmeck, Colin Rochester and Bill Rushbrooke published a comprehensive report on the development and future prospects of the Compact, entitled 'Use it or lose it', written on behalf of the Commission for the Compact.[74] Amongst others, the authors cited problems with representation, weakness within representative bodies responsible for administering both the national and local Compacts, and the 'governmentalisation' of the larger voluntary organisations as barriers to the effective implementation of the Compact.

This chapter relays some of these issues, focusing on the constitutional ramifications of these claims. It examines the main concerns,

73 G. Craig, M. Taylor, N. Carlton, R, Garbutt, R, Kimberlee, E. Lepine and A. Syed, Home Office Online Report 02/05, Development and Statistics Directorate, 'The paradox of Compacts: monitoring the impact of Compacts', Hull: University of Hull and University of West England, 2005 [accessed via: http://eprints.uwe.ac.uk/10166/1/rdsolr0205.pdf (21/07/17)]

74 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

problems with implementation, and gaps in subject matter, and the potential of the document as a means of cementing cross-sector partnerships and formalising boundaries of work. It considers whether the document could still be used as a baseline agreement for state-sector relations, if problems with implementation and understanding were resolved. Is there still scope for the document to be used to engender a more regulated and constitutionally legitimate environment for both sides of the partnership? First, the practical problems associated with the document are considered; problems that would need to be addressed if further action is taken to make the Compact a permanent fixture. Discussion then turns to the more inherent issues with implementation and commitment that would need to be resolved, and the arguments for and against making the document legally binding.

The Compact

The Compact is the only agreement so far that has set out the parameters for both sector and state involvement and outlined the undertakings by both sides and how each will conduct relations. It thus plays a part in the upkeep of the UK constitution, detailing the role of the government and state bodies in their workings with sector organisations and, even more significantly, members of the British public.

To a certain degree, this has been acknowledged both within and outside of Government at various points throughout its twenty years, although some have suggested that this has been little more than rhetoric. As part of the 1st Reading of the Commission for the Compact Bill in 2009, Tom Levitt MP listed a string of Compact achievements. The House heard how the agreement 'enshrines the sector's right to independence, including its right, within the law, to

campaign, comment on and challenge Government policy.'[75] Here, Levitt indicates that the Compact offers some sort of framework for the holding of the Government to account.

His speech also highlighted its importance in setting out the parameters of relations: what each side can expect from one another; what each of their responsibilities and tasks amount to; how they can influence each other; and the ways in which existing relations can be improved. He pointed to the resulting improvements to 'programmes, policies and services for citizens and communities,' which the Compact had enabled 'by setting clear standards, improving funding processes, and providing resources for building the capacity of the third sector.'[76] Levitt's proposal for a statutory non-public body with limited legal powers was rejected, but it is significant in demonstrating that the benefits of the Compact have previously been recognised. The Compact sets out the parameters of cross-sector work, such as length of consultation, and feedback mechanisms – all of which are central to the maintenance of accountability and constitutional legitimacy of practice. They also suggest that the principles of the Compact are constitutionally significant; implemented correctly, they scan make a tangible difference to the delivery of services and support to citizens, and improve programmes and policies that the Government is democratically responsible for.

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75 Tom Levitt MP, House of Commons Hansard Debates for 19 May 2009, Points of Order, 'Commission for the Compact', May 2009 [accessed via: https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090519/debtext/90519-0004.htm#09051970000001 (03/10/17)]

76 Tom Levitt MP, House of Commons Hansard Debates for 19 May 2009, Points of Order, 'Commission for the Compact', May 2009 [accessed via: https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090519/debtext/90519-0004.htm#09051970000001 (03/10/17)]

The agreement also promotes transparency in the development and implementation of relevant policies and schemes, and adequate measures in place for the arrangement and administration of high quality delivery of public services. It promotes fair funding opportunities and systems, and the right to campaign. More generally, it aims to provide for an independent civil society, and a diverse, fair, and equal society.[77] It also offers advice and guidance on an operational level.

The shared principles outlined in the Compact have been praised by academics for setting out a theoretical framework for better practice and working relations. Amidst concerns about the state's treatment of the sector – with the outsourcing of public services, decline in the number of state-funded grants, and so-called 'climate of fear' – the core components of the agreement represent a welcome focus on how both sides can work to deliver real outcomes and improvements, building and maintaining relationships and partnerships. It contains guidance on a number of shared responsibilities, including the involvement of the sector in policy development including who to involve, and the responsibilities of the Government and sector organisations. It also suggests best practice on the allocation of resources, guidance for commissioning and the co-designing of programmes, and funding applications and decision-making protocol. On paper, then, the Compact tackles a number of the issues discussed in this paper.[78]

77 Compact Voice, 'About Compact' [accessed via: http://www.compact-voice.org.uk/about-compact (30/50/17)]

78 Compact Voice, 'The Compact: The Compact on relations between Government and the Third Sector in England', Dec., 2009 [accessed via: http://webarchive.nationalarchives.gov.uk/20110208113738/http://www.thecompact.org.uk/files/140472/FileName/TheCompact.pdf (02/10/17)]

Crucially, the Compact has been 'accepted' by both parties. Theoretically, every government department has signed up to the agreement – its implementation overseen by the OCS. On the other side, Compact Voice is the body which represents the voluntary and community sector on the Compact in negotiations. Since 1998, the premise of the national Compact has been extended, and the majority of localities in England and Wales have established local Compact agreements which establish baseline requirements and codes of best practice on local levels. The national Compact was last renewed in 2010 under the Coalition Government.

In sum, the Compact is, in itself, significant. It is the only agreement, accepted by representatives on both sides, that deals specifically with the relationship between state and sector organisations. In this sense, it has the potential to ensure that work undertaken by the sector is held to account and constitutionally legitimate. For the purposes of this study, it also helpfully points out the key areas of cross-sector work, which will be discussed in greater detail throughout this paper. Yet as this chapter reveals, the Compact has already been placed under considerable scrutiny since it was first introduced in 1998. Respondents suggested that the Compact is now largely redundant. The following sections detail some of the difficulties in the application of Compact principles, and suggests ways to address these problems. It supports proposals for a reinvigoration of the Compact, and hopes that the Compact might, once again, feature more prominently in government interactions with the sector.

Challenges with implementation

Representation

One of the reservations originally made during the process of establishing the first Compact in the late 1990s, was that it is impossible to choose a working group for the negotiations that could represent the diverse and heterogeneous 'sector' side of the relationship. Practitioners voiced concerns about how representatives could be chosen, given the nature of sector variety. From the outset, advocates of the Compact grappled with how a working group could be established that would be able to 'legitimise this claim to speak for the sector and to ensure that any agreement with government could be regarded as binding on both parties and would be treated as such by the fullest possible range of voluntary and community organisations.'[79] (A dilemma that arguably still faces practitioners of today). Efforts were made to work around these difficulties of legitimacy and representation. A multi-layered consultation process was set up, together with a reference group, and a database of several thousand organisations, in order to counter the above concerns.

Despite the resulting arrangements, reservations continue to be held about the representativeness of the document, based on difficulties establishing a negotiating group that reflected the desires and demands of the voluntary and community sector in England. The premise that the original working group was not taken as being truly representative of the sector – if that is even possible – undermines the effectiveness and currency of the agreement. Although the Compact ('On relations between Government and Voluntary

79 W. Plowden, 'The Compact: Attempts to regulate relationships between Government and the voluntary sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 421.

and Community Sector in England') was publicly launched in November 1998 by the Home Secretary and the chairman of the VCS working group,[80] it cannot be said that this agreement was signed by those truly representative of either state or sector side of the relationship.

Similar arguments have continued to gather currency amongst practitioners and researchers observing the implementation of the Compact over the last twenty years. The Commission for the Compact drew attention to the difficulties in representation as one of the three main challenges to the success of the agreement. The Commission referred to the continuing belief amongst some critics that the Compact is discredited because 'those who claim to speak for the sector at national or local level have no right or mandate to do so.'[81] An argument running parallel to these claims is the idea that the organisations that provided the spokespeople for the voluntary sector had gained the reputation and standing amongst practitioners as a result of government support and funding. For this reason, critics have argued, sector representatives have been wary of criticising the government, at annual meetings and in discussions about joint action plans. The researchers of the 2011 report *Use it or lose it* referred to this premise as 'governmentality'.[82]

80 W. Plowden, 'The Compact: Attempts to regulate relationships between Government and the voluntary sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 422.

81 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 134.

82 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 134.

Questions have also been raised about representation and geography. The same concerns about the NCVO – an organisation operating in England and Wales – collaborating with organisations that are multi-national or international, can be applied to the function of the Compact. What about the voluntary organisations that hold offices in other British or international areas, as well as England? How do they juggle their responsibilities to various oversight bodies and agreements? For instance, is the Compact – the formal agreement in operation in England alone – ever in conflict with other written or unwritten contracts employed in Wales, Scotland, and Northern Ireland?

The Welsh Government has placed state-sector relations on a statutory basis, requiring Welsh Ministers to make a 'Scheme' which 'sets out how they propose, in the exercise of their functions, to promote the interests of relevant voluntary organisations.'[83] In some respects, then, the Scheme operates in the same way as the Compact. Crucially, though, it puts the Assembly's commitments to the sector onto a statutory footing. Published in 2014, the Government made the case for the 'Third Sector Scheme' as a way of 'taking forward their relationship with the Third Sector,' in recognition that the 2006 Act did not make this requirement legally binding. It also has regular ministerial meetings, and a Third Sector Partnership Council, which comprises representatives of 25 identified categories in the Third Sector, which provides a valuable forum for discussions. It is democratically and constitutionally problematic that organisations and beneficiaries in the other devolved states cannot access sim-

83 Welsh Government, 'Third Sector Scheme', Jan., 2014, p. 3 [accessed via: https://www.wcva.org.uk/media/818409/final_third_sector_scheme_2014.pdf 05/10/17)]

ilar such institutions.[84] Could a similar Scheme be introduced in England and Wales?

Would this Scheme be successful if implemented across the four administrations? Some commentators are unconvinced. Daniel Hurford has argued that problems with commitment are still rife. The success of Compacts and/or Schemes lies more in the commitment to the document from local authorities and voluntary organisations, than the strength of the document itself, or the use of the Compact in a particular area. Instead, 'It is largely down to the organisations, the interpersonal relationships and the history between the local third sector and the local authority.'[85] Problems with enforcement of local and national Compacts have not been sufficiently addressed. These issues relate to broader concerns about agreements between the state and sector. This example, once again, demonstrates the heterogeneity of the voluntary sector, and the complexity of the partnership between state and sector. Following on from this, would it ever be possible to form a group to represent the voluntary sector? In fact, is the notion of a 'sector' that incorporates the myriad of different organisations that might fit within the bracket of 'voluntary' helpful? How can the State be expected to follow the principles of the Compact consistently and evenly, if the boundaries of both parties and their involvement with each other are not clearly defined?

84 Welsh Government, 'Annual Report 2014-15, Third Sector Scheme', Mar., 2016, pp. 8-10.

85 Daniel Hurford, Welsh Local Government Association, Q148, in evidence to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', HL Paper 133, Mar., 2017, as quoted on p. 95.

Impact measurement

Assessing the success of the implementation of the Compact at central and local levels from both parties would provide invaluable insight into the nature of the relationship between the state and sector more generally. Research into the impact of the Compact has been attempted by a few, but problems with data collection and analysis rendered these attempts somewhat limited. Problems with impact measurement are revealed in the cancellation of a number of schemes previously introduced to assess the effectiveness of the agreement. The State of the Sector Panel research, the Department for Communities and Local Government Citizenship Survey (which ended in 2001), and OTS (later, OCS) research on central government and local authorities' funding of the VCS were all terminated or discontinued following reservations of efficacy.[86]

Unsurprisingly, there are numerous difficulties with measuring the impact of the Compact. Complexity of the environment – such as the multifaceted nature of the sector, and the spectrum of different local authorities and organisations operating at different levels – and the lack of an established oversight body responsible for assessing compliance both present obvious difficulties. The dearth of quantitative and qualitative data available, alongside the reliance on 'informal' methods in the first instance of maladministration, also makes evaluation problematic.

The 'no teeth' complaints – discussed below – can be partly attributed to these difficulties in defining the goals and outcomes of local and national Compacts, and failures to monitor and evaluate

86 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 65.

the development of the implementation and practice of Compact agreements.[87] Existing problems are therefore exacerbated by problems with impact assessment. Are any forms of impact measurement in place? This paper calls for further investigations into the measurement of the effectiveness of the document.

Understanding and awareness

There are also problems regarding a dearth in understanding and awareness of Compact principles from both parties. This undermines the effectiveness of complaints procedures and accountability measures. Without sufficient understanding and awareness of the Compact at central and local levels operating nationwide, the principles outlined in the agreement are left redundant. The success of the implementation of the principles is reliant upon the awareness, understanding, and commitment of individuals working for both parties. Are practitioners or recipients involved on the side of the voluntary sector of the relationship sufficiently aware of the Compact, and the procedural arrangements in place, should there be need to complain? Complainants need to have evidence to a breach of Compact provisions. The success of the complaints system clearly relies on an understanding of the Compact.

The structures of both government and the voluntary sector complicate systems of communication. The existing difficulties regarding commitment to the implementation of the Compact are further complicated by the multitude of different bodies that make up both parties. On the side of the state, for example, government extends

87 G. Craig, M. Taylor, N. Carlton, R, Garbutt, R, Kimberlee, E. Lepine and A. Syed, Home Office Online Report 02/05, Development and Statistics Directorate, 'The paradox of Compacts: monitoring the impact of Compacts', Hull: University of Hull and University of West England, 2005, p. 46.

far beyond the 'central' government departments and their agencies. Public bodies such as the National Health Service are complex and multi-layered organisations. In addition, and perhaps of greatest significance to the sector, are those operating at local government levels. There are nearly 400 constitutionally independent, locally elected bodies in England alone, controlled by a number of different political parties, with different funding schemes and streams, and localised government plans for service provision and delivery. Unsurprisingly, then, practitioners have referred to problems with communication. As observed by William Plowden in 2003, 'communicating the mere existence of the Compact partly precedes, and partly depends on, perceptions of its relevance and significance to those concerned.'[88] It is impossible to know whether the units, bodies, and individuals that operate within the 'voluntary sector' bracket are sufficiently informed.

Peter Alcock noted in his 2009 report on devolution and the third sector that both England and Scotland have had difficulties with lack of awareness of Compacts. Evidence published by the Scottish Executive in 2002 found that 65 per cent of sector practitioners taking part in the survey found no change in relations, and 50 per cent were unaware of its existence.[89] Admittedly, it may have been too early to be able to judge the success of the implementation of such initiatives, but this does reinforce arguments about general lack of awareness.

88 W. Plowden, 'The Compact: attempts to regulate relationships between Government and the Voluntary Sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 428.

89 P. Alcock, TSRC, 'Devolution or divergence? Third sector policy across the UK since 2000', London: IPPR, Sept., 2009, p. 10.

Smaller charities and community groups operating on localised levels are not involved in the central decision-making processes. The establishment of the Compact, and subsequent renewal in 2010, paved the way for better consultation between state and sector organisations, but practitioners have argued that little has been done to improve past efforts. Even though central government has improved its channels of communication with civil society bodies, it is unlikely that more isolated, one-off organisations are contacted, or even aware of the possibility of participation in such activities. There is also the issue of lack of resources available to the smaller bodies. Evidence suggests that an alarming proportion of smaller charities do not have the resources, personnel or expertise required to participate in any debates that they are made aware of. (Similar concerns have been noted in relation to lottery applications and contract-based commissioning.)

This, once again, relates to issues with commitment to the principles of the Compact. Given problems relating to understanding, there are also associated concerns about compliance, and the ability of oversight bodies to effectively monitor the implementation of the agreement. Who is responsible for ensuring that there is an adequate baseline level of awareness and understanding? The ability of Compact Voice, Office for Civil Society, and government departments to enforce the principles of the Compact is no doubt inhibited by these difficulties in communication and enforcement. These issues are all essential to the credibility and weight carried by the Compact. Indeed, in spite of the proliferation of local Compacts that have been introduced the first national Compact in 1998, evidence suggests that there are still numerous problems with implementation and enforcement. As it stands, in practice, complaints are dealt with by one party ‘embarrassing’ the other; practice that

is 'unlikely to promote satisfactory partnerships,' in the words of William Plowden.[90]

The bottom line of all these difficulties is the lack of accountability. The system cannot cope with matters of maladministration and malpractice. As such, there is no means of holding either party to account, and a lack of power on the part of any individual who might be involved in some way, working for or as a beneficiary of a civil society organisation.

Commitment to the Compact

If these problems with understanding, awareness, impact measurement, and representation were addressed, it is the belief of this author that the Compact itself would provide a broad yet sufficient framework for the regulation and management of state-sector relations. However, evidence indicates that lack of commitment and legal grounding renders the document superfluous. Indeed, the difficulties in implementation described are partly the product of broader issues with accountability and commitment, as illustrated in the sections above.

While the general principles outlined in national and local Compacts are supported by those working on both sides of the agreement, practitioners remain unconvinced that the documents carry any further weight. Complaints have been made about the extent to which the agreement is complied with, most notably on the side of the Government. The Government has been accused of breaking its side of the agreement on numerous occasions, with-

90 W. Plowden, 'The Compact: attempts to regulate relationships between Government and the Voluntary Sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 430.

out any effort to address these incidents. Lack of consultation on policies deemed relevant to the voluntary sector is another area of concern. The Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 is often cited in support of this claim.

It has been suggested that the Government tends to ignore the Compact when politically expedient. The Compact is used on an ad hoc basis. Members of the voluntary sector have argued that this bespoke attitude towards the document has meant that 'a lot of things have gone wrong [that] would not have gone wrong' if the principles outlined in the agreement had been upheld.[91] Calls have been made to restate the importance of the document, and the need to adhere to its messages. As part of its formal evidence submission to the Select Committee on Charities in March 2017, NCVO representatives concluded that 'now more than ever before is the time for government, led by the OCS, to restate and demonstrate its support for the Compact principles as a framework for respectful collaboration between the voluntary and statutory sectors, while recognising their separation and the independence of the voluntary sector.'[92]

Similar concerns have also been raised about the implementation of local Compacts. Practitioners working for public bodies and voluntary organisations have also put a case forward for renewal of their commitments. Indeed, members of local government associations have admitted that more could be done on the part of

91 David Cutler of the Baring Foundation, Q50, in evidence to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', HL Paper 133, Mar., 2017, as quoted on p. 94.

92 Written evidence from National Council for Voluntary Organisations, CHA0148, to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', HL Paper 133, Mar., 2017.

public bodies to ensure that the Compact is being taken seriously. There is general agreement on both sides that local Compacts are in need of a similar reinvigoration. This is illustrated in the argument put forward by Daniel Hurford, who works for the Welsh Local Government Association, to the Select Committee on Charities. He relayed worries that both national and local Compacts are at risk of being treated as 'purely symbolic'.[93]

There have been several attempts to assess levels of government commitment. Compliance has been measured based on evidence compiled on how government departments have been handling complaints and attending annual meetings. According to the original Compact, the operation and progress of the agreement is supposed to be reviewed at annual meetings held between the government and representatives of the sector. In response to reservations about the quality of these meetings, particularly when the number of attendees dropped from 91 in 2004 to 56 in 2005,[94] efforts to re-commit to an annual review were made in 2010, in the form of Joint Action Plans, agreed between Compact Voice and Office for Civil Society. The last Joint Action Plan was published in 2014-15.[95]

Similarly, the National Audit Office (NAO) relayed concerns in 2015 about the lack of progress made by government departments

93 Daniel Hurford, Welsh Local Government Association, Q148, in evidence to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', HL Paper 133, Mar., 2017, as quoted on p. 95.

94 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 61.

95 Compact Voice, 'Joint Action Plan between Compact Voice and Office for Civil Society, 2014-15', Compact Voice, 2014 [accessed via: http://www.compactvoice.org.uk/sites/default/files/compact_voice_and_ocs_joint_action_plan_14-15.pdf (29/06/17)]

in the strengthening of arrangements for monitoring Compact complaints. Most departments (10 of 14) did not have arrangements to monitor Compact complaints at the time of the survey, nor did they have arrangements in place for the monitoring and reporting of consultations.[96] Further still, the NAO also concluded that there was no central oversight of Compact non-compliance – which is the responsibility of the Cabinet Office. In light of the closure of the Compact Advisor Programme in April 2013, the Cabinet Office has relied on informal communication with Compact Voice as its main means of identifying non-compliance.[97]

On the whole, practitioners remain unconvinced with the level of commitment and collaboration on the side of the government. Those involved in the process of discussions leading to each annual meeting and joint action plans have noticed a gradual decline in the level and quality of collaboration with representatives from the sector. Research undertaken by the Commission for the Compact, published in March 2011, revealed that meetings to establish key points of the annual plans became 'perfunctory'. By the eighth annual meeting, respondents claimed that the job was of 'hidden hands'. Later meetings to discuss action plans omitted opportunities for those representing the voluntary sector to discuss points of the plans entirely. The authors of the subsequent report, entitled *Use it or lose it: A summative evaluation of the Compact*, concluded that

96 National Audit Office, 'Central government's implementation of the national Compact: a follow-up', London: Cabinet Office, Jan., 2015, pp. 6-7. [accessed via: https://www.nao.org.uk/wp-content/uploads/2015/01/Central-government%E2%80%99s-implementation-of-the-national-Compact-a-follow%E2%80%91up.pdf (30/06/17)]

97 National Audit Office, 'Central government's implementation of the national Compact: a follow-up', London: Cabinet Office, Jan., 2015, p. 7.

there had been a 'gradual diminution of meaningful content and the removal of responsibility for agreement of the annual plans.'[98]

This argument was further supported by the numbers of Ministers and government officials in attendance at the annual meetings. Of the ten meetings that took place, four hundred individuals who had some involvement in the voluntary sector attended (excluding journalists, researchers and observers). In stark contrast, only 41 ministers attended, and of these 68 per cent attended only once over the ten years.[99] The authors of this research took this as an illustration of the lack of state commitment and support of the Compact, and, by extension, the maintenance of the relationship between the state and the sector.

The failure to commit to annual reviews and report promises has been suggested as an illustration of the lack of commitment on both parts to honour the principles outlined in the 1998 and 2010 Compact.[100] Evidence suggests that the implementation of the Compact is still treated as a 'low priority' within government departments. This is problematic from a constitutional perspective, when seen in the context of the demonstrable rise in the use of the voluntary sector in public service delivery, community cohesion projects, and policy-making and implementation.

98 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 62.

99 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 62.

100 W. Plowden, 'The Compact: attempts to regulate relationships between Government and the Voluntary Sector in England', *nonprofit and voluntary sector quarterly*, 32, 3, 2003, p. 425.

In its Green Paper on voluntary action, published in 2007, the Conservative Party expressed several reservations about the scope and effectiveness of the Compact. At the time of publication, the authors criticised the fact that the government was under no legal obligation to adhere to the points outlined in the document. This argument was reinforced by the fact that 96 per cent of charity chief executives interviewed for an Acevo survey had supported the case for enforcement powers.[101]

Numerous examples were given of unchallenged breaches of the agreement at both central and local government levels. As members of the Women's Resource Centre complained at the time – in response to money for their rape crisis services being diverted from the Home Office's victims fund to statutory agencies without consultation, 'Without statutory backing, [the Compact] is simply ignored by funders.'[102] This was in spite of the establishment of the Commission for the Compact and the Commissioner role, which seemed to operate with little effect. Charities had nothing to fall back on in cases of contention or breach. The paper made a number of suggestions, including the upgrade and enhanced enforcement of the Compact on the relations between government and voluntary sector.[103] Ten years have passed since these recommendations were put forward, and yet little has been done to address the same issues that continue to inhibit the scope and effectiveness of the voluntary sector.

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101 Stephen Bubb, chief executive of Acevo, quoted in *Society Guardian*, 'Charities call for Compact to expand role', 12 Sept., 2007.

102 Tania Pouwhare, Women's Resource Centre, quoted in *Society Guardian*, 'Charities call for Compact to expand role', 12 Sept., 2007.

103 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 73.

'Lack of bite'

The most common criticism of the agreement is that it has 'no teeth', and subsequently is unsuccessful in ensuring that the principles are adhered to on both sides of arrangements. In the words of one critic, quoted by the Commission for the Compact, 'You are completely out of touch if you think a renewed Compact is going to have the slightest effect on what local authorities are or aren't deciding they are going to do with anyone's budget or retendering their contract.'[104] Compacts have remained advisory, voluntary agreements.

Although the original document of 1998 considered procedures to deal with 'maladministration', reservations about the legitimacy and sufficiency of complaints procedures were voiced from the outset. This was formally acknowledged by the Coalition Government in 2010, when it was observed that 'the Compact […] has not been backed up by arrangements for what happens when the Compact is not followed or when things go wrong.'[105] It was admitted that there were issues with how the government could be held accountable.

In the context of plans to renew the Compact in 2010, the Coalition Government produced a revised accountability and transparency guide (written in partnership with Compact Voice). The document was written to address suggestions that the Compact was essentially superfluous. Under a 'when things go wrong' section, the document listed the various options available to prospective complainants.

104 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, pp. 133-134.

105 HM Government, 'The Compact: accountability and transparency guide', London: HM Government, p. 3.

CSOs should contact the relevant government department – both informally and then formally the problem remains unresolved. The same advice is given for complaints about 'Arms-Length Bodies, Executive Agencies or Non-Departmental Public Bodies (NDPB). In these cases, complaints should be filed to the 'sponsor' government department (the department to which the body report).

As a 'last resort', the present-day Compact still includes the possibility of appeal to the parliamentary commissioner (now known as the Parliamentary Ombudsman), if there is evidence of suspected 'maladministration' on the part of the government.[106] In theory, this institution serves as a complaints system, open to all aggrieved citizens. As set out in the *Parliamentary Commissioner Act 1967*, the Parliamentary Ombudsman has the powers to investigate complaints from members of the public with evidence of injustice because of maladministration on the part of government departments or 'some' other public bodies.

However, 'some' is the operative word here. Crucially, there is a list of subjects that the Parliamentary Ombudsman cannot normally look into: consumer issues, financial services and pensions, utilities, local council (including council tax benefits, housing, planning, social care), Members of Parliament, police, political parties, postal services, privately funded healthcare, social care, telecommunications, and advertising.[107] There are also certain requirements made by the Ombudsman. The complainant must have contacted

106 L. Maer and M. Everett, House of Commons Library, Briefing Paper Number CBP7496, 'The Parliamentary Ombudsman: role and proposals for reform', House of Commons Library. Mar., 2016, p. 4.

107 Parliamentary and Health Service Ombudsman, 'If we can't help' [accessed via: https://www.ombudsman.org.uk/make-a-complaint/if-we-cant-help (29/06/17)]

the department or public body concerned, before referring to their MP with said complaint. Complaints will only be considered up to a year after the alleged incident.

Furthermore, as explained in the above description, the Parliamentary Ombudsman (the 'last resort') is not required to look into complaints that relate to any of the listed subjects. It is significant that the Ombudsman is not responsible for dealing with complaints relating to social care, considering social care makes up the largest proportion of work undertaken and provided by voluntary sector organisations. Furthermore, the document published by the Coalition Government in 2010 only provides guidelines for CSOs wishing to make complaints. It does not discuss matters relating to instances where individuals might wish to complain about the services provided by the CSO. Problems with accountability were augmented in 2010, with the abolishment of the Commission for the Compact – established in 2007 as an independent public body, responsible for overseeing and promoting the use of the Compact.

Despite the publication of the accountability and transparency guide, then, practitioners still hold a number of reservations about the effectiveness of the agreement. Longstanding questions remain unanswered. For instance, what is meant by the fact that government departments have agreed, at least on paper, to comply with principles of the national Compact? Who is responsible for ensuring that both state and sector keep up their side of the bargain? Are sufficient measures in place to safeguard the partnership, and take action if something threatens the stability? If the document does not carry any legal obligations, is it largely held redundant? There is a clear disparity in government approach. The Compact – the formal agreement accepted by both on the relationship between state and

sector – is not binding and carries no legal enforcement. Yet, a high proportion of the other agreements and contracts that define the relationship are legally binding: The Compact lies in stark contrast to the plethora of contract-based agreements.

Commission for the Compact

Following on from discussions about making the Compact legally binding, it is important to discuss the significance of the Commission for the Compact, and other suggestions which included the creation of a statutory body to oversee the implementation of the agreement.

Established in April 2007, the Commission for the Compact operated as a non-regulatory public body, tasked with overseeing and promoting the use of the Compact and its Codes of Good Practice and addressing the barrier to adoption and implementation.[108] Sponsored by the OCS, it was governed by a Non-Executive Board that met on a bi-monthly basis. Significantly, the Board was composed of mixture of practitioners with experience working in the voluntary sector and government authorities. Sir Bert Massie CBE, who served as Commissioner for the Compact, had over forty years of experience working in the voluntary sector and had served on a number of government advisory committees. Richard Corden, the Chief Executive, had experience working within Government including the Office of the Third Sector on voluntary sector policy. Indeed, respondents maintained that during the time it was active, the Commission was successful in operating as a genuinely independent body most of the time. It has been heralded by some as the 'nearest thing to a model institution.' Efforts to ensure that the Commission was placed on a statutory footing, accountable to a

108 House of Commons, HC 536, Commission for the Compact: Annual Reports and Accounts 2008-09, London: The Stationery Office, Jun., 2009, p. 8.

Government Minister instead of UK Parliament directly, would have reinforced this emphasis on independence.

As evidenced in this chapter, the Commission successfully produced critical and constructive research into the conduct of the Compact during its short lifetime. During its three years in operation, the Commission published a range of research, including a study entitled *What makes a successful Compact*, which assessed practical approaches to increasing effective local partnerships, and another looking at ways to improve independence.[109]

It also worked to improve commitment at both central and local levels. During November 2008, as part of a national awareness week, the Commission organised nearly 50 events nationwide promoting the Compact and engagement with people across Government and the voluntary and community sector. As part of this drive, he Prime Minister at the time, Gordon Brown, was quoted stating that 'Government's commitment to the Compact is stronger than ever. As we move into the Compact's second decade, we need to make sure that the Compact can meet the challenges ahead.'[110]

Yet this commitment proved short-lived. Plans to strengthen the powers of the Commission failed. A Commission for the Compact Bill, detailing proposals for the Commission as a permanent, independent and *statutory* body went to 1st reading in the Commons

109 House of Commons, HC 536, Commission for the Compact: Annual Reports and Accounts 2008-09, London: The Stationery Office, Jun., 2009, p. 11.

110 House of Commons, HC 536, Commission for the Compact: Annual Reports and Accounts 2008-09, London: The Stationery Office, Jun., 2009, p. 11.

in May 2009.[111] Suggestions for a statutory Commission were proposed as a compromise, in the wake of the decision that the Compact should retain its voluntary nature and its values – for the reasons discussed above. Tom Levitt MP moved to place the Commission on a statutory basis, with a limited range of legal powers to improve awareness and implementation of the agreement. The Bill acknowledged the need for some form of statutory framework guiding state-sector work. Crucially, this would have given the Compact some form of constitutional and democratic legitimacy, recognised and established by Parliament.[112] Less than a year later, however, the Commission was abolished in 2010 under the Coalition Government. This move was heavily criticised by practitioners, most notably because it ignored the valuable role of sector organisations in feeding back information and evidence-based recommendations to local and central government bodies, which could be used to form the basis of new policy initiatives and improve existing services.[113]

Moving forward, one suggestion might be to re-introduce the Commission. The reasons cited by advocates at the time still carry considerable weight today, particularly in the midst of criticisms

111 House of Commons, Commission for the Compact Bill, Session 2008-09, Bill 99, 2009 [accessed via: https://publications.parliament.uk/pa/cm200809/cmbills/099/09099.i-i.html (03/10/17)]

112 Tom Levitt MP, House of Commons Hansard Debates for 19 May 2009, Points of Order, 'Commission for the Compact', May 2009 [accessed via: https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090519/debtext/90519-0004.htm#09051970000001 (03/10/17)]

113 D. Cutler, 'The state and independence of the voluntary sector – who remembers the Commission for the Compact?', *The Baring Foundation*, Feb., 2016 [accessed via: http://baringfoundation.org.uk/blog/the-state-and-the-independence-of-the-volutary-sector-who-remembers-the-commission-for-the-compact/ (05/10/17)]

and concerns about the future of government dealings with charities and the general direction of voluntary organisations.

Alternatively, another idea could be to establish another oversight body responsible for monitoring and improving state-sector relations. If these suggestions are to be realised and implemented as a successful venture, respondents emphasised the importance of distance and transparency in governance and trusteeship. The ability to criticise both 'sides' would be an essential quality, if such a body were to be reinstated. The Commission for the Compact was successful 'on the grounds that it wasn't liked by either the sector or the state,' according to several respondents. An alternative body would have to be 'even-handed' in its dealings with both sides. On a practical level, the Commission also provided a means of examining the actions of organisations and areas of government work; placed greater emphasis on cooperation and collaboration; encouraged information sharing and justification of actions; assisted in dispute resolution; and offered a range of recommendations that were based on empirical evidence.[114] There are clear advantages to the re-introduction of an organisation that provided similar services. This is considered in greater detail in the following chapter on governance and regulation.

Conclusion

Questions about the viability of the only agreement drawing out the boundaries of state and sector work and relations which the State has formally accepted – with all central government depart-

114 R. Cohen and E. Davies, 'Should the Commission for the Compact be given statutory powers?', *Charity Financials*, Oct., 2008 [accessed via: http://www.charityfinancials.com/charity-financials-insider/should-the-commission-for-the-compact-be-given-statutory-powers-120.html (05/10/17)]

ments 'signed up' – destabilise the legitimacy of the position of the State in relation to the voluntary and community sector. What are the implications of this in terms of accountability? How can the State claim that its multifaceted interactions with the sector are constitutionally sound and justified, if there are not steadfast regulations and frameworks in place regarding the implementation of the Compact principles? Lack of confidence in the only agreement formally recognised by both sector and state as a reference point for the handling of state-sector relations undermines the stability of these core relations.

Moving forward, would the issues discussed in this chapter be resolved if the document was legally binding? Practitioners remain unconvinced by the future prospects of the document. In the conclusion of the 2011 report published on the basis of research conducted by the Commission for the Compact, the authors satirically proposed the following three 'equally unappealing options': 1. Recognise that it [the Compact] is a sham and a fig-leaf and get rid of it.; 2. Believe in the value of its principles, hold on and wait for better times.; 3. Wait for it to be swept away by the development of radical policies.[115]

Another option which has already been discussed within the voluntary community is the case for making the document binding. There is already substantial support in favour of arguments for a legally binding agreement. In the minds of respondents interviewed for this paper, it seems a waste to give up on the only document that holds the potential to improve constitutional accountability, and, most importantly, improve relations on a practical level. However, it is

115 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: a summative evaluation of the Compact', Practical Wisdom, Commission for the Compact, Mar., 2011, p. 136.

unclear whether it would help to make the Compact legally binding. If plans for a statutory Compact were to go ahead, a number of issues would have to be resolved. In the wake of growing concerns about the role of the Compact – and the partnership it promotes – demands have been made for a new document, and a new means of enforcing it. A new document that would reflect the shifts in relationship between state and sector, in line with the developments that have taken place in recent years. Practitioners are in doubt that relations have shifted and there is a need for formal recognition of this.[116] The current roles undertaken by the OCS and Compact Voice have been criticised for being insufficient.[117] Therefore, any form of new agreement would also need to be consolidated with a clearer system of management and oversight.

There are also a number of inherent problems with the existing agreement that would need to be overcome. Opponents of additional forms of legal requirements claim that the Compact serves to discriminate those operating in separate sectors. By delivering recommendations for best practice of commissioning agreements between the state and voluntary organisations, they maintain it provides these bodies with an added level of support and treatment unavailable to other competitors. Others sector do not have a Compact, and this has led some to argue that the sector is given preferential treatment. A Compact with legal backing would augment these existing issues.

116 K. Weakley, 'What is the Compact', *Civil Society* [accessed via: https://www.civilsociety.co.uk/voices/kirsty-weakley-what-is-the-compact.html (30/05/17)]

117 K. Weakley, 'What is the Compact', *Civil Society* [accessed via: https://www.civilsociety.co.uk/voices/kirsty-weakley-what-is-the-compact.html (30/05/17)]

In addition, special consideration of the sector in legal form would not be easy to reconcile with existing regulations and legislative stipulations that outline the fair treatment of all prospective providers. For example, practice is affected by the European Union Procurement Directives, which is implemented in England, Wales and Northern Ireland under the Public Contracts Regulations 2006. There are numerous legislative requirements that make it difficult for commissioners to apply positive discrimination to voluntary sector providers. Advertising, direct contracting, and certain tender documents are all affected by legislation. There is currently tension between requirements of the law, and the agreements outlined in the Compact. This would be exacerbated by a new legally binding document.

There are concerns that adding 'teeth' to the document might actually damage relations. Critics have argued that it might place undue emphasis on confrontation ahead of collaboration, and cause irreparable damage to an already volatile relationship. If it became legally binding, relations could be undermined by risk aversion and caution that would no doubt be part and parcel of the legal regulations, in order to minimise future legal disputes arising against the state. This would either mean that the final legal agreement might not amount to very much, or that it would actually hinder existing relations.

For these reasons, this paper concludes that it appears legislative action would be unlikely to improve cross-sector partnerships even if it was successfully introduced in a legal framework. Instead, it might be better to cast attention to the role of the government, specifically central government departments and Ministers, and its attitude towards the document. First, if the Compact is to become

more effective, the peripheral problems discussed earlier in this chapters would need to be resolved. Only then, once these matters have been addressed, can an alternative to legislation might be able to introduce internal measures that could increase pressure on Ministers, civil servants, and public workers to take the principles of the Compact more seriously.

When asked how current relations between the state and sector could be rectified, a few respondents raised the possibility of an intermediary institution that would operate entirely independent of the state. This idea has already been suggested. Writing in 2011, around the time of the abolishment of the Commission for the Compact under the Coalition Government, Sir Bert Massie CBE, previously Commissioner for the Compact, speculated on the future of the document. He predicted that revitalisation of the agreement was possible, 'If the Government introduces an effective mechanism for independent oversight of the Compact's operation and for holding the Government to account for its implementation of the Compact.' However, he warned that without the introduction of such a system, the Compact would become 'worthless and devoid of effectiveness.'[118] Interestingly, in the years since Masse wrote this, the role of the Commission for the Compact was mentioned as an example of this. Another means of addressing the problems with the implementation of the current Compact – and the alleged deterioration of state-sector relations – could be to establish a new mediatory institution modelled on the Commission for the Compact. This model body would place the principles of independence and critical evidence-based inquiries at the heart of its work.

118 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 1 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

Finally, it should not be forgotten that the majority of issues discussed in this paper depend on individuals. The individual relationships are central to the broader problems. As such, lack of training, lack of knowledge, lack of Compact agreements and adherence, and high staff turnover in state authorities all impede on efforts to stabilise and improve cross-sector relations. Best practice is dependent on the individuals involved. The future efficacy of the Compact – and state-sector relationships more generally – lies with the individuals involved at every level. More emphasis should be placed on ensuring that better understanding, commitment, and communication mechanisms are in place within local government authorities and voluntary organisations.

It is hoped that past efforts to improve conformity to both the national and local Compacts are successfully reinvigorated. If the Compact was taken seriously, it would offer a welcome means of establishing ground rules for cross-sector partnerships. Given the considerable parts performed by the sector in several areas of state work, it follows that there should be some form of regulatory framework governing this engagement. The Compact, if implemented properly, would ensure the sector knows what it can expect from the state, and, on the other side, help public servants to have an idea on what and how they should tackle consultation and collaboration.

Governance and regulation

The demise of the Kids Company, and the subsequent investigation into the executive management of the organisation and the role of the government in the scandal, fuelled growing anxieties about regulation of the voluntary sector. In the wake of growing calls for greater oversight and governance, this paper seeks to explore past and present practice from a constitutional perspective.

This chapter outlines the official ways in which the state approaches its relationships with the sector. It examines the formal bodies and agencies that have been set up, as well as broader initiatives and state-led programmes aimed at overseeing the sector's development, and managing state-sector relations. This contributes to some of the central questions that run throughout this paper, specifically with regards to issues of accountability, responsibility, partnership and management. Does the government provide an oversight role? Is it within the constitutional remit of the state to hold the sector to account?

The role of the government

The position of the UK government in the oversight of the sector is not clear-cut, and the majority of respondents interviewed for this paper assumed that the government has no formal or constitutional obligation towards the management and regulation of the sector. This is indicative of underlying ambiguity surrounding the dynamics and boundaries of state-sector interactions. In reality, the government has long fostered a multifaceted relationship with the voluntary and community sector operating in the UK, responsible

for coordinating collaborative work, setting agendas, scrutinising sector work, and overseeing the regulation and governance of sector organisations. There are a number of ways in which the state contributes to oversight mechanisms. For instance, legislation, taxation, and policy-making decisions all contribute to the regulatory framework set out for the myriad of different types of voluntary organisations (discussed separately in other chapters.) This section focuses on the specific and explicit state-led initiatives and quasi-state bodies designed to monitor voluntary work.

The responsibility of the state is implicit in some of the House of Commons and House of Lords literature published in recent years. The report of the Committee on Charities, published in March of this year included recommendations for further government-led public consultations and the establishment of new government initiatives to improve relations with the charity sector.[119] Calls made by the Public Administration and Constitutional Affairs Committee – together with the Etherington Review of 2015 – provided the impetus for the newly-established Fundraising Regulator.[120] The involvement of politicians, civil servants, and members of both Houses of Parliament indicates that the regulation of the voluntary sector, and charities in particular, falls within the remit of government departments and Houses of Parliament.

The Big Society Capital (BSC) is another recent example of a state-led initiative. Set up in 2012, BSC is an independent social

119 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 28.

120 NCVO, S. Etherington, 'Regulating fundraising for the future: Trust in charities, confidence in fundraising regulation', NCVO, Sept., 2015 [accessed via: https://www.ncvo.org.uk/images/documents/policy_and_research/giving_and_philanthropy/fundraising-review-report-2015.pdf (17/07/17)]

investment organisation, which provides the foundations for more effective social investment programmes. Although it operates as an independent institution, it was founded by the state, arguably on the premise that it would help alleviate the burden placed on the state to provide financial aid through grants and funding.[121] BSC reveals the role the government plays in the development and sustainability of the sector. It is symbolic of the evolving and fluid relationship between both sides, in line with developments and growth in the sector, and changing priorities and expectations from the state (most noticeably in relation to service delivery and social enterprises).

The premise that the state plays a part in the management and regulation of the sector is the subject of ongoing debates amongst academics, politicians, and practitioners. On the one hand, some argue that the government exercises too great a degree of power and influence over sector practice. Amongst those who have voiced reservations are charities known as 'non-departmental public bodies'. These are organisations that the government has substantial powers over appointments and dismissals of board members and directors, and that receive a high proportion of their income from the government. More than 20 well-known charities, including most of the London's museums and heritage institutions, fall within this category. In recent years, complaints have been made from these establishments that the government has increased regulations held over them to such a degree that they have been unable to perform their functions effectively. New rules on advertising, technology and procurement have all been identified as examples of 'government

121 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, HL Paper 33, Mar., 2017, p. 63.

interference'.[122] In one instance, it was alleged that the government had 'forced' these organisations to introduce IT systems that were 'both more expensive and less suitable than their preferred alternatives.'[123] Should stricter guidelines be implemented to ensure that the state does not work beyond its constitutional boundaries?

Conversely, in the wake of declining accessibility of resources and support, calls have been made for the state to play a larger part in the maintenance and support of the sector. Others argue that the state should play a more active role in supplying information, advice, and intervention schemes to regulate organisations working within the voluntary sector. They maintain state intervention is inevitable. As observed by academic Jane Lewis, it is unlikely that 'government will hand money over to voluntary organisations without demanding to know how it is spent.'[124] Advocates have also argued that this is needed to provide for consistency across the board. The Lords Committee report revealed that there is a tendency for the government to focus on some aspects of charity work ahead of others,[125] resulting in certain organisations being subject to greater scrutiny and/or support. The influence of state support is widely recognised. The Committee supported demands for further state involvement,

122 D. Ainsworth, 'Heritage charities complain of government interference', *Third Sector*, 2 Jun., 2011 [accessed via: http://www.thirdsector.co.uk/heritage-charities-complain-government-interference/governance/article/1073383 (17/07/17)]

123 D. Ainsworth, 'Heritage charities complain of government interference', *Third Sector*, 2 Jun., 2011 [accessed via: http://www.thirdsector.co.uk/heritage-charities-complain-government-interference/governance/article/1073383 (17/07/17)]

124 J. Lewis, 'New Labour's approach to the voluntary sector: independence and the meaning of partnership', *Social Policy & Society*, 4, 2, p. 128.

125 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 15.

suggesting that the government consider providing more guidance and re-assessed existing laws and regulations.[126]

In 2015, at the time of the Kids Company scandal, commentators remarked that the episode raised questions about how charities operate, how they are regulated and what their relationships with the state should look like. More specifically, questions were asked about the external oversight of charities operating in the UK. As observed in *The Independent* in the months that followed, 'For a charity with the status of Kids Company to have collapsed so spectacularly inevitably raises questions about regulation.'[127] The author concluded that the 'Government cannot have it both ways: encouraging charities to step in where the state is cutting back, yet passing the buck when things go wrong.'[128] The author of the article suggested that accountability for scandals such as the collapse of Kids Company lies with the state.

Implicit in these arguments for greater state responsibility is the notion that the state holds the key to change and development in the third sector, encouraging and enabling best practice models. The government is clearly expected to maintain relations with the sector.

126 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, HL Paper 33, Mar., 2017, p. 65.

127 'Passing the buck: The Government and Charity Commission are culpable in Kids Company's demise – and must be held to account', *The Independent*, 8 Aug., 2015 [accessed via: http://www.independent.co.uk/voices/editorials/passing-the-buck-the-government-and-charity-commission-are-culpable-in-kids-company-s-demise-and-10446203.html (03/08/17)]

128 'Passing the buck: The Government and Charity Commission are culpable in Kids Company's demise – and must be held to account', *The Independent*, 8 Aug., 2015 [accessed via: http://www.independent.co.uk/voices/editorials/passing-the-buck-the-government-and-charity-commission-are-culpable-in-kids-company-s-demise-and-10446203.html (03/08/17)]

Does the state thus perform a guardianship role? Are the members of the UK electorate aware that the government is expected to play an instrumental part in the make-up and management of the charity sector? And if so, is this level of responsibility and authority given adequate consideration by political leaders and political parties? Discussions about proposed policy agendas and directives for state-sector relations and role of voluntary sector organisations in the functioning of the UK were absent from any campaigning in the run up to the June 2017 General Election.

Regulatory bodies

The government is also instrumental in the setting up and oversight of quasi-state institutions that have a direct say in the governance of the voluntary sector. The last twenty years has witnessed the establishment of a number of different state bodies, set up specifically to foster and regulate the changing relationship between the government and the voluntary sector. This section examines some of these institutions, in order to establish the official parameters of state-sector relationships.

Office for Civil Society (OCS)

In 2006, the Office of the Third Sector (OTS) was established, bringing together responsibilities of the Home Office and Department for Trade and Industry into one office; the first state body tasked with overseeing state-sector relations. Since replaced by the Office for Civil Society - which has moved from the Cabinet Office to the Department for Culture, Media and Sport in July 2016 – it aims: 'To support the Government's ambitions for volunteering, for philanthropy and social investment; to support the general development of the voluntary and community sector; and to grow the

National Citizen Service for young people.'[129] Over the last few years, the OCS has supported social investment and encouraging new mediums of fundraising for the voluntary sector, focused on specific outcome-based goals for the National Citizen Service, and scaled up SIBs and Payment by Results schemes.[130] It has also overseen the establishment of several initiatives and schemes set up to improve the charity sector, including the Local Sustainability Fund and Small Charities Fundraising Training Programme. These initiatives feature as part of the government's wider agenda to support voluntary organisations in the delivery of public services.

The last few years have seen increasing demands placed on the remit of the work undertaken by the OCS. This suggests that the parameters of OCS responsibilities – and by extension, the role of government organisations – are not set in stone. A high proportion of the recommendations made by the House of Lords Committee earlier this year focused on the OCS. Suggestions for improvements to existing economic and tax policies, for example, mentioned the role of the OCS in helping to raise awareness and maximise the availability of payroll giving, and promote further collaboration with HMRC on possible changes to VAT and NLW.[131] It is clear that some would like to see the scope of OCS work extended.

A number of observations can be made from these suggestions. Are the recommendations put forward in the 2017 Select Committee

129 Accessed via: https://www.gov.uk/government/people/mark-fisher (30/01/18).

130 Written evidence from the Office for Civil Society, Department for Culture, Media and Sport to the House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 87.

131 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 60.

report reflective of a trend, which has seen the OCS take on more responsibility than it was not initially set up to do? Have these suggestions been 'lumped' onto the OCS as a result of insufficient oversight bodies that could pick up these tasks? If the OCS does not act on the recommendations, is there another body that is picking up the slack?

This might be the product of the dearth in other oversight bodies or other government bodies willing to take a more active approach to the management of relations with the voluntary sector. There is a risk that an ever-growing list of tasks placed on the Office might impact upon the quality and level of services provided. Some respondents interviewed for this study intimated that the OCS has recently focused too much of its attention on the development of social investment schemes and the National Citizenship Service, to the detriment of other areas of improvement. Does the OCS focus too much of its attention of specific areas of policy that are likely to help central government, as opposed to prioritising the areas that would benefit both sides of the partnership? Are the needs of the sector overlooked? Calls from the voluntary sector to look at the type and extent of grants being funded, for example, were largely overlooked. Critics have marked this down to lack of commitment on the part of the Office in supporting the sector and improving practice. Alternatively, it could be due to an overburdening of the Office. If this is the case, it is worth considering whether there should be a separate Office dedicated specifically to the voluntary sector?

Indeed, questions have already been raised about the competency and efficacy of the current OCS. Critics have claimed that the OCS has not successfully ensured that central government departments

take their responsibilities towards sector organisations – in the management of contracts and public service delivery systems, for example – seriously enough. Some have argued this is the result of a lack of commitment on the part of the Office. Following this line of thought, the additional tasks and greater responsibility suggested by the Committee will not materialise. Instead, these recommendations will be little more than rhetoric, so that on paper it looks as if the issues have been dealt with.

Another of the reservations held by practitioners is the idea that the OCS has not successfully encouraged widespread engagement with sector organisations across all central government departments. Whether this is the result of unsatisfactory commitment on the part of the Office itself, or general from government departments and Ministers is unclear. Either way, practitioners are unconvinced that the Office takes fostering and maintaining communication and collaboration with outside organisations seriously. Specifically, the House of Lords Committee heard complaints that the government does not engage effectively with the charity sector, 'especially when developing new policies and initiatives.'[132] A number of respondents of the 2016 inquiry called for further work to be done to ensure that the OCS had more authority and more success in engaging and committing different departments to working with the sector. They complained about the extent to which the OCS successfully embeds its work across government. The Small Charities Coalition noted that 'it may be that a more formal network of OCS leads is required across all departments to ensure that work is strategically embed-

132 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 88.

ded.'[133] If the OCS is not performing its job properly, this is hugely problematic for the levels of accountability of both state and sector contributions to cross-sector initiatives and general relationships. This paper supports suggestions that a more defined outline of the roles undertaken by both government, and the OCS more specifically, would make it easier to assess the effectiveness of the state.

Concerns have been voiced about the efficacy of current mechanisms in place for holding the OCS itself to account. When the OTS was first set up in 2006, the Public Administration Select Committee (PASC) took on responsibility of the oversight of the OTS, under the premise that the examination of policy, administration and expenditure of the Cabinet Office came under the PASC's wider role of the scrutiny of the Civil Service and public services. Following this logic, then, the newly established Office for Civil Societies is managed by the Department of Culture, Media and Sports. Has this oversight role been formally recognised by the Department? What is the remit for this adopted scrutiny role? Does the Department have sufficient time and resources to include this addition into its work, alongside existing commitments?

It is also significant that the sector does not have any say in how the OCS operates or how the state maintains its relations with voluntary organisations. This paper suggests that closer collaboration between the state and sector could provide for a more effective and efficient OCS function. The OCS is responsible for monitoring the work undertaken by government departments that is relevant to the sector. If the work conducted by the OCS – and, by extension, government departments and subsidiaries – was subject to scrutiny

133 Written evidence from Small Charities Coalition to the House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017.

and open to suggestions by the sector organisations that it purports to support, the quality of collaborative efforts would surely benefit. Similarly, there is also scope for changing current procedural arrangements to include government departments and agencies in decision-making processes. It would be advantageous to give government representatives a greater say in how the OCS is used, and the type of work it undertakes. This would encourage the sharing of best practice, and raise the standard of state-sector collaborations throughout central government.

One final point to mention is that the OCS does not take any responsibility for government authorities operating at local and devolved levels. This is significant, given that the majority of interactions that take place between government bodies and sector organisations take place at local levels. Currently, then, there is no framework in place to oversee relations between local government agencies and quasi-state bodies, and sector organisations. The lack of effective governance and regulation of local government authorities in their treatment of the sector might play a part in deficiencies in cross-sector collaboration and communication.

Charity Commission

If the OCS is responsible for overseeing how central government departments and programmes manage their responsibilities towards the voluntary sector, the Charity Commission is its counterpart; the designated body for the other side of relations. The Charity Commission is the regulatory body for registered charities in England and Wales. As with the OCS, there are limitations to the work of the Commission as a representative body of the sector. There is no one single body that represents the interests of voluntary organisations at work in the UK. The Commission is only respon-

sible for registered charities operating in England and Wales. Thus while the work and scope of the Commission is significant in that it serves as the largest institution responsible for the governance and regulation of most common type of sector organisation, the limitations of its remit and influence should be remembered in the following discussions. It should not be treated as the representative body for all charities working in the UK, let alone all voluntary organisations. Even within the charities sector, though, there is a diverse range of different groups and institutions. The position of the Commission is still fraught with difficulties.

Technically, accountability of the voluntary sector falls to the Charity Commission for charities operating in England and Wales, and the respective oversight bodies in the devolved authorities – the Office of the Scottish Charity Regulator, and the Charity Commission for Northern Ireland. The first Charity Commission can be traced back to the 1853, established under the Charitable Trust Act 1853. The present-day structure and remit of the Commission was established in the Charities Act 2006. Although the Commission is responsible for the regulation of charities registered in England and Wales, since 1 June 2010, most of its statutory powers now extend to exempt charities as well (although the 2011 Act requires the Commission to consult a charity's principle regulator before exercising powers over an exempt charity.)

As a non-ministerial government department, the Charity Commission for England and Wales is responsible for regulating registered charities in England and Wales. In the Revised Regulatory Statement, published in January of this year, the Commission committed to promoting compliance by charity trustees with their legal obligations; enhancing transparency and the rigour with which we

hold charities accountable; promoting the effective use of charitable resources by raising awareness; and supporting trustees and enabling them to comply with their duties.[134]

Central to the work conducted by the Commission are the principles of independence and accountability. Who holds the Commission to account? On paper, it is directly answerable to the UK Parliament, specifically the Public Administration Select Committee, and is governed by a separate board, and has a Chief Executive and an executive team. In this sense, the Commission is another example of how the state has taken on forms of responsibility for the regulation of the sector.

However, in reality, it is less clear-cut. Under the 2006 Act it also has the powers to conduct statutory investigations.[135] Its decisions can also be the subject of appeal to the Charity Tribunal – a body established by the 2011 Act. The Treasury also oversees the expenditure of public funds, while Parliament exercises accountability privileges for the regulatory functions. The Commission is also held to account by charities serving as proportionate regulators and, by

134 Charity Commission for England and Wales, Policy Paper, 'Charity Commission Revised Regulatory Statement', 9 Jan., 2017 [accessed via: https://www.gov.uk/government/publications/charity-commission-statement-of-mission-regulatory-approach-and-values/charity-commission-statement-of-mission-regulatory-approach-and-values#respecting-independence (02/08/17)]

135 This has been the subject of dispute. The Commission was accused of choosing to perform regulatory compliance investigations instead of opening full statutory inquiries, in order to minimise the risk of upsetting existing and future relations between charities and the regulator. At one stage, the Commission performed a mere three full statutory investigations, compared to over 140 compliance investigations in the same year. In response to concerns of malpractice, it was announced that regulatory compliance investigations would no longer be undertaken from 2011 onwards.

extension, their beneficiaries, acting in the public interest.[136] There have also been instances when the NAO has intervened.[137] With this range of different bodies and sectors holding the Commission to account, it is not surprising that questions have been raised about the efficacy of the system. Perhaps one of the fundamental problems also relates to more generic difficulties in the official status of the Commission itself. As Lord Rooker bemoaned in evidence to the House of Lords Charities Committee, 'most of Whitehall does not have a clue about how to deal with non-ministerial departments.'[138]

Although the Commission is part of the Civil Service, by law, as a non-Ministerial government Department, it is independent of Ministerial influence,[139] and of the sector it regulates.[140] Ensuring that the Commission is independent from government and the sector it regulates is the responsibility of the Commission's non-executive board.[141] Thus, in theory, although the Commission might work in

136 Kenneth Dibble in evidence to the House of Lords Select Committee on Charities, 'Corrected oral evidence: Charities', 6 Dec., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/44558.html (10/09/17)]

137 National Audit Office, *The regulatory effectiveness of the Charity Commission*, London: NAO, Dec., 2013.; National Audit Office, *Follow-up on the Charity Commission*, London: NAO, Jan., 2015.

138 Lord Rooker quoted in House of Lords Select Committee on Charities, 'Select Committee on Charities Oral Evidence', QQ1-14, p. 7.

139 HEFCE, 'Regulation of charities', Higher Education Funding Council for England [accessed via: http://www.hefce.ac.uk/reg/charityreg/regchar/ (03/08/17)]

140 HEFCE, 'Regulation of charities', Higher Education Funding Council for England [accessed via: http://www.hefce.ac.uk/reg/charityreg/regchar/ (03/08/17)]

141 Charity Commission for England and Wales, 'Our governance' [accessed via: https://www.gov.uk/government/organisations/charity-commission/about/our-governance (02/08/17)]

partnership with the charity sector, government, political neutrality and independence from the government and sector organisations is essential in terms of perceived independence and actual independence. The Commission relies on both forms for its credibility and effective functioning.

Despite reassurance by Willian Shawcross, Chairman of the Commission, it is 'completely independent of government,' and defends the proximity of work with 'dozens of memorandums of understanding and regular liaisons,'[142] numerous instance of connections with the state complicate this picture of independence. There is clear overlap with other government bodies and departments in some of its tasks and approaches to its work. Making sure that public funds are used prudently, for example, is a commitment and objective shared with other government departments. There is also overlap in terms of personnel. One of the members of the Commission's non-executive board is also a Member of the HM Treasury's Audit Committee and Chair of the Government Internal Audit Agency.[143]

Problems also relate to its legal status as a non-ministerial department; and appointments and powers of the Commission board. In a report published in 2015, the NCVO argued that its position as a non-ministerial department was undermined by the fact that the Commission is chaired by a ministerial appointee. According to some, this has resulted in the Commission being too far removed from the executive, and at the mercy of Parliament instead. Further

142 Paula Sussex in evidence to the House of Lords Select Committee on Charities, 'Corrected oral evidence: Charities', 5 Jul., 2016.

143 Mike Ashley, Charity Commission for England and Wales, 'Our governance' [accessed via: https://www.gov.uk/government/organisations/charity-commission/about/our-governance (02/08/17)]

reservations about the appointment and powers of the Commission's board and Chair include that the Chair of the Commission was 'at serious risk of being perceived to be politically biased'; and that the board had become involved in the executive and oversight functions of the Commission.[144] While the Charity Act 2011 states that 'in the exercise of its functions, the Commission shall not be subject to the direction or control of any minister or government department,'[145] critics have argued that this has not provided sufficient or appropriate protection. As it stands currently, the appointments process is the responsibility of the Public Administration Select Committee (PASC). Concerns remain over whether MPs have any real formal power over major public appointments. According to some commentators, this has led to certain political parties having considerable sway over the appointments.[146]

There have also been occasions where the Commission has been drawn into the political arena. Evidence reveals a number of incidents where governments have attempted to sway the direction of the Commission's work. According to the NCVO, under Labour,

144 NCVO, 'Charity Commission independence: NCVO discussion paper', Apr., 2015, p. 2 [accessed via: https://www.ncvo.org.uk/images/documents/policy_and_research/independence_and_values/charity-commission-independence-ncvo-discussion-paper-april-2015.pdf (03/08/17)]

145 NCVO, 'Charity Commission independence: NCVO discussion paper', Apr., 2015, p. 9 [accessed via: https://www.ncvo.org.uk/images/documents/policy_and_research/independence_and_values/charity-commission-independence-ncvo-discussion-paper-april-2015.pdf (03/08/17)]

146 F. Nelson, 'Gordon Brown's secret army could defeat the Coalition's welfare and education reforms', The Telegraph, Oct., 2012 [accessed via: www.telegraph.co.uk/news/politics/david-cameron/9633379/Gordon-Browns-secret-army-could-defeatthe-Coalitions-welfare-and-education-reforms.html (03/08/17)]

the Commission was urged to investigate private schools.[147] The Coalition Government was also allegedly instrumental in the Commission's lines of inquiries.[148] This was deemed inappropriate for a quasi-judicial body (as described by the NCVO) and is 'deeply problematic for a sector that relies on being known as non-party political.'[149] The perception of the Charity Commission is fundamental to its effectiveness as a regulatory body. As such, irrespective of the foundations of these criticisms of politicisation and government corruption, the fact that concerns have already been raised marks a significant problem.

These various forms of overlap raise several issues. To what extent, then, can the government and the Charity Commission be treated as separate entities? Should the Commission be seen as part of the state infrastructure? Is it actually a state-led body by another name? If so, what impact does this have on the independence of the sector it regulates? Does this have a detrimental effect on the extent to which the sector is held to account? If the sector does not have access to a strictly independent oversight body, then there could be instances where voluntary practice is moulded or sculpted illegitimately by the government in office, or influential political parties. If the regulatory body responsible for ensuring the charities sector maintains good practice is, in practice, a subsidiary of the state,

147 Accessed via: www.telegraph.co.uk/education/6838576/Private-schools-attackpolitically-motivatedcharity-rules.html (30/01/18)

148 Claystone 'Muslim Charities: a suspect sector', Nov., 2014 [accessed via: www.claystone.org.uk/wpcontent/uploads/2014/11/MuslimCharities_SuspectSector_Claystone.pdf (03/08/17)]

149 NCVO, 'Charity Commission independence: NCVO discussion paper', Apr., 2015 [accessed via: https://www.ncvo.org.uk/images/documents/policy_and_research/independence_and_values/charity-commission-independence-ncvo-discussion-paper-april-2015.pdf (03/08/17)]

does this change the degree of influence members of the British electorate have on sector organisations? This is clearly another example of the blurring of distinctions between the state and the voluntary sector. The remit of state influence is not clear-cut, and this is constitutionally problematic.

The cases cited above in this section reinforce concerns about the relationship between the state and the Commission, and the extent to which the Commission can be trusted as an independent non-ministerial department. Concerns about the Commission feed directly into wider issues with the mechanisms in place for holding sector organisations to account. Without confidence in the oversight bodies, the accountability of state relations and reliance upon voluntary organisations needs to be questioned and re-evaluated.

The problems discussed about the independence, transparency, and accountability of the Commission are constitutionally relevant, given the public services and policy initiatives taken under the wing of the charity sector on behalf of the state. The concerns and questions that have continually been raised in relation to the position of the primary regulator of voluntary organisations demonstrate the fragility of the system of accountability in place for the voluntary sector. Uncertainty and confusion is rife amongst members of both state and sector. An issue well-illustrated in the line of questioning by Baroness Scott of Needham Market: 'If there were a point in the future where you were not receiving any taxpayers' money and all the money was coming from the charity sector, would that not change the nature of your accountability to Parliament, at least morally, if it was not putting anything in?'[150]

150 (The answer: The Commission will always be answerable to Parliament, first and foremost.) Baroness Scott of Needham Market to the House of Lords Select Committee.

Finally, it is worth briefly discussing very recent complaints brought against the other function of the Commission, largely forgotten given its regulatory powers. Speaking at the Labour Party conference in September 2017, Baroness Young of Old Scone, criticised the Charity Commission for failing to promote the work and status of charities amidst displays of antagonism. Baroness Young argued that the 'Charity Commission has kindly forgotten that as well as having a regulatory role it is also meant to be a promoter and supporter of charities.'[151] A number of respondents concurred. They argued that the Charity Commission has lost the necessary separation between its regulatory and educational, advisory functions, which enabled it to provide more supportive and helpful advice in the past. Currently, however, evidence suggests that the Commission primarily focuses on 'naming and shaming', offering only ambiguous guidance at best. Moving forward, interviewees suggested that the Commission could once again prioritise provision of advice literature, as well as highlighting examples of best practice, to shift the emphasis away from defamation.

Fundraising Regulator

A number of other bodies are responsible for some form of regulatory functions. Most recently, the Fundraising Standards Board was taken over by the Fundraising Regulator in the wake of recommendations made the Etherington Review of September 2015, tasked with protecting donors to charities based in England and Wales.

151 Baroness Young of Old Scone, quoted in *Civil Society*, 'Charities feel 'picked on' and 'punished' by regulators, says Woodland Trust chair', *Civil Society*, 26 Sep., 2017 [accessed via: https://www.civilsociety.co.uk/news/charities-being-picked-on-by-regulators-says-woodland-trust-chair.html?utm_source=Civil+Society+News+List&utm_campaign=b59c1e-12ab-EMAIL_CAMPAIGN_2017_09_27&utm_medium=email&utm_term=0_26f393b813-b59c1e12ab-86527901 02/10/17)]

The new Regulator operates as a voluntary, independent regulatory of charitable fundraising. Its establishment marked a new system of self-regulation, with organisations that spend more than £100,000 per annum on generating donations from the public contributing to a sliding-scale levy.[152] In this sense, the Regulator performs a role in holding the sector to account, providing the public with a more effective and transparent means of voicing complaints.

However, concerns have been raised about the number of charities that have so far refused to pay the levy, resulting in a loss to the Regulator. The Regulatory published a list of 1,570 charities which fall within the scope of its levy as of 31 August 2017, as well as the name of those 162 charities which either refused to pay or have not responded. Critics have also taken to questioning the premise of the work undertaken by the new regulator. According to Baroness Young of Old Scone, talking at the Labour Party Conference 2017, the Fundraising Regulatory 'has set off on the wrong foot seeing as it is offering punishment rather than support and improvements.'[153] The Regulator is set to consult the sector on changes to the *Code of Fundraising Practice* between October and December 2017, in its

152 'Fundraising Regulator publishes names of over 160 charities yet to pay levy', *Civil Society*, 31 Aug., 2017 [accessed via: https://www.civilsociety.co.uk/news/fundraising-regulator-publishes-names-of-162-charities-yet-to-pay-levy-in-list.html (02/10/17)]

153 Baroness Young of Old Scone quoted in Civil Society News, 'Charities feel 'picked on' and 'punished' by regulators, says Woodland Trust chair', Civil Society, 26 Sep., 2017 [accessed via: https://www.civilsociety.co.uk/news/charities-being-picked-on-by-regulators-says-woodland-trust-chair.html (19/12/17)]

efforts to bring regulations in line with the General Data Protection Regulation.[154]

Conclusion

Government clearly accepts some form of responsibility for the oversight and regulation of the voluntary sector. As outlined in the House of Lords Select Committee of Charities report of this year, it is expected that the government provides a certain degree of advice, guidance, and monitoring of the voluntary sector – irrespective of whether or not a third sector organisation is a recipient of government funding or contract-based support.[155] There are a number of regulatory bodies that hold the sector to account – the OCS and the Charity Commission being the two primary organisations.

However, evidence suggests that the part performed by the government as a regulator extends beyond the remit of the OCS and the official state-led initiatives mentioned in this chapter. It is argued that sector regulation is now cemented as a core constitutional responsibility of the UK government. The various levels of state-sector interaction means that it is impossible for the sector to remain untouched and unregulated by the state itself. In the words of a current practitioner consulted for this paper, 'It all becomes the government's problem when the government are funding or supporting a voluntary organisation in some way, and something

154 R. Cooney, 'Fundraising Regulator to consult on changes to code of practice', Third Sector, 26 Sep., 2017 [accessed via: https://www.thirdsector.co.uk/fundraising-regulator-consult-changes-code-practice/fundraising/article/1445669 (02/10/17)]

155 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 4.

goes wrong. They are suddenly held accountable, with increased public interest and expectations.'[156]

Questions of legitimacy and transparency relate to the lack of formal recognition of these regulatory powers and overlaps in the parameters of work undertaken by the state. The numerous parts played by the state in the regulation of the sector – as demonstrated in the reservations regarding public appointments of quasi-government organisations and regulatory bodies – are problematic on several fronts. First, they pose a threat to the independence of the sector; one of the key distinguishing principles of the sector and a central justification for the use of voluntary sector organisations. Second, the influence of the state in the governance and regulation of the sector also undermines the efficacy of accountability procedures. It is unclear how the sector is held to account. The ability of the state to be involved, in theory, with the work undertaken by the main regulatory body for charities that might be working in collaboration or on behalf of the state raises legitimacy issues. This practice could jeopardise the transparency and fairness of the procedural arrangements for holding charities to account. Third, it is democratically intractable for the state to take on a greater role in the oversight of the sector without this being sufficiently conveyed to members of the British electorate.

Significantly, however, concerns have been raised over the years surrounding the extent to which the OCS and Treasury exercise sufficient control, particularly in the oversight of funding. Responsibility for government policies and official commitments to third sector relations – specifically, the funding structure and

156 Baroness Scott of Needham Market to the House of Lords Select Committee.

framework – lies with these authorities, but control of funding relationships is indirect at best.

Despite overarching policies and guidelines outlined by the OCS and Treasury, and the Compact, the management of the relationships between these bodies and the third sector organisations varies widely. Instead of being administered by one overarching authority, the use of a variety of different organisations working in different ways and on different levels undermines the coherency and ultimately the stability of the funding arrangement.

The questions raised in this chapter reveal that there are still concerns about accountability. One cannot be satisfied with the responses of the regulatory bodies, tasked with holding the sector to account on behalf of, yet 'independently' from, the state. One suggestion for improvements is to introduce further measures of accountability, to ensure that sector organisations are held accountable to the state, their beneficiaries, and the public as a whole. Would charities – and other types of voluntary organisations – be willing to accept further levels of scrutiny? Asheem Singh, former Chief Executive of ACEVO (the charity and social enterprise leaders network) suggested that some would be open to the idea. Speaking on behalf of the charity sector as part of his oral testimony submitted to the Lords Committee, he argued: 'we should be hungry as a sector to find more ways to talk about and show what we do. Scrutiny is not necessarily a threat unless it is malicious. It is an opportunity to learn more about our mission and improve what we do.'[157]

157 Asheem Singh to the House of Lords Select Committee on Charities, 'Revised transcript of evidence taken before The Select Committee on Charities', Inquiry on Charities, Evidence Session No. 2, 12 Jul., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/35129.html (10/09/17)]

Several interviewees bemoaned the gradual change in the type of work performed by the Commission in recent years, claiming that undue attention is given to penalising charities at the expense of providing detailed and accessible advice and guidance literature. This paper also calls for greater emphasis to be placed on the advisory role traditionally undertaken by the Charity Commission.

Finally, it is worth briefly discussing very recent complaints brought against the other function of the Commission, largely forgotten given its regulatory powers. Speaking at the Labour Party conference in September 2017, Baroness Young of Old Scone, criticised the Charity Commission for failing to promote the work and status of charities amidst displays of antagonism. Baroness Young argued that the 'Charity Commission has kindly forgotten that as well as having a regulatory role it is also meant to be a promoter and supporter of charities.'[158] A number of respondents concurred. They argued that the Charity Commission has lost the necessary separation between its regulatory and educational, advisory functions, which enabled it to provide more supportive and helpful advice in the past. Currently, however, evidence suggests that the Commission primarily focuses on 'naming and shaming', offering only ambiguous guidance at best. Moving forward, interviewees suggested that the Commission could once again prioritise provision of advice literature, as well as highlighting examples of best practice, to shift the emphasis away from defamation.

158 Baroness Young of Old Scone, quoted in *Civil Society*, 'Charities feel 'picked on' and 'punished' by regulators, says Woodland Trust chair', *Civil Society*, 26 Sep., 2017 [accessed via: https://www.civilsociety.co.uk/news/charities-being-picked-on-by-regulators-says-woodland-trust-chair.html?utm_source=Civil+Society+News+List&utm_campaign=b59c1e12ab-EMAIL_CAMPAIGN_2017_09_27&utm_medium=email&utm_term=0_26f393b813-b59c1e12ab-86527901 02/10/17)]

Finally, difficulties with existing regulatory bodies could be resolved by the establishment of another oversight group operating independently and separately from the state and, as far as possible, from sector representatives. Following on from the recommendation outlined in the chapter on the Compact, this paper recommends that attention be given to calls for another intermediary institution. The Commission for the Compact – examined in the previous chapter on the Compact – was mentioned by several respondents as an organisation that could be used as a template for such an institution. As evidenced earlier, the Commission successfully produced critical and constructive research into the conduct of the Compact during its short lifetime. Although little came of the proposals for strengthening the legal authority of the Commission, respondents maintained that during the time it was active, the Commission was successful in operating as a genuinely independent body. It has been heralded by some as the 'nearest thing to a model institution.' The successful components of the Commission could be borrowed and adapted to form the basis of a new mediatory institution – most notably its independence from both state and sector, and its genuine commitment to constructive criticism, and empirical research and communications. This might help in addressing the problems with the implementation of the current Compact – and the alleged deterioration of state-sector relations.

A number of respondents referred to the Commission for the Compact as the only example of a past body set up to tackle state-sector relations that succeeded in being completely independent. Independence from the state and the market was cited as an essential prerequisite for any oversight or representative body that is going to be able to improve present-day relationships and address practical and theoretical problems.

Legislation

Voluntary organisations have held a central position in the political and social landscape of England, Wales, Scotland, and Northern Ireland for centuries. Yet despite their longstanding contributions to British society, the legal status of these bodies, and the legislative framework surrounding their practice and regulation, remains ambiguous. Laws regulating the voluntary sector in the UK have only recently been reinvigorated. Before the Charities Act 2006, there was relatively little legislation related to the position and regulation of charities: although the first formal acknowledgement of charities came in a 1601 Statute, it wasn't until the Charities Act 1960 that the first modern system of oversight was introduced. As with much of the development of the UK systems of governance, then, in the absence of a formal written constitution, the regulation and management of the charity sector has been performed on an ad hoc, piecemeal basis.

As a result, the legal status of voluntary sector organisations is not straightforward, and remains a source of contention. The discourse is complicated for bodies operating within the voluntary sector in several capacities. The multifaceted, diverse nature of the sector itself presents numerous challenges, and a wide variety of different legal bodies are often lumped together in the 'voluntary and community sector' bracket. (The differences in legal status of voluntary sector organisations reiterates the perils of treating the voluntary sector as a single homogeneous entity.) Difficulties are also the result of ambiguity surrounding definitions. Questions have been raised about the meaning of 'public authority' for the purposes of environmental laws (specifically the United Nations Economic

Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998), Freedom of Information requests since 2000, and the application of human rights legislation.[159] Finally, changes to the types of work undertaken by the sector has led to further legal uncertainty. The upward trend in the number of VSOs now contracted to deliver public services, for instance, has complicated the legal standing of these organisations.

From a constitutional point of view, these issues have resulted in problems in the establishment and implementation of numerous legislative acts. The fluidity has manifested in numerous court cases, based on lack of understanding, and uncertainty on the part of complainants, but also in Court. The lack of consistency in application has led to claims of unconstitutional practice, allegedly having a direct impact on the lives and rights of British citizens. In the absence of a written constitution, ambiguity has been heightened in these instances, and case law has set the precedent for the treatment of those involved in the voluntary sector. This is especially true of incidents relating to public service provision by an organisation that claims to be a voluntary body, working on behalf of a public authority.

Direct legislation

UK legislation affects the relationships between the state and the sector in a number of ways: sector involvement in negotiations and

159 R. English, 'What is a "public authority" for the purposes of environmental information?', 2013 [accessed via: https://ukhumanrightsblog.com/2013/09/17/what-is-a-public-authority-for-the-purposes-of-environmental-information/ (05/07/17)].; for more information on the Aarhus Convention, see The Aarhus Convention [accessed via: http://ec.europa.eu/environment/aarhus/ (05/07/17)]

policy-making decisions, providing insight from grassroots experience; government policies which can have a direct or indirect impact on the sector; legislation surrounding issues that organisations have an interest in or subject overlap (such as awareness raising for the subject areas they are involved in); and legislative acts that relate specifically to charities, and voluntary and community sector organisations.

In the last ten or so years, a number of laws have been passed specifically concerned with the set-up and practice of the voluntary sector; specifically, the Charities Acts of 2006 and 2011. To a certain degree, they have marked a shift in relations between state and sector, precipitating new directions for existing partnerships and unwritten conventions. The establishment of these laws has, for the most part, brought further stability, certainty, and rigidity to voluntary organisations. They have also cemented stronger boundaries, outlining areas of voluntary influence, scope, and control. While changes were brought through as part of a general rhetoric to improve and help charities in capacity-building and overall influence, they have also been seen as restrictive.

However, it is worth discussing some of the general complaints that surfaced. The House of Lords Select Committee on Charities of 2017 raised concerns about the formal discussions and consultation processes that took place in the lead up to the passing and implementation of these policies. It suggested that improvements needed to be made to the ways in which the government consults with the third sector on these developments. More specifically, it referred to the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014. It argued that the discussions that were held in Westminster, and the subsequent proposals for an ‘an-

ti-advocacy' clause, in the lead up to the Act caused unnecessary angst and anxiety for those working in the voluntary sphere.[160] This could have been avoided if more effort was made to engage with the sector. (This will be discussed in greater detail in this chapter.)

Further to this, the Committee also maintained that existing methods of consultation need to be improved with regards the devolved administrations and infrastructure organisations in place.[161] Although there is a different legal and constitutional arrangement for charities in Scotland and Northern Ireland, legislation passed in England can still impact upon the practice of charities operating outside of the country, particularly on reserved matters.

This chapter considers the direct and indirect acts of legislation that influence sector practice. Specific legislation that regulates and determines the legal status of charities in particular is examined, with two major exceptions: The Lobbying Act 2014 and taxation policies. The significance of these two policy areas in relation of positioning the legal standing of organisations is recognised in two separate chapters. It is also worth noting that the majority of direct legislation discussed in this chapter relates specifically to charities. Although charities represent the primary type of voluntary organisation operating in the UK, it is still problematic that other sources of voluntary work might be overlooked. This is particularly true in the current era of social enterprises.

- *Charities (Protection and Social Investment) Act 2016*

160 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 4.

161 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 4.

Some of the recommendations put forward by Lord Hodgson in his 2012 report were later included in the Charities Act 2016. The Act granted additional powers to the Charity Commission, specifically the ability to remove and disqualify trustees in certain circumstances.

In the same year, a new Fundraising Regulator was established in January 2016 as the official oversight body, taking on the responsibilities of the past Fundraising Standards Board, the Public Fundraising Association, and a number of the tasks previously undertaken by the Institute of Fundraising. The new Fundraising Regulator operates independently of the state, as does the Charity Commission. It is telling that the House of Commons Public Administration and Constitutional Affairs Committee described the new body as the 'last chance for fundraising self-regulation.'[162] Indeed, in the Charities (Protection and Social Investment) Act 2016 that was passed later that year, the government was granted a reserve power to direct the regulation of fundraising to the Charity Commission in cases it deemed this necessary.[163]

The 2016 Act granted the state the power to intervene and delegate responsibility for fundraising management in instances where the Fundraising Regulator failed to perform its roles adequately. Although the government directs powers to the Charity Commission in these cases, it is clear from this that the state claims to hold some responsibility over the management and regulation of civil societies, in this instance charities specifically. This can be taken as an illustration of the ways in which the state demands and expects

162 Public Administration and Constitutional Affairs Committee, *The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators*, Third Report, Session 2015-16, HC 431.

163 Charities (Protection and Social Investment) Act 2016, section 14.

to have some form of authority and sway over the proceedings of the voluntary sector. One clear example of this general approach is found in the response to the demise of the Kids Company, and the state intervention and critique of the handling of the incident by the Charity Commission. These examples indicate that despite the role of designated oversight bodies, the state still plays a part in the overarching management of civil societies. Is this sufficiently reflected in the legislation? What authority should the government have in these situations? Does the government actually perform the job of an oversight body? Does accountability ultimately lie with the state? And if so, is this formally recognised as one of the constitutional responsibilities of the executive?

- *Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014*

The Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 (more commonly known as the Lobbying Act 2014) introduced new regulations surrounding the activities of registered 'non-party campaigners' – including charities – in the run up to General Elections. The planned legislative change placed limits on the amount charities can spend on campaigns ahead of the general election. According to the legal framework, charities could face prosecution by the Election Commission if spending reached more than £9,750 per constituency on campaigning that was deemed to be 'politically' orientated. The Act was met with outright and widespread hostility.

These concerns were included in Lord Hodgson's review, which called for greater clarity and transparency surrounding the registration of non-campaigning bodies with the Electoral Commission. His recommendations were put forward to address concerns raised

by practitioners that the Act puts unnecessary restrictions that impeded upon charities' abilities to undertake their core purposes.[164] Under a chapter entitled 'Part One: Is any regulation of third parties necessary?', the Hodgson review examined arguments made for and against the use of regulations for third party participation in general election campaigning.[165] The 2014 Act was aimed at ensuring that the amount spent by voluntary sector organisations on general election engagement was limited, so as not to affect the balance of political campaigning. Despite promises made at the time of enactment, practitioners have gone further than merely prevent 'undue influence' on the election. They maintained that the new rules have prevented third parties from engaging in political debates. As Hodgson made clear in his review, the Act was introduced in spite of 'relatively low level of third party expenditure on 'qualifying activity'. Hodgson also drew attention to the 'widely perceived adverse impact of the controls governing election expenditure on participation in debate by third party campaigners,' in order to ask 'whether, and if so, why, any controls on expenditure are required at all.'[166] Along these lines, this question could be further extended to question the role of government in the regulation of the sector entirely.

The 2015 General Election and Referendum on Exiting the European Union 2016 were the first opportunities for charities and

164 E. Chamberlain, 'Lobbying Act: Reviewed and Improved', NCVO Blogs, 18 Mar., 2016, p. 2.

165 Hodgson, Cm 9205, 'Third party election campaigning – getting the balance right: review of the operation of the third party campaigning rules at the 2015 General Election', London: TPCR, Mar., 2016, p. 17.

166 Hodgson, Cm 9205, 'Third party election campaigning – getting the balance right: review of the operation of the third party campaigning rules at the 2015 General Election', London: TPCR, Mar., 2016, p. 17.

non-party campaigners to test the waters, and see how the new Act operated in practice. The Act was condemned by a coalition of 160 charities, as well as a cross-party coalition of politicians. Voluntary sector organisations approached campaigning and lobbying in the lead up to the 2015 election with caution. News coverage at the time argued that the Act had had a 'chilling effect' on charities that had been previously involved in campaigning activities.[167]

Similar concerns were also raised in the run up to the referendum on the European Union in 2016.[168] As opponents of the Act had pre-warned, the law seemed to 'gag' charities, preventing vital lobbying agencies from contributing to policy debates on issues that ordinarily benefit from their contributions. This effect was dubbed the 'chilling effect'. During the referendum campaign in 2016, a high-profile 'row' broke out after the Charity Commission's guidelines were criticised by some charities for preventing them from making pro-EU arguments.

Most recently, the June 2017 'snap' general election prompted a wave of concerns and outrage amongst practitioners about the effects of the Lobbying Act 2014. The Act was criticised as an assault on free speech. Charities argued that the new regulations have the potential to de-rail charitable efforts to protest against issues such as child poverty, health, and homelessness. Evidence suggests that charity figures were deterred from staging campaigns on specific issues relevant to their causes brought up in General Election man-

167 'Charities warn 'gagging law' stops them campaigning on election issues', *The Independent*, 18 Feb., 2015.

168 A. Asthana and R. Mason, 'Charities criticise watchdog's 'gag' on EU campaigning', *The Guardian*, 8 Mar., 2016 [accessed via: https://www.theguardian.com/society/2016/mar/08/charities-criticise-commission-ban-eu-campaigning-referendum (18/05/17)]

ifestos and campaigns. They felt unable to campaign on matters of joint interest, and forced to resort to 'vaguely worded' protest messages.[169]

Fears were realised in 2017, when the charity Greenpeace UK was fined £30,000 by the Electoral Commission for refusing to register as a 'third-party campaigning organisation' in the lead up to the 2015 General Election. This was in response to its campaign for sustainable fishing policies to be included in party political manifestos, including discussions about fracking.[170] Speaking of their decision, John Sauven, Executive Director of Greenpeace UK, described the Act as 'a democratic car crash; it weakens democracy and curtails free speech.'[171] Sauven also criticised the Lobbying Act for being undemocratic and unconstitutional. It has allegedly suppressed voluntary sector efforts to participate in worthwhile political debates, whilst enabling larger corporate organisations to continue operating in the shadows, seemingly unaffected by the legislative change. He observed that while corporate lobbying agencies (paid by companies to fight against particular legislation, such as anti-smoking law) have been little affected, efforts made by campaigning groups like Greenpeace, 'trying to get political parties

169 'Charities warn 'gagging law' stops them campaigning on election issues', *The Independent*, 18 Feb., 2015.

170 M. Taylor, 'Greenpeace fined under Lobbying Act in 'act of civil disobedience', *The Guardian,* 18 Apr., 2017 [accessed via: https://www.theguardian.com/politics/2017/apr/18/greenpeace-first-organisation-fined-lobbying-act (18/05/17)]

171 M. Taylor, 'Greenpeace fined under Lobbying Act in 'act of civil disobedience', *The Guardian*, 18 April 2017 [accessed via: https://www.theguardian.com/politics/2017/apr/18/greenpeace-first-organisation-fined-lobbying-act (12/07/17)]

to make strong commitments on the environment or human rights,' are been flouted in the face of the new regulations.[172]

Allegations have also been made against the Charity Commission itself, amidst concerns that Commission personnel were using the body to 'drive their own political agenda', under the chairmanship of William Shawcross (Rupert Mudroch's biographer, described by Margaret Hodge MP as an 'arch Eurosceptic'.[173] It is still unclear where responsibility lies for ensuring that the Commission is politically unbiased and performs its role as regulator sufficiently. Several questions still need to be answered: Does the government hold responsibility for the oversight of this regulatory body? And if so, does the state have overarching authority over the third sector? What does this say about the independence of voluntary bodies? Does this undermine the legitimacy of the third sector?

As it turned out, in response to mounting concerns and high-profile hostility, the Labour Party pledged to scrap the legislation, on the grounds that the Act served as a 'gag on charities and campaigners' – as described by Ed Miliband.[174] In 2016, the government announced proposals to include an 'anti-advocacy' clause into all future government grants. The clause would forbid the use of public

172 M. Taylor, 'Greenpeace fined under Lobbying Act in 'act of civil disobedience', *The Guardian*, 18 April 2017 [accessed via: https://www.theguardian.com/politics/2017/apr/18/greenpeace-first-organisation-fined-lobbying-act (12/07/17)]

173 A. Asthana and R. Mason, 'Charities criticise watchdog's 'gag' on EU campaigning', *The Guardian*, 8 Mar., 2016 [accessed via: https://www.theguardian.com/society/2016/mar/08/charities-criticise-commission-ban-eu-campaigning-referendum (18/05/17)]

174 'Charities warn 'gagging law' stops them campaigning on election issues', *The Independent*, 18 Feb., 2015.

money for advocacy work undertaken by charities.[175] In response to substantial criticism, these proposals were put on hold, and the government has since amended its plans. In both cases, although the proposed bill and the 'anti-advocacy' amendment were not implemented, the proposals – and outrage they prompted – illustrate the potential power the government could wield over the sector, despite independence claims. A more detailed discussion of lobbying and campaigning work can be found in the separate chapter on advocacy.

- *Charities Act 2006 and Charities Act 2011*

The Charities Act 2006 marked a shift in the formal relationship between state and sector. The 2006 Act provided statutory definitions of a 'charity' – defined by the Act as an institution which is 'established for charitable purposes only.' The Act sets out 12 such 'charitable purposes', including: poverty relief, the advancement of education, advancement of the arts, advancement of religion or advancement of health.[176] Further to this, it also introduced the Charitable Incorporated Organisation (CIO) structure, which entitled some charities to corporate body status, which came into effect in 2013. The Charities Act 2006 was later combined with other relevant legislation in the Charities Act 2011.

There are a number of aspects of the Charities Act 2006 worth discussing. First, the notion of charitable purposes. Following the Charities Act 2011, charitable purpose is now defined as 'one that

175 Cabinet Office, 'Update on a new chance to be inserted into grant agreements', Chapter 8. [accessed via: https://www.gov.uk/government/news/update-on-a-new-clause-to-be-inserted-into-grant-agreements (14/03/17)]

176 Charities Act 2006, sections 1-2. These provisions have since been replaced by the Charities Act 2001, sections 1-3.

falls within 13 descriptions of purposes and is for public benefit.' The 13 purposes are as follows:

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of the arts, culture, heritage or science;
- the advancement of amateur sport;
- the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- the advancement of environmental protection or improvement;
- the relief of those in need, by reason by youth, age, ill-health, disability, financial hardship or other disadvantage;
- the advancement of animal welfare;
- the promotion of the efficiency of the armed forced of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and other charitable purposes.[177]

Clearly, the term 'charity' can thus be applied to a broad spectrum of organisations. The services provided by the government also fall within the large majority of these categories. This reiterates the

177 Charity Commission for England and Wales, 'Charitable purposes' [accessed via: https://www.gov.uk/government/ publications/charitable-purposes/charitable-purposes#about-charitable-purposes (30/01/18)].

point that there is considerable overlap between the roles performed by the state and the tasks undertaken by charitable organisations.

This was accentuated in the recent debates concerning the status of institution providing state and private secondary education.[178] Several newspapers have published articles with the following titles: 'Is it right that public schools have charitable status?'; 'Gove private schools are welfare junkies'; 'Revealed the 10m private schools save on rates because they are charities.'[179] Critics have suggested that independent schools should give up their claims to charitable status, arguing that it is wrong for them to be entitled to generous tax breaks when many cannot demonstrate their direct impact on the lives of the less fortunate and needy. These arguments demonstrate the difficulties in defining an institution as a 'charity', and the tumultuous disputes surrounding the responsibilities and purposes of organisations that are given legal charitable status.

Second, the idea that a charity is an institution that is established for 'charitable purposes only.' At what point does the provision of services for public benefit move from being defined as a charitable act to a statutory contribution of government? What distinguishes

178 Accessed via: http://www.independent.co.uk/news/business/news/private-schools-pay-tax-michael-gove-vat-boost-state-education-charity-status-funding-mic-a7597126.html.;https://www.spectator.co.uk/2017/04/how-private-schools-are-risking-their-charitable-status/ (30/01/18).

179 Accessed via: http://www.telegraph.co.uk/education/2017/02/02/government-must-realise-education-not-charity-first-priority/.; http://www.telegraph.co.uk/education/secondaryeducation/12102231/Public-schools-could-lose-generous-tax-breaks-unless-they-provide-annual-audit-of-how-they-share-facilities-with-poor.html.; https://www.theguardian.com/commentisfree/2014/nov/29/is-it-right-public-schools-charitable-status.;https://www.tes.com/news/school-news/breaking-news/gove-private-schools-are-welfare-junkies.; http://www.heraldscotland.com/news/13066294.Revealed__the___10m_private_schools_save_on_rates_____because_they_are__charities_/ (30/01/18).

certain organisations from their local authorities? What is less clearly defined are the differences between the services provided by charities and the services provided by local and central authorities. There is a blurring of the boundaries between the tasks performed on behalf of charities and tasks performed on behalf of the government. This is particularly true of charities that provide public services through contract-based government funding. This is potentially problematic, in terms of regulation, oversight, accountability, and the application of particular laws – such as the Human Rights Act and the Freedom of Information Act. This point of recent contention also demonstrates the room for flexibility afforded within the current terms in the legislation. There is clear scope for overlap with the work of the government, and this has the potential to create uncertainty, inchoate practice, and disagreements between state and sector.

Third, questions have been raised about the 'public benefit' element to the legislative requirements. The Charity Commission is responsible for articulating and explaining 'the concept of public benefit in a way which is consistent with the law and clear to the public.'[180] According to the Commission, there are four key principles relating to the 'public benefit' stipulation: 1 - There must be an identifiable benefit. 2 - Benefit must be to the public, or a section of the public. 3 - People on low incomes must be able to benefit. 4 - Any private benefit must be incidental.

Despite the Commission's efforts to provide succinct and transparent guidance, the concept of 'public benefit' remains a subject of contention. Its Memorandum revealed divided opinion over

180 Parliament UK, 'Memorandum by the Charity Commission (CPB 01) [accessed via: https://www.parliament.uk/documents/upload/memoranda-by-the-charity-commission.pdf (24/08/17)].

whether or not ancillary benefits should be considered as part of the public benefit criteria. Debates also centred on how wide the interpretation of a charity's purpose could be extended, and what the implications of this extension might have on additional benefits. The Commission concluded that this topic needed further consideration as a result of the difficulties in reaching consensus. It is somewhat alarming that the conclusions of the Commission's public consultation that were published in 2007 still carry weight in present-day discussions.[181]

In fact, it has been suggested that the problems with understanding and application of the law have been augmented by the Charity Commission itself. Questions have been raised about the role of the Charity Commission in the provision of guidance and support literature. The 2006 Act introduced a 'public benefit requirement', which required that charities demonstrated this in order to be registered by the Charity Commission.[182] This gave the Commission responsibility for interpreting this aspect of legislative fulfilment, and has since published guidance outlining its interpretation of public benefit. This fits into the overarching statutory objective of the Charity Commission, which dictates that the Commission sets out to enhance the accountability of charities to donors, beneficiaries and the public.

However, evidence supports the concerns raised by the PASC about the role of the Commission in informing charities of the

181 Parliament UK, 'Memorandum by the Charity Commission (CPB 01) [accessed via: https://www.parliament.uk/documents/upload/memoranda-by-the-charity-commission.pdf (24/08/17)]

182 Parliament UK, 'Memorandum by the Charity Commission (CPB 01) [accessed via: https://www.parliament.uk/documents/upload/memoranda-by-the-charity-commission.pdf (24/08/17)]

implications of the Act. The guidance literature on the principle of 'public benefit' supplied by the Charity Commission has not been necessarily reflective of the legal requirements as stated in the Charities Acts. This is problematic, given that charities and beneficiaries are dependent upon the Commission to provide them with clear and accurate information about their rights and privileges. In the Memorandum by the Charity Commission, published in 2007, the Commission admitted that differences have emerged regarding the interpretation of the principles of public benefit. Of the four principles of public benefit that the Commission expected charities to demonstrate – Principle 2: People on low incomes must be able to benefit – the Commission noted that a significant minority of the responses it received to a consultation on guidance suggested that the Commission's 'interpretation goes beyond what the law requires in this area.'[183]

Attempts have been made to address these problems. Lord Hodgson's subsequent review of the Charities Act 2006, published in 2012, considered the use of statutory public benefit tests to alleviate these problems.[184] The House of Commons Public Administration Select Committee's (PASC) 2014 post-legislative scrutiny report argued that the 2006 Act had introduced a 'critically flawed' approach. In the wake of costly legal disputes – most notably in the case of the battle between the Independent Schools Council and the Plymouth Brethren Christian Church – it recommended that Parliament

183 Parliament UK, 'Memorandum by the Charity Commission (CPB 01) [accessed via: https://www.parliament.uk/documents/upload/memoranda-by-the-charity-commission.pdf (24/08/17)]

184 Lord Hodgson of Astley Abbotts CBE, *Trusted and Independent: Giving charity back to charities: Review of the Charities Act 2006*, Jul., 2012 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79275/Charities-Act-Review-2006-report-Hodgson.pdf, 14 Mar., 2017]

revisit the legislation and set out more explicit criteria for public benefit, instead of delegating this to the Charity Commission.[185] This paper recommends that the suggestions outlined in the Review are implemented.

This also serves as an example of how some view the state as responsible for charitable organisations. Arguments are often made for the state – in this case the House of Commons – assuming responsibility for the management and regulation of the charity sector. This supports the argument of this report that although charities are technically held accountable to the Charity Commission – if they have registered – which acts as an independent regulatory body, ultimate accountability often lies with the state.

It also reveals the level of uncertainty and flexibility in the development of legislation. The impact of these legislative acts are primarily felt outside of state institutions. Yet there is growing support for the premise that the government is increasingly taking on some form of oversight role. Is the extent of these concerns about state intervention the result of exaggerated commentary? Regardless of whether evidence supports these claims, it reveals uncertainty about the role of the government in charity sector regulation. Who does the public think is the body responsible for looking at the work and governance of charities? Where does responsibility lie for these cases of contention? Clearly, legislative uncertainty has remained despite the enactment of both Charities Acts, which has arguably resulted in disparity in application, and a blurring of the distinctions between state and sector responsibility and accountability.

185 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 11.

More generally, the Charities Acts have not encompassed the voluntary and community sector as a whole. Where does this leave other quasi-charitable organisations, such as community bodies and faith-based organisations? The 2006 Act was enacted in response to demands for a much-needed re-haul of legislation. This is particularly important in light of recent emphasis and increasing use of charities; the last few years have witnessed a rise in the number of charities taking on contracts with the state for the delivery of public services, for example. Surely, then, using this reasoning, organisations operating in the voluntary and community sphere that are not formally and legally recognised as 'charities' are also in need of a re-vamp of the legislative status.

Indirect legislation

Other acts of legislation are relevant without direct and necessarily obvious repercussions for the voluntary sector. The enactment of policies can have an indirect influence on the running of voluntary organisations that is not necessarily obvious from the outset. An example of this is the recent increase in the National Living Wage (NLW). While research was carried out on the impact of this change on businesses – with reassurances that the cost of paying the new NLw would be evened out by the cuts to corporation taxes – VSOs were not given any means of counterbalancing effects to their practice. Does responsibility lie with the state to ensure that the sector is sufficiently informed in such matters? In this particular example, did responsibility fall within the remit of the Office for Civil Society? Should the Office have informed HMRC of the possible repercussions of this policy change, and worked towards implementing necessary safeguards?

Lack of consultation on legislative changes has been an ongoing source of contention since the renewal of the Compact in 2010. It is widely held that the government needs to put more effort into consulting with the sector. Advocates of more detailed collaboration on legislative change argue that the state needs to include the possible effects proposed changes might have on the sector before finalising reforms. The voluntary sector needs to be given more opportunities to participate in preliminary debates and inform policy discussions, in order to maximise contingency plans. Currently, critics have criticised the dearth of interaction between state and sector and the subsequent lack of understanding about the impact legislative changes are having on voluntary performance. In evidence to the Select Committee on Charities, the Wellcome Trust cited the Research & Development Expenditure Credit, which denied charities eligibility, and reforms made to the Corporation Tax Code 2010, which saw the introduction of further charges on charities.[186] Both these examples of change took place without sufficient consultation without consideration of their impact on the sector. A series of consultations on a number of specific details of charity laws have been undertaken by the Law Commission. This author hopes that the results will focus on the need for further collaboration, when published in a report and draft bill later this year.[187]

- *Human Rights Act 1998*

The Human Rights Act (HRA) is another example of inconsistency and ambiguity in the legal standing of organisations operating on the

186 Written evidence from the Wellcome Trust, CHA0164, to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 96.

187 Law Commission, 'Charity Law, selected issues' [accessed via: http://www.lawcom.gov.uk/project/charity-law-selected-issues (30/05/17)]

fringes of the public sector. The HRA was justified on the grounds on ensuring that existing actions taken by public authorities comply with the European Convention on Human Rights, and thereby improving the quality of public services and safeguarding the human rights of individuals.[188] As outlined by the Joint Committee on Human Rights in 2004:

> *'The Human Rights Act makes it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights. It allows those who believe their rights have not been respected by public authorities to seek vindication and redress in the courts of the United Kingdom.'*[189]

The Act relies upon public authorities and British citizens to fulfil the measures and principles outlined in the Act to attain a 'greater respect for human rights in the provision of public services,' thereby contributing to the government's objective of 'increasing respect throughout society.'[190]

Passed in 1998, the Act came into force in 2000. Seventeen years later, however, problems continue to be raised about the implementation and impact of the Act. At the fore of difficulties cited

188 F. Butler, *Improving public services: using a human rights approach: strategies for wider implementation of the Human Rights Act within public authorities',* London: IPPR, Jun., 2005, p. 7.

189 Joint Committee on Human Rights, 'The meaning of public authority under the Human Rights Act', Seventh Report of Session 2003-04, HL Paper 39, HC 382, London: The Stationary Office Ltd, Mar., 2004, p. 3 [accessed via: https://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf (05/07/17)]

190 F. Butler, *Improving public services: using a human rights approach: strategies for wider implementation of the Human Rights Act within public authorities',* London: IPPR, Jun., 2005, p. 10.

by practitioners is the premise that the wording of the Act remains ambiguous, and this has resulted in a general lack of understanding, to the detriment of the application of the legislative principles and practices. Issues with compliance are widespread. This is particularly true of public services delivering social services, health, and social care, and housing facilities. Reports have suggested that a low level of understanding has diminished the impact of the Act among public authorities, and this has undermined the effectiveness of the Act in protecting the vulnerable and marginalised peoples. Research conducted by the think-tank IPPR, for instance, claims that current confusion about which organisations constitute 'public authorities' and 'charities' under the Human Rights Act is also 'perpetuating an injustice particularly experienced by vulnerable people.'[191] This lack of awareness or understanding has resulted in incorrect implementation of the responsibilities set out under the HRA. It is alleged that some public authorities have experienced difficulties in understanding the extent of their responsibilities under the HRA. Some services that many claim to serve as 'public authorities' in the provision of services on behalf of the state are not defined as 'public authorities' according to the guidelines set out in the HRA, and are therefore not subject to the legislative framework as outlined in the Human Rights Act 1998.

It must be noted that there are cases of best practice. Examples cited in a JCHR report found evidence of voluntary bodies engaging with public authorities on their responsibilities under the Act, and influencing their policies, leading to subsequent reviews and changes to procedures. One voluntary organisation cited Article 11 of the Act to persuade a mental health services provider that had introduced

191 F. Butler, *Improving public services: using a human rights approach: strategies for wider implementation of the Human Rights Act within public authorities',* London: IPPR, Jun., 2005, p. 3.

a blanket ban on patients congregating in groups of two or more to review its policy, on the basis of right to free association.[192] In another case, Child Poverty Action Group used Article 8 to encourage schools to adjust the way in which free school meals were allocated, in an effort to avoid attaching stigma to FSM children.[193] The sector worked within the HRA with positive results.

However, these examples of the use of voluntary organisations in the application of human rights law are exceptions. In fact, in the case of the mental health provider, the voluntary organisation had relied upon training by the British Institute for Human Rights when advising on the legal framework of the law. In the main, there are concerns about a general lack of understanding amongst practitioners. They argue that lack of understanding and the complexity of the legislative process undermines the ability of the sector to comply with human rights legislation in the provision of public services. The inchoate nature of the delivery of public services in the UK exacerbates these existing difficulties. The myriad of different service providers – a combination of voluntary, public, and private bodies – means that the system is reliant on even more people to understand, oversee, and enforce human rights policies. In the wake of this, calls have been made for a more integrated and accessible approach to the provision of public services, and the enforcement of the Human Rights Act.

192 F. Butler, *Improving public services: using a human rights approach: strategies for wider implementation of the Human Rights Act within public authorities',* London: IPPR, Jun., 2005, p. 10.

193 J. Rankin and S. Regan, *Meeting complex needs: the future of social care*, London: IPPR, 2004 [accessed via: http://www.ippr.org/files/images/media/files/publication/2011/05/Meeting_Complex_Needs_full_1301.pdf?noredirect=1 (18/05/17)]

In response to concerns about inconsistent and restrictive application of the law by the Courts, the JCHR undertook an inquiry into the 'meaning of public authority under the Human Rights Act,'[194] referring specifically to the two types of 'public authority' defined under Section 6 of the Act. The JCHR concluded that confusion and ambiguity surrounding the types of organisations that are liable under the Act has resulted in failure by the courts to ensure that the protection offered by the Act is comprehensive. It observed that a body could be liable under the Act one day, and not the next. Many private and voluntary sector providers of public services were considered to fall outside the protection of the Act, resulting in cases where the rights and freedoms of beneficiaries were put at risk.[195] This was a direct consequence of ambiguity of terminology and definitions of the public sector, and inconsistency in application of the law.

- *R (Weaver) v London and Quadrant Housing Trust*

The Weaver versus London and Quadrant Housing Trust (LQHT) case is a particularly good example of the possible impact of the legal difficulties in the definition of 'public authority' under HRA, as outlined described by the JCHR. The case was brought to court

194 Joint Committee on Human Rights, 'The meaning of public authority under the Human Rights Act', Seventh Report of Session 2003-04, HL Paper 39, HC 382, London: The Stationary Office Ltd, Mar., 2004, p. 4 [accessed via: https://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf (05/07/17)]

195 Joint Committee on Human Rights, 'The meaning of public authority under the Human Rights Act', Seventh Report of Session 2003-04, HL Paper 39, HC 382, London: The Stationary Office Ltd, Mar., 2004, p. 6 [accessed via: https://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf (05/07/17)]

when a tenant of the LQHT challenged their grounds for possession order and eviction from the property.

To set out the background for this case, LQHT is an exempt, not-for-profit charity, which provides 'housing, accommodation and assistance to help house people and associated facilities, amenities and services for poor people or for the relief of aged, disabled, handicapped or chronically sick people.'[196] It has substantial connections with local authorities. 10 per cent of its stock came from stock transfers from local authorities, and in 2006, 64 per cent of new lettings were based on local authority nominations.[197]

The case came to court when Mrs Weaver, an assured tenant of LQHT challenged the LQHT's decision to take possession proceedings based on a Ground 8 claim (a mandatory ground for outright possession order). The defendant challenged the use of Ground 8 on the grounds that it was a breach of her rights under Article 8 of the HRA Convention. Importantly, for the purposes of this paper, in order to follow through this line of argument, the defence first had to prove that LQHT was 'amenable to judicial review'. In other words, it had to be established that LQHT was a 'public authority' within the meaning of section 6(3)(b) of the HRA – organisations which exercise a function of a public nature' some but not all of the time.

Significantly, the LQHT conceded that it was a 'hybrid' authority under HRA regulations, accepted on the grounds that some of the functions undertaken by the body were 'public functions'. This was sealed by the LQHT's ability to obtain parenting orders and

196 [2008] EWHC 1377 (Admin) [17] (Richards LJ).

197 I Alderson, 'R (Weaver) v London and Quadrant Housing Trust', *The Charity Law & Practice Review*, Vol. 16, Nov., 2013, p. 130.

anti-social behaviour orders, which can only be obtained by certain core authorities and RSLs/RPs, but not by private landlords.[198] (This relates to concerns about access to government records and open data, which are discussed in a separate section of this paper.) Although the courts rejected Mrs Weaver's grounds of challenge, the Divisional Court held that the LQHT was a public authority. At the time, Lord Justice Richards maintained that this decision was, in his opinion, 'unlikely to be of great practical significance in many other cases.'[199]

The Weaver declaration that 'the management and allocation of housing stock […] (including decisions concerning the termination of a tenancy) is a function of a public nature, with the effect that [LQHT] is to be regarded as a public authority', has had an impact on the financial and legal treatment of housing associations. It has since been held that housing associations and other similar third sector organisations should 'equally be amendable to judicial review on conventional public law grounds […]'[200]

This case – and several other widely reported cases – holds significant implications for the legal treatment of housing associations, and other voluntary organisations. The National Housing Federation (NHF) has argued that the Weaver judgement, along with several other widely reported cases, has further complicated existing issues about funding. NHF have argued strongly that the Weaver

198 I Alderson, 'R (Weaver) v London and Quadrant Housing Trust', *The Charity Law & Practice Review*, Vol. 16, Nov., 2013, p. 132.

199 *Weaver HC* (n3) [63] (Richards LJ), cited in I Alderson, 'R (Weaver) v London and Quadrant Housing Trust', *The Charity Law & Practice Review*, Vol. 16, Nov., 2013, pp. 132-133.

200 *Weaver HC* (n3) [64] (Richards LJ), cited in I Alderson, 'R (Weaver) v London and Quadrant Housing Trust', *The Charity Law & Practice Review*, Vol. 16, Nov., 2013, p. 133.

judgement placed housing associations as semi-public independent deliverers, and in so doing, have raised questions about borrowing, public expenditure, as well as the applicability of judicial review and human rights legislation.[201] In a report, commissioned by the HACT, those working for housing associations have attributed this case law to growing ambiguity about their 'non-governmental' status. Questions have been raised on the degree to which: the government funds association; they regulate detailed activities; and what types of associations are eligible to perform local authority statutory duties.[202]

This example serves to demonstrate how the law as it currently stands could mean that British citizens do not always have the access to the human rights they are entitled to, under European – for the time being – and UK law. It also demonstrates how the inchoate system of public service delivery – in part a result of the use of and reliance upon the voluntary sector – has undermined the ability of practitioners to undertake the necessary measures for implementation of the Act.

The example of the Human Rights Act also flags up another constitutional problem, which has the potential to be problematic in future cases. The scope and remit of both the public sector and the voluntary sector have changed significantly over the last few decades. This shift in practice and standing has not necessarily been reflected in changes in legislation. For example, the ECHR rights of the Human Rights Act – designed to protect the individual from abuse of power by the State – were agreed at a time when the

201 C. Hughes, 'The role of the third sector in delivering and improving public services', HACT, Mar., 2010, p. 5.

202 C. Hughes, 'The role of the third sector in delivering and improving public services', HACT, Mar., 2010, p. 5.

boundaries of the public sector were different to current parameters. It is potentially problematic – both from practical and theoretical perspectives – that legislative acts that are currently used may not adequately reflect the realities at an operational level. Ambiguity surrounding the status of voluntary sector organisations, specifically in relation to their contributions to the state, may be denying individuals access to their rights as British citizens.

In terms of recommendations, it is clear that more efforts need to be made to ensure that public authorities and service providers understand how to improve the delivery of public services in line with the Act, so that a better human rights approach can be taken. This paper calls for further consideration of where responsibility for informing and guiding the authorities and public lies. The system is in need of greater clarity and cohesion in terminology and application. Better delivery of the principles outlined in legislative acts will translate into more effective provisions and rights for British citizens.

- *Freedom of Information Act 2000*

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. The Act thus contains a definition of organisations that are recognised as being subject to the regulations. According to FOIA, a 'public authority' refers to 'any body which, any other person who, or the holder of any office which – (a) (i) is listed in Schedule 1, or (ii) is designated by order under section 5, or (b) a publicly-owned company as defined by section 6.'[203]

203 Information Commissioner's Office, 'Public authorities under the Freedom of Information Act', Version 2.2, Sept., 2016, p. 2 [accessed via: https://ico.org.uk/media/for-organisations/documents/1152/public_authorities_under_the_foia.pdf (05/07/17)]

However, the bodies listed in the schedules and sections referred to in this statement are not clear-cut. As considered in the guidance provided by the Information Commissioner's Office (ICO) on the application of the FOIA to public authorities, there are difficulties in ascertaining the specific body that takes on the label, and thereby legal responsibility, of the 'public authority' in instances where powers have been devolved. For example, public authorities in the National Health Service (NHS) range from trusts to individual practitioners who provide services under contract to the NHS.[204] Respondents to this paper pointed to the disparity in application of law with regards to private organisations. Private companies supplying public services on behalf of a government body are not required to respond to FOI requests. Similarly, the vast majority of charitable organisations are also not subject to the FOI Act, regardless of whether they are in receipt of considerable amounts of public funding, or contracted to provide public services. Therefore, a local authority that has chosen to provide the exact same service that has been contracted out to a charity in another local authority area might be required to respond to a FOI request whereas the charity would not have to.

Furthermore, as outlined in the Act, some public authorities may only be subject to FOIA for certain information. The BBC is an example of this. It is also within the powers of the Chancellor of the Duchy of Lancaster to add or remove from the Schedule, which lists the categories of public organisations that are subject to FOIA regulations. There is thus scope for change and alteration. The definition of a public authority is not set in stone.

204 Information Commissioner's Office, 'Public authorities under the Freedom of Information Act', Version 2.2, Sept., 2016, p. 2 [accessed via: https://ico.org.uk/media/for-organisations/documents/1152/public_authorities_under_the_foia.pdf (05/07/17)]

- *Public Services (Social Value) Act 2012*

Under the Public Services (Social Value) Act 2012, public commissioners are required to consider how contracts can provide maximum social value and public benefit. This Act was praised at the time by practitioners working for civil societies, for encouraging commissioners to look towards charities and social enterprises as forerunners in this line of work.

Conclusion

The legal standing of voluntary sector organisations remains ambiguous on several fronts, despite recent changes to the law. This is partly a reflection of the multifaceted nature of the sector. The variety of different bodies that can be loosely categorised within the umbrella terms 'voluntary' and 'community' create difficulties with legal definitions and terminology.

There are numerous ways in which the law can have an impact on organisations operating within this sphere. They can be affected by policies that are indirectly related to VCSOs – such as legislation that affects the beneficiaries of charities, the subject areas they are involved with, awareness raising, and policies that have a direct impact on the sector and are directly related to practice and regulation of the sector. This chapter has outlined the effects of legislative changes that have had a direct impact on the sector in recent years, most specifically in relation to those qualified as 'charities'.

The Charities Act 2006 and Charities Act 2011 have undoubtedly shifted the legal status of charities operating within England and Wales, and, to a lesser degree charities in the devolved states. Points of constitutional significance with these changes include difficulties

with what is meant by ‘charitable purpose’ and ‘public benefit’, as described in the wording of the Act itself. The definition of ‘charitable purpose’ and how this is recognised in practice has proved particularly controversial in the wake of media interest in the legal status of private schools, for example. The Acts have brought long-standing concerns about what constitutes a ‘charity’ and what justifies ‘charitable status’ to the fore. This is constitutionally relevant, given that taxpayers money is used to subsidise charitable practice, as explained in the following chapter on taxation.

The Human Rights Act 1998 is another example of difficulties with wording. Confusion still revolves around where sector organisations stand with regards to the application of the legislative principles and practices outlined in the Act. The definition of ‘public authority’ in particular has resulted in difficulties with low levels of understanding within sector organisations. Evidence shows that this has led to poor application of the law. It is constitutionally problematic that some citizens might not have access to their rights under UK laws as a result of this, as highlighted in the Weaver v London and Quadrant Housing Trust.

Moving forward, this paper proposes a number of recommendations for future practice. It supports existing calls for better consultation methods. The government has been criticised for failing to give adequate consideration to the possible effects of legislative change. This work should theoretically fall to the OCS to ensure government departments incorporate sector relations in policy-making and decisions. More efforts should be made to ensure that relevant sector organisations are consulted on prospective changes to the law that might either directly or indirectly affect their line of work.

There is a clear need for greater clarity in the terminology used in existing and future legislative Acts. Voluntary organisations rarely 'feel fully consulted about proposed new laws and regulations and […] this increases the risk of unintended consequences,' as noted by the House of Lords Select Committee.[205] Suggestions have been in favour of transferring responsibility from the Charity Commission to a government authority – perhaps the OCS or a central government department. Alternatively, the Charity Commission could open another public consultation open to those involved in the charitable sector in a bid to establish where improvements could be made, much like the one conducted in 2007.

205 House of Lords Select Committee on Charities, HL Paper 133, 'Stronger charities for a stronger society', Mar., 2017, p. 1s16.

Taxation

Alongside legislation, taxation determines the status of voluntary sector organisations operating in the UK. It is one of the most important, and often controversial, elements of sector regulation that influences the overall framework of the sector.

Tax policies have a considerable impact on the everyday management of voluntary organisations. But they are especially important for those operating as charities. Charity VAT is a complicated part of tax legislation. Charities are treated like any other organisations for taxation purposes: if they are engaged in VAT-taxable activities that exceed HMRC's compulsory VAT registration threshold, then they have to register for VAT. However, for charities – a large proportion of those operating in the UK – that rely on government grant funding or similar income streams, registration for VAT is not required.[206] Tax relief is also provided for individual donors. This, too, has been another source of contention. In 2012, George Osborne – then Chancellor of the Exchequer – proposed a cap be placed on the amount that a person may donate to a charity in one year. Although this was met with hostility from the sector, others took this as an opportunity to call for a re-haul of UK tax laws for charitable organisations. Other schemes, such as Gift Aid, offer further benefits. The Small Charitable Donations and Childcare Payments Act 2017, for instance, helped to simplify the eligibility requirements for GiftAid donations. (Although practitioners have

206 B. Lewis, 'Q&A: Charity tax and VAT', *The Guardian*, 15 Dec., 2009 [accessed via: https://www.theguardian.com/society/2009/dec/15/charities-tax-vat (14/07/17)]

argued that there is scope for further improvement.)[207] Tax relief can make a substantial difference to incomes; tax relief was estimated £3.67 billion in 2015/16, £1.79 billion of which was provided through the national non-domestic rate relief (the largest type of tax relief available to charities).[208]

Crucially, charities are only granted these exemptions in recognition that the money given for public benefit should not be taxable. The following are all forms of activity and income that charities are exempt from income and corporation tax: income from carrying out their primary charitable purposes; activities carried out by their beneficiaries; rents from land and buildings; bank interest; dividends; certain fundraising events, and the sale of donated goods.[209]

Discourse surrounding taxation

There has been little debate surrounding the subject of legal status and taxation within either voluntary or academic circles. The majority of voluntary sector organisations take the view that tax relief is a positive policy. The NCVO, for example, would argue that it boosts charitable income and should therefore be encouraged. Politicians have also typically supported this view. Opposition to the use of tax relief is rarely discussed amongst practitioners, for

207 House of Lords Select Committee, 'Stronger charities for a stronger society', London, HL Paper 33, Mar., 2017, p. 59.

208 HM Revenue and Customs, *UK charity tax relief statistics 1990-91 to 2015-16*, London: HMRC, Jun., 2016 [accessed https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532722/UKCharityTaxReliefStatisticsCommentary.pdf (23/05/17)]

209 B. Lewis, 'Q&A: Charity tax and VAT', *The Guardian*, 15 Dec., 2009 [accessed via: https://www.theguardian.com/society/2009/dec/15/charities-tax-vat (14/07/17)]

fear of shortcutting income avenues. There is thus a gap in existing literature.

As a result of this, little thought has been given to some of the issues inherent in the concept of tax relief itself. One respondent for this paper noted that there is scope for an argument to be made against tax relief for voluntary organisations on constitutional grounds. Tax relief is a foregone tax – money that would have gone to the Exchequer. As such, it is therefore potentially problematic that not all the organisations in receipt of tax relief are organisations that the government has any authority or control over. This issue has not been discussed amongst practitioners on either side, for the obvious reason that the principle of tax relief benefits those operating in the 'sector'. However, further consideration should be given to the fact that some charities operating in the UK and in receipt of the most tax relief do not work in areas that would be typically described as areas of priority for the state. Charities that enjoy a high degree of popularity do not necessarily reflect the needs and demands of the representative elected government, and yet are entitled to benefit from GiftAid and other tax exemptions. Should the UK taxpayer and UK government be providing financial support to organisations that support principles that are not necessarily in keeping with the core policies promised to the UK electorate by the government in office?

Other areas of contention have received far more attention. In recent years, taxation policies have been the subject of huge controversy within the media, not least because of the financial commitments made by the state. One of the primary arguments against tax relief for donors is the assertion that the amount of monetary difference it makes to the charitable sector does not warrant the amount invested

by the government. Data compiled in several studies, including one performed for HM Revenue & Customs by the Policy Studies Institute, suggested that tax is not essential to encouraging people to make charitable donations. Data collected in 2010/11 revealed that the total government tax expenditure was in the region of £2 billion, whilst charities collectively received donations of approximately £5.5 billion where income tax relief was claimed.[210] Advocates for change cite these statistics to question the extent to which the tax relief was an appropriate use of taxpayers' money, given the relatively limited benefits to the charitable sector. Another is the premise that tax relief has relatively little impact on the decisions made by donors looking to give to charities in the first place, thereby undermining the reasoning behind tax relief for donors.

Arguments surrounding the use of tax exemptions also revolve around the types of charitable organisations that are deemed eligible. Despite rules and regulations outlining the definition of key terms, such as 'charitable purpose' and 'public benefit', a number of charitable organisations have also been subjects of controversy. This uncertainty is another product of the broad nature of the 'sector' and the difficulties in categorising the types of organisations that fit within the accepted sphere of the 'voluntary sector'. The ambiguity surrounding the types of organisations that fall within the umbrella of civil society is particularly acute in the context of charitable status and tax benefits. Questions about the sorts of charities that are eligible for forms of tax relief is especially contentious. Confusion and dissension has resulted in numerous instances of HMRC taking charities to court – and usually losing the case – and

210 Tax Research UK, 'Tax and charities – a bigger ethical issue than how they invest?', Tax Research UK, 11 Dec., 2013 [accessed via: http://www.taxresearch.org.uk/Blog/2013/12/11/tax-and-charities-a-bigger-ethical-issue-than-how-they-invest/ (19/12/17)]

charities being vulnerable to misunderstandings of the complexities of the taxation laws.[211] This chapter will now consider three of the most contentious organisations in receipt of tax relief.

Fee-charging schools

Debates have centred around fee-charging charities in particular; including fee-charging schools, fee-charging hospital and health-care providers, and fee-charging conservation charities. The subject was briefly raised by Peers in a witness evidence session in 2016, in response to growing calls for something to done to 'address whether charitable status should be considered a privilege or a right and whether volunteer status is an essential part of a charity.'[212] References were also made to the use of the public benefit fit by the Office of the Scottish Charity Regulator (OSCR) in Scotland. The test currently in operation in Scotland requires an organisation to have 'only charitable purposes, and have activities which provide public benefit in Scotland or elsewhere.'[213] It is not enough for organisations to have charitable purposes. In contrast, in England and Wales, 'charitable purposes' applies to organisations that are capable of delivering public benefit. Respondents favoured the Scottish model, and several argued that it could be adopted elsewhere. However, suggestions of a similar model in England and Wales were immediately dismissed by expert witnesses, warning

211 A. O'Brien, 'Tax rules helping UK charities build homes can also bring financial ruin', *The Guardian,* 2 Nov., 2015 [accessed via: *https*://www.theguardian.com/housing-network/2015/nov/02/tax-rules-uk-charities-build-homes-vat-exemptions (14/07/17)]

212 Lord Hodgson of Astley Abbotts in Select Committee on Charities, 'Corrected oral evidence: Charities', 1 Nov., 2016.

213 OSCR, 'Meeting the charity test: guidance', OSCR, Scottish Charity Regulator [accessed via: https://www.oscr.org.uk/charities/guidance/meeting-the-charity-test-guidance/public-benefit (12/09/17)]

the Committee of this as an issue 'which has a very short fuse with a very big bomb on the end.'[214] It feeds into the heart of long-standing issues with the definition and application of 'charitable status'. In other words, the subject of private schools is a politically divisive – and explosive – subject that could attract a significant and problematic degree of public and media interest and detract from any tangible improvements being made to the current system in operation.

This argument is supported by the research that has already been conducted into proposals to restrict existing charitable privileges, which has indicated that some sort of public benefit test would not be easily implemented. Efforts to test-drive a public benefit test on private schools in 2014 resulted in nine barristers at the final determination of the tribunal – paid out of the public pocket. (Something that was not left unnoticed by critics.) The Third Sector Research Centre also prototyped restrictions based on the percentage of income derived from the government. Speaking on these tests, Professor John Mohan, Professor of Social Policy at the University of Birmingham and Director of the Third Sector Research Centre, has criticised them for being too arbitrary: 'It struck me that, at the end of the day, the charities receiving those funds are still producing a public benefit and delivering services as part of that, so I am not sure that is necessarily and inherently a basis for it.'[215] He also suggested that an absence of volunteers could not be used as a measure for the removal of privileges.

214 Lord Hodgson of Astley Abbotts in Select Committee on Charities, 'Corrected oral evidence: Charities', 1 Nov., 2016.

215 Professor John Mohan, Select Committee on Charities, 'Correct oral evidence: Charities', 1 Nov., 2016.

Despite these concerns, there have been plans to remove the charitable status from private schools that don't help state-run counterparts. In a green paper released by the Department for Education in 2016, entitled 'Schools that work for everyone: Government consultation',[216] the Department set out a series of proposed reforms that targeted independent schools and their responsibilities towards state schools. Proposal 11 dictated that in order to benefit from their charitable status, independent schools with capacity and capability should either (a) sponsor academies or set up a new free school in the state sector OR; (b) offer a certain proportion of places as fully funded to those who are insufficiently wealthy to pay fees.[217] Consultation respondents were asked whether the Department should 'consider legislation to allow the Charity Commission to revise its guidance, and to remove the benefits associated with charitable status from those independent schools which do not comply?'[218]

Since the publication of the green paper in December 2016, there has been speculation that these proposals are to be dropped. Recent

216 Department for Education, 'Schools that work for everyone: Government consultation', Launch date 12 Sep., 2016 [accessed via: https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.PDF 16/09/17)]

217 Department for Education, 'Schools that work for everyone: Government consultation', Launch date 12 Sep., 2016, p. 14. [accessed via: https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.PDF 16/09/17)]

218 Department for Education, 'Schools that work for everyone: Government consultation', Launch date 12 Sep., 2016, p. 16. [accessed via: https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.PDF 16/09/17)]

announcements made by the Department have shifted the emphasis onto brokering voluntary partnerships between schools in the two sectors instead. It is unclear at this stage whether this marks a U-turn on the policy proposals.[219] Whether this is implemented or not, then, remains to be seen. However, this example is significant, nevertheless, in the treatment of the voluntary sector. It demonstrates that it is possible for more stringent rules and regulations to be introduced regarding charitable status and the use of the voluntary sector. Furthermore, it reveals an interest and a commitment to holding organisations in receipt of charitable status privileges to account in new ways. Does this mark a shift in central government rhetoric towards the voluntary sector? Could – and should – similar stipulations be put in place for other organisations that are similarly controversial? This is something that should be considered for the following case studies: think tanks and faith-based organisations.

Think tanks

The charitable – and political – status of think tanks operating in the UK, for instance, is a well-cited source of contention. Arguments made against the charitable standing of think tanks in the face of political participation have been made on countless occasions. They have primarily focused criticisms on two fronts: that think tanks are inherently political and should not be awarded charitable status (and the benefits that come with this); and the premise that think tanks have been poorly regulated by oversight bodies. Countless

219 S. Weale, 'U-turn over threat to charitable status of private schools', *The Guardian,* 13 Sep., 2017 [accessed via: https://www.theguardian.com/education/2017/sep/13/government-backtracks-on-charitable-status-of-private-schools 16/09/17)]; L. Kay, 'Government says policy pledge on private schools has not been dropped', Third Sector, 13 Sep., 2017 [accessed via: https://www.thirdsector.co.uk/government-says-policy-pledge-private-schools-not-dropped/policy-and-politics/article/1444502 (16/09/17)]

examples can be found of former. In January 2016, for instance, the *Third Sector* published an article entitled 'Time for a rethink on think tanks?' after allegations were made against the centre-right think tank Policy Exchange, on the grounds of involvement with political parties.[220] These discussions have raised fundamental questions about the definition of 'charity' and the legitimacy of the role government plays in their funding and collaborative activities. It is a point that is continually raised, in response to a high-profile accusation against a particular think tank or controversial ruling of the Charity Commission.[221]

Similarly, the longstanding notion that think tanks are poorly regulated remains unresolved. In 2008, commentators complained of the Charity Commission's inconsistent application of the legal requirements for charitable organisations. David Walker, then editor of the *Guardian*'s Public magazine, argued that the Commission 'unfairly, applies much tighter criteria of non-partisanship to would-be charitable thinktanks than to existing organisations, even though partisanship may be a necessary condition for turning ideas into actions.'[222] These remarks did not amount to any change in protocol. Dame Suzi Leather, Chair of the Charity Commission in 2011, described the registration of think thanks as a 'difficult area

220 Third Sector, 'Time for a rethink on think tanks?', Third Sector, 21 Jan., 2016 [accessed via: http://www.thirdsector.co.uk/time-rethink-think-tanks/governance/article/1379877 (131/09/17)]

221 M. Sherrington, 'Transparency and politics in think tanks and charities', Third Sector, 21 Jan., 2015 [accessed via: http://guest.thirdsector.co.uk/2015/01/21/transparency-and-politics-in-think-tanks-and-charities/ (13/09/17)]

222 D. Walker, 'Caught in a tank trap', *The Guardian*, 17 Sep., 2008 [accessed via: https://www.theguardian.com/society/2008/sep/17/policy.thinktanks 13/09/17)]

for the Commission', resulting in 'quite tricky questions,' affecting both of the main political parties.[223]

These concerns were explored by the Public Administration and Constitutional Affairs Select Committee in 2013. Having taken evidence on the subject, the Committee concluded that think tanks have a place in the charity sector (provided they are established for a charitable purpose and for the public benefit) although it did admit to concerns about 'an apparent lack of consistency in the application of rules.'[224]

These examples highlight difficulties in the regulation and oversight of think tanks. As charitable institutions that play a role in holding the government to account – providing UK citizens with a voice and a means of participating in advocacy work – and as organisations that are provided with funding from the public purse, the inconsistency in application of legal regulations is constitutionally significant. Have improvements been made to the regulatory system, in response to the recommendations made by the PASC in 2013? Is information and guidance on regulatory advice and boundaries of think tank activities still lacking in clarity? Pledges made by the Commission that it would produce 'specialist guidance' for think tanks (made on numerous occasions since 2008) and

223 Dame Suzi Leather, PASC, 2011,

224 Parliament UK, Public Administration Committee, 'The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006', Chapter 10: Political campaigning and independence', 2013 [accessed via: https://publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/7613.htm#note246 13/09/17)]

conduct a review into the position of charitable think tanks did not materialise.[225]

The position and role of think tanks is just one example of the controversial 'grey' areas in relationships maintained between the sector and political organisations. The premise that the voluntary sector – those with charitable status in particular – is used as a platform for political engagement is, clearly, and somewhat ironically, a highly politicised debate. Criticism is almost exclusively raised by members with right-leaning political allegiances. Writing for the *Telegraph* in 2014, then- Justice secretary and Conservative MP, Chris Grayling wrote an article entitled 'Labour campaigners are hiding behind a veneer of neutral non-partisanship'. He complained that an 'extraordinary number' of Labour campaigners were mounting professional campaigns against Conservative policy agendas, hiding behind organisations such as 38 Degrees to encourage criticism and hostility. Grayling argued that this practice posed a threat to the stability and progress of vital Conservative Party initiatives.[226] This paper does not purport to investigate any of the above claims, though it does encourage readers to be aware of the origins and political allegiances of those writing such articles, and treat these arguments with necessary caution.

225 Third Sector, 'Time for a rethink on think tanks?', Third Sector, 21 Jan., 2016 [accessed via: http://www.thirdsector.co.uk/time-rethink-think-tanks/governance/article/1379877 (131/09/17)]

226 C. Grayling, 'Chris Grayling: Labour campaigners are hiding behind a veneer of neutral non-partisanship', *The Telegraph*, 17 Aug., 2014 [accessed via: http://www.telegraph.co.uk.news/politics/11037305/Chris-Grayling-Labour-campaigners-are-hiding-behind-a-veneer-of-neutral-non-partisanship.html (07/07/17)]

Faith-based organisations

Faith-based organisations (FBO) – a term borrowed from the United States – serve as another example of a sub-category of charitable organisation that has received increased academic and lay interest in recent years.[227] The relationship(s) between the state and FBOs is a constant source of debate amongst politicians and practitioners. It is an arena of policy activity that continues to expand, and is likely to become an even more prevalent sphere of interest. Some aspects of the relationship have been the subject of existing academic research, but this section considers the role of FBOs from a constitutional perspective.

To an even greater degree than other voluntary bodies, it is often assumed that faith-based organisations uphold higher ethical and moral codes in their work, setting them apart from the codes of conduct driving public and private sector agendas. This premise has played a factor in the state use of FBOs. FBOs have increasingly been operated at the centre of numerous government-led policy initiatives. New Labour was associated with the establishment of Regional Faith Forums and the development of an inter-faith strategy under the Department for Communities and Local Government, which promoted inter-faith dialogue to address concerns surrounding community and social cohesion. FBOs in this period were

227 Concerns have primarily centred on the following issues: the role of volunteers and their willingness to be actors in implementing government policy; the implications of accepting government funding on values and ethos; the challenge of campaigning for social justice whilst also acting as delivery partners with government; the potential to be used as a cheap way of providing welfare services; the lack of religious literacy and understanding in the public sphere; and the extent to which FBOs have utilised their roles as service providers and community leaders to promote religious messages, and prioritise specific religious persons.

seen as 'vocal and effective actors in civil society' – as observed by social researcher O'Toole in 2013.[228] (Although O'Toole also criticised the approach under New Labour as being opportunistic; limiting recognition of FBOs contributions to areas of work that contributed to government agendas.)

More recently, the government has funded specific faith and community groups. As part of the Near Neighbours initiative, established in 2014, the Department for Communities and Local Government provided funding for a small grants programme to help small FBOs operating in specified areas of England.[229] Controversially, the funding was realised through the Church Urban Fund – the Church of England's agency for urban social engagement.[230] Perhaps the most obvious example of government-endorsed faith-based policies is the introduction of the Prevent programme, established as part of the counter-terrorism strategy under New Labour, and revised by the Coalition government in 2011.

These examples also illustrate the role of faith-based organisations in providing a means of community cohesion. Government is indebted to the contribution made by religious organisations in the bringing of communities together. This was recognised by the

228 T. O'Toole, Faith and the Coalition: A new confidence to 'do God'?, Westminster Faith Debates, 2013, p. 4 [accessed via: http://faithdebates.org.uk/wp-content/uploads/2013/09/1328268927_OToole-Faith-andthe-Coalition-final.pdf (15/06/17)]

229 Paul Hackwood and Aamer Naeem in evidence to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society' Report, March 2017, as quoted on p. 19.

230 C. MacLaren, 'Nearer Neighbours?': an analysis of the factors that inhibit or promote effective and sustained social action and interaction between faith communities in Bradford', Unpublished dissertation, University of Leeds, 2013.

House of Lords Select Committee on Charities, which published its report in March 2017.[231] (Although some would argue the opposite, in fact – drawing on the notion of exclusivity and isolation that is sometimes associated with more extremist and elitist religious organisations). The Committee took notice of the number of evidence submissions that referred to role of faith charities in social cohesion. One such reference was made to Asheem Singh from the Association of Chief Executives of Voluntary Organisations (ACEVO), who depicted this part played by faith charities as 'one of the great under-explored areas by the secular bit of the sector,'[232] and argued that there is considerable scope in this line of work.

The same issues apply to the use of faith-based voluntary organisations in the delivery of public services. Faith-based organisations have a long tradition of supplying forms of charitable aid and services to the people of Britain. This role has become more formalised in recent decades – in the wake, some of argue, of diminishing state resources and contributions to local authorities. To take one example, Stephen Timms (Labour MP for East Ham), speaking in Parliament in 2016, drew attention to the significant contribution of volunteering undertaken by religious establishments in the UK. He supported his argument with reference to the 'food bank phenomenon', in which over 400 food banks organised by the Trussell Trust – each linked to a Church –provided more than half a million households in just one year (2015-16), with each

231 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 19.

232 Asheem Singh in evidence to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society' Report, March 2017, as quoted on p. 19.

beneficiary household supported with over two lots of three-day emergency food supplies.[233]

The use of the FBOs in the above examples pose a number of questions about the constitutional position of FBOs, and the legitimacy of practices. Were faith community organisations sufficiently informed and aware of their participation in wider state policies (such as community cohesion and counter-terrorism agendas)? These initiatives undoubtedly rely on a baseline level of religion and faith literacy amongst members of the British public. In instances where the government relies on the support and cooperation of FBOs for the implementation of policies, who is responsible for ensuring that a satisfactory – and necessary – level of understanding is met?

There are also democratic issues with this practice. The British government represents a multi-cultural and multi-ethnic group of citizens. Is it problematic that FBOs are being used to provide statutory services to a wide range of members of the public, irrespective of their religious beliefs? Is there sufficient transparency in the use of FBOs in these instances? Some members of the public who accept services on the assumption that they are provided by government bodies might be hesitant to accept the support of certain groups, if they were made aware of their religious origin. Conversely, others argue that it is enough to ensure that the government fulfils its obligations, regardless of how statutory services are administered. Are members of the electorate entitled to have a say in the finer arrangements for service delivery?

Are members of the electorate aware that the democratically elected government in office might be using public funds to support specific

233 Fiona Bruce, Hansard records, 5 May 2016 [accessed via: https://hansard.parliament.uk/commons/2016-05-05/debates/160505103000001/VoluntarySectorFaithOrganisations (30/01/18)]

religious organisations? To some, this might be viewed as a form of state endorsement of certain religious institutions, or support of certain religions and ideologies ahead of others. Is the state entering in discussions and practices that go beyond its constitutional remit?

A number of arguments have been made against the use of faith-based organisations in the delivery of public services in this way. Perhaps the most fervent has come from the British Humanist Association (BHA), which looked into some of the issues in its 2007 report, 'Quality and Equality: Human rights, public services and religious organisations.'[234] Highly critical of the contracting out of public services to religious organisations, the report claimed that the government's 'clear policy objective of expanding the role of religious organisations within the public services runs the risk of lowering standards, increasing inequalities, introducing 'parallel services' and damaging social cohesion:'[235] quite the opposite to recognition of the community cohesion allegedly fostered by cross-sector work undertaken by faith-based organisations.

Other concerns regarding the commissioning of local authority services from faith groups rest on two main issues: that public funds may end up being used for religious purposes; and that there may be a bias in the delivery of services to members of the faith

234 British Humanist Association, *Quality and Equality: Human rights, public services and religious organisations*¸ London: Nov., 2007 [accessed via: https://humanism.org.uk/wp-content/uploads/BHA-Public-Services-Report-Quality-and-Equality.pdf (16/05/17)]

235 British Humanist Association, *Quality and Equality: Human rights, public services and religious organisations*¸ London: Nov., 2007 [accessed via: https://humanism.org.uk/wp-content/uploads/BHA-Public-Services-Report-Quality-and-Equality.pdf (16/05/17)]

group. These points continue to be raised by critics and sceptics.[236] Polly Townbee, speaking as President of the BHA, said 'It cannot be right that any provider of public services is permitted by law to discriminate in employment policies or in the manner in which it provides statutory, state funded public services.'[237]

- *FBOs and education*

Over the last few decades, there has been an increased interest in the role of faith-based schools and educational organisations. In the wake of Operation Trojan Horse in March 2014 – Birmingham City Council's response to an alleged attempt to introduce an Islamist or Salfist ethos in schools in Birmingham – the status of FBOs and their involvement with central and local government authorities has been explored. Commentators at the time questioned the extent of state responsibility and accountability in the emerging scandal. The issues raised then still apply to present-day practice: Are faith-based organisations undertaking roles that should be performed by the state? Is some of the work performed by FBOs actually the responsibility of the state? Should the state be doing more to oversee the delivery of services in instances where they are contracted out or dependent on outside organisations?

Discussions about faith-based schools, their position within society, and their status as 'charities' (along with private schools) have also become embroiled in wider debates about counter-terrorism poli-

236 Fiona Bruce, Hansard records, 5 May 2016 [accessed via: https://hansard.parliament.uk/commons/2016-05-05/debates/160505103000001/VoluntarySectorFaithOrganisations (30/01/18)]

237 British Humanist Association, *Quality and Equality: Human rights, public services and religious organisations*¸ London: Nov., 2007 [accessed via: https://humanism.org.uk/wp-content/uploads/BHA-Public-Services-Report-Quality-and-Equality.pdf (16/05/17)]

cies and the existence of faith schools.[238] In 2016, complaints about the use of Ofsted to regulate and inspect 'out-of-school activities among young people that take up more than six hours a week'; taken by most to mean surveillance of religious groups. Heated parliamentary and public debates about this development sparked discussions about the role of FBOs in British society and politics. In the same year, research published by McCabe at the Third Sector Research Centre complained that faith groups were being taken advantage of. According to its report, faith groups have been increasingly seen by the state as a handy means of responding to local needs. In Statement 4 of the report, faith leaders were quoted saying: We are administering the new poor laws. There was consensus across faith groups that they were being pushed or expected to deliver, if not administer, aspects of welfare reform: to 'pick up the pieces' of human lives left outside safety nets, other services and welfare benefits in austere times.'[239]

Clearly, state reliance on FBOs to perform tasks that were traditionally the responsibility of public bodies flags up several issues. Opponents argue that this practice can result in decisions about who is eligible for local help and support being made by people who are choosing their beneficiaries based on personal religious ideologies. They argue that it is constitutionally problematic, given that the principles underlying these organisations might not be in keeping with the agendas affiliated with the political party chosen by the British electorate. In fact, they might not even represent a significant minority of the electorate, never-mind the majority.

238 Discovery Society, 7 Jan., 2014 [accessed via: http://discoversociety.org/2014/07/01/trojan-horse-ofsted-and-the-preventing-of-education/ (14/12/17)]

239 A. McCabe et al (eds.), 'Belief in social action: exploring faith groups' responses to local needs', TSRC, Working Paper 137, Apr., 2016, p. 22.

This paper does not support these claims, but these arguments do lead to more general considerations about the role of the state in these discussions. For example, where does the state stand in the promotion of particular religious ideologies? How does the use of faith-based organisations in the delivery of public services fit in with the boundaries of the constitutional responsibilities of the state? Is the use of faith-based organisations in the delivery of public services and advocacy work problematic for the unwritten conventions adhered to by the UK systems of governance?

The conclusion provides suggestions of ways to address some of the concerns raised in this section. In particular, it suggests more concerted efforts on both sides to establish more concrete guidance outlining the responsibilities of government and faith-based organisations, and the ways in which relations can be most effectively developed. There is precedence for this. In 2014, for example, Birmingham City Council signed up to a national inclusion covenant,[240] and supported suggestions to commission some services from faith groups, in the wake of big cuts to spending. Does written acceptance of a faith covenant, in instances of faith sector cooperation, represent sufficient formal recognition of this constitutional move? It is disappointing that attempts to ground existing and developing relations between sector and state (in this instance, faith-based organisations specifically) have – so far – been geographically specific and not legally-grounded. It is recommended that a clearer strategy is taken to foster better working relations between local government authorities and FBOs operating at local levels.

240 For more details, see Oasis Foundation, 'Faith in Public Service: The role of the church in public service delivery', Oasis Foundation, 2016 [accessed via: https://oasis.foundation/sites/foundation.dd/files/Oasis%20Foundation%20Report%20FINAL%20RS.PDF (21/06/17)]

Conclusion

Debates about taxation policies segue into more fundamental questions about charitable status and contributions to UK society. The treatment of all three of these charitable institutions feeds into wider debates about what constitutes 'charitable' status, and whether certain baseline commitments are expected of them in receipt of charitable benefits. In the case of think tanks, there have also been discussions about the political involvement of bodies which are legally recognised as 'charitable' organisations. Possible directions for future improvements to working relations in the UK are particularly complicated. Unlike other countries – with written constitutions that have been used to set out more defined parameters of government and charitable work[241] – in the absence of a written constitution in the UK, the boundaries delineating state and sector responsibilities are less easily defined.

The House of Lords Select Committee on Charities, which published a report in 2017, suggested a number of ways in which the state could improve current tax policies, economic policies, and processes. Recommendations included closer collaboration between the OCS and Her Majesty's Revenue & Customs (HMRC) on issues such as the value of Gift Aid, future changes to VAT and the NLW, and the availability of payroll giving. The conclusions reached by the Committee illuminate the nature of the relationship between state and sector. The Committee implied that, at the very least, the government had a responsibility to set an example to businesses, private and public organisations, on issues such as payroll giving. It can be inferred from the report that the state's

241 W. Bielefeld and W. S. Cleveland, 'Faith-based organisations as service providers and their relationship to Government', *Nonprofit and voluntary sector quarterly*, 42, 3, 2013, p. 476.

role extends further than mere encouragement, according to the views of the Peers sitting on the Committee. A high proportion of the Committee's recommendations were reliant on the cooperation and initiative of the OCS, in conjunction with other government departments – again, reiterating the responsibility of the state in the regulation of the sector. The NCVO also recently announced that it would be undertaking an independent review of the current charity tax system.[242] It is hoped that this review will explore some of the issues that are yet to be addressed. For instance, the extent to which charities should be treated differently from other organisations, and how this treatment should look. Widely-held reservations about the tax exemptions given to charities are based on critiques of the special status given to charitable organisations by the government. To placate opponents, greater clarity could be given to the standards of charities that are eligible for tax exemptions, and the level of support and services provided in return.

Previous suggestions for improvements to the current system have already been discussed in relation to the Scottish system. Other recommendations have included the implementation of a 'public benefit' system modelled on the system in America. In the US system, different tax reliefs are offered to different types of charitable or voluntary organisations. As with suggestions for a test like the one already in operation in Scotland, these recommendations have been widely overruled on the grounds that the complexities of the system, and general scepticism about the numerical measurement of public benefits. When put in the Charity Commission's public consultation, responses included concerns that this method would

242 Civil Society News, 'NCVO to establish independent commission to review charity tax system', *Civil Society News*, 1 Mar., 2017 [accessed via: https://www.civilsociey.co.uk/news/ncvo-to-establish-independent-commission-to-review-charity-tax-system.html (23/05/17)]

risk treating 'public benefit as a kind of commodity', through which the government might 'consider that it had more 'ownership' over charities if public benefit was measured directly against tax relief.'[243] As with the difficulties in defining 'public benefit', the notion of a public benefits test is also thwarted by difficulties with assessment and measurement. As one practitioner asked in their consultation response to the Charity Commission, 'how do you cost the preservation of the environment, the value of drug and alcohol rehabilitation, and the appreciation of art for example?'[244] The problems first identified in the initial years after the implementation of the Charities Acts still represent the primary difficulties facing bodies responsible for holding the sector to account. Difficulties in definition, implementation, and assessment and measurement of the key principles as outlined in charity legislation undermine the effectiveness of the state and other governing bodies in the regulation and oversight of the voluntary sector. Based on existing research undertaken, then, this paper does not recommend that a public benefits or absence of volunteerism test is implemented in England and Wales.

In the case of faith-based organisations, this paper supports calls for formal recognition of the growing reliance upon faith-based organisations, and the voluntary sector more generally. The government would be well-served to review the recommendations drawn in the Oasis Foundation's first report, entitled 'Faith in Public Service':

243 Parliament UK, 'Memorandum by the Charity Commission (CPB 01) [accessed via: https://www.parliament.uk/documents/upload/memoranda-by-the-charity-commission.pdf (24/08/17)]

244 Select Committee on Public Administration, Written Evidence: Appendix 2', Public Benefit Discussion – Religious Charities, 28 Sept., 2006 [accessed via: https://publications.parliament.uk/pa/cm200607/cmselect/cmpubadm/904/904we04.htm (19/12/17)]

The government should 'articulate a clear strategy for national and local engagement with faith organisations, to include…sponsorship of the Covenant developed by the APPG on Faith and Society.'[245] The international sphere offers a number of opportunities for better practice. It would be worth considering the adoption of more formalised provision of a stronger foundation of faith and state relations, as in the case of Germany. As Stephen Timms MP highlighted in a parliamentary debate, Germany has a formalised agreement that has officially recognised and promoted arrangements for the main Protestant and Catholic Churches to deliver agreed welfare services on behalf of the state. In America, calls for a strengthened partnership between state and non-state providers led to the publication of Executive Order 13559 under, then-President, Barack Obama. Specifically, the order details the boundaries of responsibilities, and includes measures to safeguard against forms of discrimination or malpractice. (Although this type of approach has been criticised by practitioners, who have advocated a 'lighter' style covenant.)[246]

The debates and proposals for new guidelines to be enforced for fee-charging institutions suggest the possibility of the adoption of similar stipulations for other charitable organisations that operate in a quasi-government, quasi-voluntary capacity. This paper recommends that the government considers extending this line of proposals to other types of organisations. It suggests that more research be conducted into possible restrictions and requirements for charitable

245 Oasis Foundation, 'Faith in Public Service: The role of the church in public service delivery', Oasis Foundation, 2016 [accessed via: https://oasis.foundation/sites/foundation.dd/files/Oasis%20Foundation%20Report%20FINAL%20RS.PDF (21/06/17)]

246 Fiona Bruce, Hansard records, 5 May 2016 [accessed via: https://hansard.parliament.uk/commons/2016-05-05/].

organisations that have been subject to contention and debate in recent years.

Politics

The voluntary sector prides itself on its independence from the state at both central and local levels. Separation from partisan politics and state bureaucracy – which many argue present barriers to working with Britain's hard-to-reach communities – is often cited as one of the sector's leading characteristics. In practice, however, relations between the political sphere and the voluntary sector are more complicated. There are numerous points of interaction between the voluntary sector and the UK's party political system that serve to undermine the independence of the sector and, by extension, its claims of separation.

Political engagement of the sector has a long historical trajectory. Historians have pointed to the establishment of the National Health Service in the mid-twentieth century as a major turning point in recent history. In the wake of the fuller emergence of the welfare state and the public services that began to be delivered by state authorities, charitable organisations began to include political campaigning for rights, legislative change, and awareness into their scope of work. The identity of the sector changed to redefine its role and embark on political advocacy and campaigning that has come to become an established part of its remit.[247]

247 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 8.

Despite historical precedence, the political engagement of the voluntary sector is still a source of contention amongst practitioners. This chapter deals specifically with the key points of interaction between the voluntary and community sector and political spectrum from a constitutional standpoint. The problems associated with party politics in relation to the sector are considered, before more general and longstanding concerns about the political involvement of sector organisations are discussed. Although advocacy work forms a central part of the sector's political engagement and involvement, this chapter focuses explicitly on other sources of political contact and involvement. Advocacy – including the enactment of the Lobbying Act 2014 and anti-advocacy clause proposals – merits discussion in a separate chapter.

Political agendas

It has long been accepted that political agendas involve and incorporate the work of the voluntary sector, thereby impacting upon the ways in which voluntary sector work is performed. The development of UK politics has impacted – and continues to impact – the make-up of the UK voluntary sector and the ways in which it conducts itself.[248] The present-day relationships fostered between the state and the sector are often attributed to the political agendas of the New Labour movement. It is commonly remarked that present-day dynamics of state-sector 'partnerships' originated in the late 1990s. Under Tony Blair, the Labour government adopted a 'third way'

248 It is worth noting that this affiliation with the left-wing political spectrum has resulted in the majority of political critiques of the voluntary sector being given by right-wing commentators. One should be aware of the potential biased of arguments made against the participation of the sector in so-called 'political' activities.

approach, which afforded the sector a more central role in policy development and delivery.[249]

According to the BVSC, 'The identity of the VCS is contingent on the dominant political ideologies of the time in which it operates.'[250] The premise that voluntary organisations' goals and objectives are often closely entwined and harnessed to the goals of the government in office, or leading political parties, is well supported. Examples of sector activity include services provided as part of government programmes, such as welfare-to-work; government directives, such as urban regeneration schemes; and more fluid government agendas, such as community cohesion and community building work.[251] This is reinforced in the existing literature, which broadly undermine the narrative of sector separation and independence.[252]

The government's counter-terrorism strategy, entitled CONTEST, also relies on the work of voluntary organisations – amongst other bodies – to contribute to the four main areas of work: pursue, prevent, protect, and prepare. The Office for Security and Counter-Terrorism, based in the Home Office, relies on community cohesion methods to enforce the second of the four measures, Prevent, which is aimed at stopping people becoming terrorists or supporting

249 T. Blair, 1998 cited in P. Alcock, TSRC, 'Devolution or divergence? Third sector policy across the UK since 2000', TSRC, Sept., 2009, p. 5.

250 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', BVSC, Newman University College, 2012, p. 29.

251 J. Lewis, 'New Labour's approach to the voluntary sector: independence and the meaning of partnership', *Social Policy & Society*, 4, 2, p. 126.

252 J. Kendall, *The Voluntary Sector*, London: Routledge, 2003.; Linda Milbourne and Mike Cushman's 2012 report.

terrorism.[253] As quoted by the government, 'Prevent depends on a successful integration strategy, which establishes a stronger sense of common ground and shared values, which enables participation and the empowerment of all communities […].'[254] The strategy thus depends on a wide range of organisations, including those in the voluntary sector, to promote community cohesion, and establish the foundations of community and faith integration.[255] Sector bodies serve one of the centre stones of the state's directive for tackling terrorism in the UK. Faith charities in particular are also utilised as a means of promoting inter-faith interactions; something which the state has acknowledged is central to fostering a sense of 'Britishness' and community cohesion. The government relies on the sector to provide support in this area, without direct statutory expectations or agreements.

The government's Community Cohesion agenda serves as an example of cross-sector collaboration. Officially defined as 'working towards a society in which there is a common vision and sense

253 HM Government, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism', London: HM Government, Jul., 2011 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf (20/05/17)]

254 HM Government, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism', London: HM Government, Jul., 2011, p. 10 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf (20/05/17)]

255 HM Government, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism', London: HM Government, Jul., 2011, p. 10 [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf (20/05/17)]

of belonging by all communities'[256] – promotes activities which appreciate and value diversity in background and circumstances of citizens, and ensure that everyone has access to similar life opportunities irrespective of their origins. The UK government has been committed to the implementation of a national Community Cohesion agenda for over fifteen years, following serious disturbances in Bradford in 2001.[257] This has since been formalised in legislation in the Equalities Act 2010 which introduced the Public Sector Equality Duty in April 2011.[258]

Community Cohesion therefore forms a part of the constitutional work undertaken by the UK government. Central government approaches Communities Cohesion both as a direct policy – projects that are specifically designed to target issues relating to cohesion ventures – and as a principle which governs other policies, serving as an undercurrent for work conducted at all levels of society. Local authorities have been incorporated into the official state agenda, through the creation of the Public Service Agreement (PSA 21), which provides a framework and strategy plan for central and local government bodies, and the inclusion of cohesion indicators in

256 Communities and Local Government, 'Guidance on the duty to promote community cohesion', Nottingham: Department for Children, Schools and Families, 2008 [accessed via: http://www.tedcantle.co.uk/publications/029%20Guidance%20on%20duty%20to%20promote%20community%20cohesion%20in%20school.pdf (31/08/17)].; Based on the Government and the Local Government Association's definition first published in Guidance on Community Cohesion, LGA, 2002, and resulting from the Cantle Report 2001.

257 Home Office, 'Community Cohesion: Report of the Independent Review Team – The 'Cantle Report', London: Home Office, Cantle, 2001.; Home Office, 'Building cohesive communities, report of the ministerial group on public order and community cohesion (The Denham Report), London: Home Office, 2001.

258 Stoke-on-Trent, 'Community Cohesion Strategy 2016-2020', City of Stoke-on-Trent, 2016.

the Local Area Agreements (LAAs). Community cohesion is the responsibility of national and local government authorities.

Crucially, for the purpose of this paper, the government has sought the help of voluntary organisations to undertake the implementing community cohesion agendas. Emphasis has increasingly been placed on the autonomy of local authorities to respond to local environments as they see fit, thus providing local bodies with substantial room to manoeuvre when tackling ventures. Thus, while responsibility on community cohesion is assigned to both local and national government, the third sector is perceived as an important partner in delivering the agenda.[259]

The government rhetoric presents the voluntary sector as a 'key partner' in these activities, whilst claiming that responsibility remains on local and national governments.[260] There are several constitutional issues with this practice. First, the state is relying on a different sector to undertake central government agendas: agendas that the government is constitutionally bound and obliged to see through. Second, members of the UK electorate voted for the government in office in the belief that the constitutional promises and responsibilities set out in the party's election manifesto and acts of legislation would be conducted by state authorities. This challenges

259 J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, p. 17 [accessed via: http://www.ioe.mmu.ac.uk/caec/docs/Evaluating%20the%20Impact%20of%20Voluntary%20and%20Community%20Sector%20Organisations%20on%20Community%20Cohesion.pdf (31/08/17)]

260 J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, p. 22 [accessed via: http://www.ioe.mmu.ac.uk/caec/docs/Evaluating%20the%20Impact%20of%20Voluntary%20and%20Community%20Sector%20Organisations%20on%20Community%20Cohesion.pdf (31/08/17)]

the democratic legitimacy of UK practice. Does the state do enough to warrant accepting responsibility for the promotion of community cohesion, as it is formally and legally obliged to perform? More generally, community cohesion thus serves as an example of the various ways in which the sector has increasingly played the part of partner or provider of government agendas – working on behalf or instead of the public sector. This supports the premise that state dependency on the voluntary and community sector has grown. It has arguably become more difficult for the sector to remove itself from government priorities, as demonstrated in the case of community cohesion measures.

There are several problems with this practice. Given the freedom to interpret central government policies as they like, community cohesion has been approached in a variety of different ways.[261] While the advantage of this flexibility is that members of local communities could well have access to more bespoke services, reliance on localities and the voluntary sector risks inconsistency in practice and delivery. There is the possibility that some members of the electorate may not be subject to the same regulations or have access to the same programmes that others might be offered, depending on the locality and initiatives taken by their local representative bodies. This undermines state promises.

Research has revealed that the fragmented structures of governance and representation have resulted in difficulties in effective engage-

261 J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, p. 11.

ment with policy makers.[262] In other words, the extent to which local bodies have fulfilled their requirements on behalf of central government has been questioned, in light of the various interpretations of the brief at each level of governance. Indeed, a report published by the Home Office in 2004 referred to instances where this filtering through of central agendas, from central government departments, to local government bodies, and then on to local voluntary and community organisations had resulted in a distortion of the community cohesion agenda in some areas.[263] Concerns have also centred on the accessibility and universality of voluntary and community organisations. Some have suggested that the input of community and faith groups can actually exacerbate the insularity of individual communities. The Institute of Community Cohesion (iCoCo) found several instances were community leaders from the voluntary, community or faith sectors acting as "gate keepers" rather than "gate ways" between members of their communities or organisations and resources or contact with local statutory agencies,'[264] in its review of different community initiatives.

On a practical level, then, this supports existing claims that political influences have jeopardised the quality of sector work. As part of a review into the implementation and success of the Compact, academics from the University of Hull and University of West England have claimed that the political environment in the UK has

262 G. Blake, D. Robinson, and M. Smerdon, *Living Values: A Report Encouraging Boldness in Third Sector Organisations*, London: Community Links, 2006.

263 Home Office, 'The end of parallel lives? The report of the Community Cohesion Panel (the 2nd Cantle Report), Jul., 2004 [accessed via: http://www.tedcantle.co.uk/publications/012%20The%20end%20of%20parallel%20lives%20the%202nd%20Cantle%20Report%20Home%20Off.pdf (19/12/17)]

264 Institute of Community Cohesion, 2009, p. 16.

had a negative impact on the application of compact agreements.[265] Researchers referred to unevenness in commitment; the product of either various party political agendas, priorities, and rivalries. The latter point refers to a number of possible scenarios which have – or might – serve to undermine state-sector collaboration, either directly or inadvertently. Political hostility or mistrust of specific political parties and their initiatives might result in lack of sufficient commitment or motivation on the part of practitioners and voluntary bodies as a whole. Similarly, a lack of political commitment or awareness could also hamper efforts to work collaboratively. Differences in commitment might also be dependent on particular party affiliations and loyalties, which could – and has, as argued by researchers – threaten to diminish the effectiveness of agreements like national and local Compacts, and the success of joint-working policy initiatives. Links between particular projects and specific political parties also has the potential to be problematic, if there is a change in political direction or party dynamics.

These assertions about the influence of UK politics and partisan politics also raise a number of constitutional questions. The case studies examined in this chapter suggest that partnerships fostered between local and central government(s) and voluntary sector organisations have been used as a vehicle through which central government has been able to pursue its own policy agendas.[266] The fact that the voluntary sector's own goals 'may differ in substance

265 G. Craig, M. Taylor, N. Carlton, R. Garbutt, R. Kimberlee, E. Lepine, and A. Syed, Home Office Research, Development and Statistics Directorate, 'The paradox of Compacts: monitoring the impact of Compacts', London: Home Office, Jan., 2005, p. 64.

266 M. Wyatt, 'Partnership in health and social care: the implications of government guidance in the 1990s in England, with particular reference to voluntary organisations', *Policy and Politics*, 30, 2, pp. 167-182.

or in emphasis is not acknowledged,'[267] as Jane Lewis observed in 2005. It is constitutionally problematic if this has indeed led to a 'blurring' of the distinction between the sectors. At what point does a charity stop being a charity and become a mere subsidiary of the state? Are the connections between political party agendas, political trends, and sector practice recognised by voters? Is this dimension of political work sufficiently addressed in general election party manifestos? Do political parties acknowledge their role in the maintenance and development of supposedly independent organisations? Should voters be able to have a say in the running of the sector, given its contributions to the work of political parties?

'The Revolving Door': connections between political parties and sector personnel

Another point of contact between political parties and the sector relates to the ability of political parties to influence internal decisions within voluntary sector organisations. In 2014, Conservative MP Charlie Elphicke spoke of 'a revolving door between charities and the Labour Party' that was 'warping the independence of the third sector.'[268] Since then, this argument has continued to be raised by members of more right-leaning individuals and organisations that there the voluntary sector is overwhelmingly affiliated with left-wing political parties and members. Right-leaning politicians and commentators have purported in outrage that a number of senior positions in some of the UK's leading charities have been filled

267 J. Lewis, 'New Labour's approach to the voluntary sector: independence and the meaning of partnership', *Social Policy & Society*, 4, 2, p. 126.

268 C. Hope, 'Half of Gordon Brown's 'spads' work for charities lobbying Coalition, as Tories condemn 'revolving door'', *The Telegraph*, 15 Aug., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/11037088/Half-of-Gordon-Browns-spads-work-for-charities-lobbying-Coalition-as-Tories-condemn-revolving-door.html (30/06/17)]

by ex-Labour senior officials and staff. Writing in an article for the *Telegraph*, Fraser Nelson – editor of the *Spectator* magazine – claimed that British charities are 'stuffed to the gunwales with Labour placemen.'[269]

Though these claims have been the subject of exaggeration and scare-mongering by the press, they do pose a number of interesting constitutional questions. The implication underlying these arguments is that political parties – more specifically, the Labour Party – have been using the voluntary sector as a way of pushing party political interests, in the face of opposition through the usual mediums. In this sense, voluntary sector organisations are vulnerable to manipulation by political party activists and players.

According to research cited in the *Spectator*, between 2011 and 2012, 77 per cent of public sector appointments were made to individuals affiliated with the Labour Party.[270] They referred to figures showing that over half of Gordon Brown's special advisers in the Labour government went on to work for think tanks or charities that were actively involved in lobbying against Conservative party policies. These remarks were also made in the context of the Charity Commission's investigations into the links between the Institute for Public Policy Research (IPPR) and the Labour party. The article concluded with far-fetched claims that Labour was preparing a 'stay-behind fifth column', placed to disrupt the policies

269 F. Nelson, 'Gordon Brown's secret army could defeat the Coalition's welfare and education reforms', *The Telegraph*, 25 Oct., 2012 [accessed via: http://www.telegraph.co.uk/news/politics/david-cameron/9633379/Gordon-Browns-secret-army-could-defeat-the-Coalitions-welfare-and-education-reforms.html (30/06/17)]

270 D. Sewell, 'The quango state: how the left still runs Britain', *The Spectator,* 8 Feb., 2014 [accessed via: https://www.spectator.co.uk/2014/02/why-are-quangos-still-so-stuffed-with-lefties/# (30/06/17)]

of the then-incoming Coalition government.[271] For a more detailed discussion of think thanks, refer to the chapter characteristics and categorisation.

In 2014, the Charity Commission investigated claims that the Institute of Public Policy Research had hosted nine 'co-ordinated' events with the Labour Party; events that had been used to promote particular party lines.[272] The sector could be used as a quasi-political tool. This is constitutionally problematic, if the state is able to use its powers to influence organisations operating outside the remit of government to bolster government initiatives. This suggests a lack of transparency in the methodology and tactics utilised by political parties, but also of governments in office. This supports calls for further restrictions and regulations to be implemented – though this time, to restrict government activity.

Conversely, other sector practitioners have claimed that voluntary organisations are vulnerable to being victims of 'political vetting'. In other words, the notion that the state has the ability to purposefully suppress specific charitable organisations that it does not condone. Past examples of this in practice include the political vetting of some groups by the Northern Ireland Office in the late 1980s and early 1990s. Concerns about possible links with the paramilitary culminated in targeted cuts to funding. This resulted in the closure

271 D. Sewell, 'The quango state: how the left still runs Britain', *The Spectator,* 8 Feb., 2014 [accessed via: https://www.spectator.co.uk/2014/02/why-are-quangos-still-so-stuffed-with-lefties/# (30/06/17)]

272 C. Hope, 'Half of Gordon Brown's 'spads' work for charities lobbying Coalition, as Tories condemn 'revolving door', *The Telegraph*, 15 Aug., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/11037088/Half-of-Gordon-Browns-spads-work-for-charities-lobbying-Coalition-as-Tories-condemn-revolving-door.html (11/07/16)]

of a crèche at Conway Mill, and the removal of funding to Glor na nGael, an Irish language community group.[273]

Both arguments – made against the political vetting of the sector, and the sway of party politics on systems of appointments – allude to the vulnerability of the sector in the wake of state powers. This supports the premise discussed elsewhere in this report, that the relation between state and sector in the UK is largely hierarchical. Regardless of whether there is any evidence to support these claims, they do highlight interesting points concerning the use of the sector for strategic party political decision-making.

State powers to appoint voluntary sector personnel

Issues relating to voluntary sector personnel also extend to state involvement in appointments and staffing decisions. The role of voluntary sector organisations in the delivery of statutory – and discretionary – public services has blurred the boundaries between state and sector responsibility (as described in the chapter on public service delivery.) This has led to interesting anomalies in the adoption of certain responsibilities performed by the state. Questions have been raised in particular about the role of government officials in the decision-making process surrounding sector appointments.

For instance, towards the end of 2015, a private member's bill aimed at removing ministerial power to appoint trustees to NHS charities was endorsed by the then-minister for community and social care, Alistair Burt. Designed to give NHS charities greater independence and autonomy, the Bill expanded upon promises that were made in

273 N. Garbutt, 'Sticking to the knitting: the real threat to charities', *Scope NI*, 13 Mar., 2015 [accessed via: http://scopeni.nicva.org/article/sticking-knitting-real-threat-charities (30/06/17)]

response to a 2012 government consultation on the status of NHS charities.[274] The Bill was successful, and it is now possible for an NHS Charity to transfer to a charity independent of the Department of Health and unaffected by the National Health Service Act 2006, under the NHS (Charitable Trusts Etc.) Bill (Bill 11 2015-16).

The Bill serves as an example of a successful attempt to reduce the level of state involvement in non-public sector organisations.[275] As outlined in the official guidelines for charities considering a transfer from NHS charity to independent charity status, the Bill has provided charities with the opportunity for a greater level of independence of decision-making and autonomy.[276]

This particular case also raises questions about levels of state intervention and the degree of separation between the two spheres. What is the constitutional responsibility of the state in relation to the voluntary sector? Is the state expected to perform a guardianship role over voluntary organisations? Should the power to appoint trustees in NHS charities be given to a state minister? In terms of sector independence, does the state have a constitutional obligation to oversee appointments and key decisions that are needed to be made within the voluntary sector? It also undermines the popular premise that one of the main advantages of using charities to deliver ser-

274 R. Cooney, 'Government backs bill to remove ministerial power to appoint trustees to NHS charities', *Third Sector*, 3 Dec., 2015 [accessed via: http://www.thirdsector.co.uk/government-backs-bill-remove-ministerial-power-appoint-trustees-nhs-charities/policy-and-politics/article/1375665 (08/07/17)]

275 T. Powell, Briefing Paper, Number CBP7364, 'NHS (Charitable Trusts Etc.) Bill', House of Commons Library, 15 Jan., 2016, p. 3.

276 Department of Health, 'NHS charities: Conversion to independent status – outline guidance', Department of Health, Mar., 2015, p. 3. [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419157/NHS_Charities_guidance.pdf (11/07/17)]

vices is their independence from the state, and their distinctiveness. If charities are not able to operate as independently as possible, surely the very principle of sector involvement in service delivery is contradicted. Why should charities be used at all, if they cannot make any decisions independently?

Conclusion

This chapter has established that the sector cannot be separated from the sphere of politics. It should therefore not be pitched as a sector immune from political activities. The political significance of work undertaken in the voluntary sector, and the role sector organisations seemingly play in the formation of government policies and party political activities, give rise to a number of constitutional that issues are worth discussing.

It has long been held that the sector – or sections of the sector – is affiliated with particular political parties and agendas. Researchers have used evidence to support claims that shifts in sector practice and state-sector relations are inextricably linked to the political environment and party political situation at the time in which sector developments occur. While it is most commonly assumed that left-wing political organisations are more likely to foster relations with the voluntary sphere, this is not necessarily the case. Numerous examples can be found of political parties from all spectrums utilising the sector to support political and policy agendas. Amongst the concerns raised about this practice, it is constitutionally problematic that the use of the voluntary sector in these initiatives and the delivery of public services is sold on the – arguably false – premise that they have a degree of independence and separation from the state.

The example of 'community cohesion' initiatives reveals that the voluntary sector has been used to implement key constitutional responsibilities of the state. There have been practical difficulties and with this involvement. In order to address the concerns discussed earlier, this paper suggests the following recommendations for future practice. It supports calls for the points outlined in the local government White Paper *Strong and Prosperous Communities* and the Action Plan for Community Empowerment to be expanded to ensure that representatives from new communities – such as refugees and other mobile communities – are better represented in government strategies for community engagement. It also welcomes the suggestion made by the Joseph Rowntree Foundation (JRF) that the state should provide 'clear and comprehensive guides to services,' and hopes that efforts are made to implement the recommendations made in the JRF report. In particular, more attention could be given to making sure that the allocation of resources is fair and transparent. This should resolve the problems experienced by service users surrounding access to information, the distribution of welcome packs for new arrivals, and support networks.[277] The state is entitled to seek the help and support of the sector in the implementation of its community cohesion policies, but this should only be done in the knowledge that all regions of the UK have access to the same level of support, and that the same evaluation processes and impact measurement systems are in place.

Indeed, there is a clear need for more consistent and comprehensive systems of evaluation and monitoring frameworks. Efforts have been made already by the Department for Communities and Local Government (DCLG) to address concerns about the fragmented ini-

277 Joseph Rowntree Foundation, 'Community engagement and community cohesion, 25 Jun., 2008 [accessed via: https://www.jrf.org.uk/report/community-engagement-and-community-cohesion (31/08/17)]

tiatives currently in operation. The DCLG proposed a system that used three main cohesion indicators as benchmarks. However, these have since been criticised for being too specific. Representatives of the CLG itself admitted in evidence to this paper that it was not a 'magic bullet' to addressing the complex myriad of present-day local monitoring. There are examples of best practice cases where effective evaluation programmes and projects have been implemented – Praxis Community Projects, a London-based charity supporting migrants, has a well-developed evaluation system that considers basic human rights as key performance indicators.[278] However, these have mostly been 'ad hoc evaluations' rather than systems that can be easily replicated on a national scale. Local government authorities and voluntary organisations responsible for administering community projects should consider switching the current focus away from project deliverers on to beneficiaries to assess best and work practice. This paper thus supports the recommendations for the creation of a toolkit for community based, voluntary sector organisations, which could be tested and then disseminated nationally, as suggested by the Professional and Community Education department at Goldsmiths College, London.[279]

278 J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, pp. 31-32 [accessed via: http://www.ioe.mmu.ac.uk/caec/docs/Evaluating%20the%20Impact%20of%20Voluntary%20and%20Community%20Sector%20Organisations%20on%20Community%20Cohesion.pdf (31/08/17)]; Stoke-on-Trent, 'Community Cohesion Strategy 2016-2020', City of Stoke-on-Trent, 2016.

279 J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, pp. 31-32 [accessed via: http://www.ioe.mmu.ac.uk/caec/docs/Evaluating%20the%20Impact%20of%20Voluntary%20and%20Community%20Sector%20Organisations%20on%20Community%20Cohesion.pdf (31/08/17)]

Cross-sector collaboration in policy agendas centres on the premise that the voluntary sector is often considered to be more trusted by the public than the public sector is. This suggests that sector organisations sometimes serve as substitute representative bodies, where local government authorities have failed either to reach and engage with their populations, or delegated tasks to voluntary organisations that do not carry the same level of democratic accountability of responsibility. It could be argued, of course, that by incorporating existing voluntary sector organisations and utilising their knowledge and understanding of hard-to-reach communities, the local government is fulfilling its role as state and democratic representative, oversight and regulatory body. Conversely, however, evidence suggests that in some areas, government authorities are not necessarily relying on voluntary organisations to perform community cohesion activities because they are 'best placed to understand key issues, and engage communities,'[280] but rather because the local authority is struggling to deal with low levels of trust in mainstream institutions. If this is the case, the authorities should be looking at the reasons behind public mistrust and discontent, and attempt to change existing systems, to ensure that trust is restored, in order to fulfil their constitutional obligations as local representative bodies.

This chapter has also explored the areas of controversy surrounding the political involvement of voluntary organisations that have surfaced in the last few years. There are palpable difficulties with the involvement of non-government bodies in the design and delivery of partisan politics. Efforts have been made to address some of the 'grey' areas of overlap in policy areas and the types of actions taken

280 Communities and Local Government, 2007, p. 10.; Institute of Community Cohesion, 2009.; J. C. Cock, 'Evaluating the Impact of Voluntary and Community Sector Organisations on Community Cohesion', London: Goldsmiths University of London, 2010, p. 17.

by organisations. The same issues are felt even more acutely in the advocacy work undertaken by many sector bodies – explored in the following chapter.

The cases discussed in this chapter suggest that, in the main, sector involvement in policy implementation and partisan agendas jeopardises the level of transparency that members of the British electorate are entitled to expect from their Westminster government and parliamentary representatives. If the sector is involved in partisan politics and state policy-making, should members of the electorate be able to have more of a say in the ways in which sector organisations conduct themselves? If it can be proven that the sector is quasi-political, does this change the legal and democratic status of the sector? Should the UK systems of democratic representation reflect the roles played by voluntary sector organisations, in order to ensure sufficient democratic accountability? This paper does not have any immediate answers to these questions, but they are clearly worth further examination by both parties involved.

Analysis of these lines of inquiry have revealed two contrasting arguments: the notion that state 'interference' in the work of the public sector is too high; and the contradictory suggestion that the government needs to increase the level of involvement in the monitoring and regulation of sector organisations. This author suggests that best practice is more fluid, and the state needs to be more responsive to different circumstances. Some issues could be resolved by tighter regulations, whilst others might benefit from a loosening of existing restrictions. One of the overarching conclusions that has continued to crop up is the need for better mediums of cross-sector communication and collaboration. This point has already featured heavily in existing literature, and yet, as of yet,

has not been given adequate attention. It is hoped that the House of Lords Select Committee report of March 2017 might lead the way for a new era of cross-sector work. The imminent government response will provide more information regarding the direction the state is willing to take.

Advocacy

> *'This role – of advocacy, campaigning, opposing excesses, abuses and injustices and holding powerful interests to account – is a vital, perhaps the vital role of voluntary action, which has the unique characteristic of occupying the space between the market and the State.'*[281]
>
> Andy Benson, NCIA

Perhaps the main source of political activity undertaken by the sector is advocacy work. There is a longstanding tradition of voluntary organisations participating in campaigning and lobbying for – and against – government policies and initiatives. Historians have highlighted the establishment of the Welfare State as a pivotal stage of development in this line of sector work. It now forms a central part of cross-sector engagement and interaction for a high proportion of voluntary organisations, particularly charities, enabling them to scrutinise existing government policies and holding the state to account. Advocacy work can take a number of forms. There are examples of explicit advocacy work – for example, organisations that offer welfare support before tribunal trials that are literally holding the government to account in a legal capacity. There are also implicit cases involving campaigning bodies.

The extent to which the sector performs an official role in holding the government to account was an area of contention amongst respon-

281 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015, p.11. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

dents for this paper. Several interviewees remained unconvinced that the advocacy work undertaken by some voluntary organisations can be described as 'constitutional'. Others supported the premise that the sector plays a part in the scrutiny of the government. However, they argued further that the last decade has witnessed a shift in practice. According to long-serving practitioners, the voluntary sector was previously engaged in this form of oversight role, but current constraints on sector practice has prevented organisations from upholding democratic accountability in the same way. Whereas previously, there was an effort to perform some sort of scrutiny – which was even acknowledged by past administrations – the shift that began in the 1980s with the contracting out of public servicesand alleged suppression of independence. In the words of one respondent, 'the government has increasingly seen voluntary sector organisations as a means of achieving its own ends,' and this has undermined sector efforts to criticise or question state practice. Advocacy and campaigning is only successful if 'the state chooses to listen.'

Indeed, the extent to which voluntary organisations, specifically charities, can participate in campaigning or lobbying against the government has been the subject of much debate, particularly in the wake of the recent general election. There are a number of rules and regulations that non-government organisations have to abide by when engaging in campaigning or lobbying activities. Charities wanting to participate in campaigning or lobbying that might be classified as 'political' are subjected to numerous legal requirements. These regulations have been the source of dispute for several years, and arguments pitched for and against came to a head in 2016, amidst government plans for an anti-advocacy clause. The enactment of the Lobbying Act has fuelled existing disquiet

about the suppression of the sector's independence and ability to hold the government to account. In the words of one respondent, the current culture has 'silenced the critical voice' of the sector. Practitioners have alleged that organisations that had engaged in high-profile advocacy work have become 'somewhat mute.' Many of those working within the sector maintain that recent efforts to suppress sector criticisms – with the so-called 'gagging' clause and climate of fear – have rendered the sector largely unsuccessful in holding the government to account.

This chapter examines some of these issues. It considers the role of the sector in holding the government to account, and the implications of this work for democratic accountability, before contextualising these functions in the wake of recent legislative developments. The majority of literature written on this subject and the sources available convey the opinions of representatives who take issue with the some of the legal and financial policies adopted by central and local government authorities. As far as is possible, the author considers a broad range of material from both government and sector representatives.

Holding the government to account

Questions are often asked about the accountability of voluntary sector organisations – and the extent to which the state is actually responsible for the management of the sector – but less is said of the important scrutiny role the sector performs in holding the government to account. As the charity Action Against Hunger said in its written evidence submission to the House of Lords Select Committee on Charities, 'charities play a crucial role as a non-partisan watchdog of government actions and the actions of any individual or corporation that may have a negative impact on

communities.'[282] In this sense both government and sector hold separate, opposing, regulatory positions.

The sector performs this role, whether intentionally or unwittingly, by providing commentary on government policy-making and practice. Organisations both challenge and support government policies and decisions, depending on evidence based on their experiences working at grass roots levels. One of the recognised key advantages of using voluntary organisations as service providers – and as advisers for government policy-making – is the localised nature of voluntary practice. They often purport to represent their stakeholders, speaking on behalf of the people they work with. Specifically, voluntary sector organisations often claim to represent the voices of those who are less able and less likely to be heard otherwise. This is especially true, when one takes into account the span of both geography, issues, and subject matters covered by charities operating on both a national and local level. The voluntary sector has the potential to connect with a wide variety of different communities and individuals.

Sector organisations also perform a form of scrutiny work by contributing to select committees and evidence sessions as witnesses and expert practitioners. Select committees – such as the House of Lords Select Committee on Charities, which was an ad hoc committee that reported on its findings after a year of sessions – rely on the evidence submitted by representatives of civil societies to form the foundations of their conclusions and recommendations put towards the departments and executive. There is thus an understanding that civil societies can provide an insight into the lives and practices of

282 Written evidence from Action Against Hunger to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 18.

British individuals in a way that is hard to access through central and/or local government mechanisms of communication.

It is interesting to compare this to the role performed by government and parliament. There is not only significant overlap in the types of issues and policy areas both government and VSOs are interested in, but also the roles undertaken by both state and sector. Both purport to be representative of wider society. Voluntary organisations view speaking on behalf of the people at a more localised level as one of the sector's unique qualities.[283] They are frequently referred to as organisations that keep the beneficiary at the heart of the service. Yet, isn't this what central and local government representatives purport to be doing as well? The recent devolution agenda has emphasised these longstanding claims to representation. Local parliamentary candidates, metropolitan mayors and Members of Parliaments all now serve to act as representatives of individuals in their local constituencies.

To what extent does the voluntary sector undertake the responsibilities of government and, even more so, Parliament? Representative democracy is one of the cornerstones of our current system of governance in the UK. Does the fact that charities are viewed by many as the first points of call for people seeking help and support at grassroots levels undermine the efficacy and significance of government? Alternatively, does the increased reliance on charitable support identified by respondents and evidence submissions in

283 Written evidence from British Red Cross, Bolton Community and Voluntary Services, Lucy Caldicott, Citizens Advice Newcastle, Civil Exchange, Community Southwark, Mr Andrew Purvis, Rural Community Council of Essex, and Visionary to the to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 18.

existing reports suggest that charities are fulfilling the traditional role of parliamentary representatives, in the wake of a failure on the part of central and local governments to provide these services? Are charities taking over responsibilities that are part of the UK Constitution? And is this a reflection of the inadequacy of our current government?

Promoting democracy

Linked to this notion of oversight responsibility is the promotion of democratic principles. Another characteristic associated with the voluntary sector is its ability to speak for the people: to give the citizens of the UK a voice, and, in doing so, hold the government to account. The idea that the sector might be helping in promoting democracy, assisting the government in its efforts to be more inclusive and transparent, has factored into discussions since the late 1990s. Antony Giddens, author of *The Third Way: The renewal of social democracy*,[284] raised the possibility of involving the voluntary sector in the context of addressing issues with citizenship and democracy under the New Labour administration. The sector was subsequently invited into the political policy landscape to help in the development and implementation of policies at both national and local levels. The government provided grants and funding for VSCs to improve their professional capacities – or, in other words, their ability to deliver government agendas. The sector took on a more business-like approach to its work, or at least this was the expectation, and in so doing became progressively similar to the local authorities and private organisations it was pitched against. It could be argued that by providing for the professionalisation of the sector, the state was moulding and sculpting VSCs. At what

284 A. Giddens, *The Third Way: The renewal of social democracy*, Cambridge: Polity Press, 1998.

point does the cultivation of the sector result in it being subsumed as just another part of the sphere of central and local government? (Notably, Giddens' argument was based on the notion that the sector would become a 'partner' in these processes.[285] The idea of a 'partnership' between state and sector is therefore not as novel as some might suggest.)

The premise that the sector performs a role in bolstering democratic awareness is well-supported. The voluntary sector can be linked to state attempts to engage with the British public: members of the electorate. The notion of a 'democratic deficit' – a phrased used to describe the withdrawal of citizens' interest and interaction with politics, or lack of political literacy and understanding – has been used by some advocates as a way of supporting arguments for the introduction of greater powers and scope for the voluntary sector. According to this line of thought, charities could be instrumental in engaging citizens, and increasing levels of public interest in politics and parliamentary processes. This relates to the premise that there is currently a crisis in political confidence and democratic interest.

Past governments have recognised the potential of the sector to improve democratic accountability, and have endeavoured to harness the capacity of the voluntary sector through guidance and support measures in service delivery. In 2006, the Office of the Third Sector (since named the Office for Civil Societies) published an action plan for third sector involvement, entitled *Partnership in Public*

285 A. Giddens, *The Third Way: The renewal of social democracy*, Cambridge: Polity Press, 1998, cited in BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', BVSC, Newman University College, 2012, p. 31.

Services.[286] The document acknowledged the role of the sector 'in holding services to account,' and promised to support this function. Specifically, it referred to the ability of the VCS to afford local people a greater say in the delivery of their services; to enhance the rights of citizens; to help the government in reaching socially excluded groups; and to establish user-led initiatives based on effective citizen involvement.[287]

Past claims of democratic responsibility still carry weight amongst present-day practitioners. Several respondents to this paper supported the notion that the sector has some sort of democratic function. Penny Waterhouse, writing for the NCIA in 2016, argued that this action 'does a critical job as part of our [UK] democracy. As well as serving as a 'check and balance' of the state, including identifying gaps in community needs – as discussed elsewhere in this paper – she suggested that the sector should, in theory at least, serve to provide an ungoverned, or own-governed space for citizens to meet and engage that is separate from any degree of public or private sector involvement. Waterhouse concluded that in the UK's system of democracy, 'voluntary services are duty bound to safeguard their autonomy, without which their particular democratic role is compromised.' Implicit in this suggestion is the premise that democratic

286 Office of the Third Sector, 'Partnership in Public Services: an action plan for third sector involvement', London: Cabinet Office, HM Government, 2006 [accessed via: http://webarchive.nationalarchives.gov.uk/20090130074312/http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/psd_action_plan.pdf (03/07/17)]

287 Office of the Third Sector, 'Partnership in Public Services: an action plan for third sector involvement', London: Cabinet Office, HM Government, 2006 [accessed via: http://webarchive.nationalarchives.gov.uk/20090130074312/http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/psd_action_plan.pdf (03/07/17)]

roles are central to the responsibilities of voluntary organisations.[288] Her analysis also intimated that certain developments in sector practice have threatened to undermine the ability of the sector to conduct these functions, particularly in the wake of public service commissioning – a theme that runs throughout this paper.

Implicit in the notion of democratic responsibility, is the idea that voluntary and community sector organisations are closer to British citizens than local public authorities are. This is reinforced by other documents issued during this period. The Local Government White Paper, published in October 2006, acknowledged that local third sector organisations often 'act as a voice for local communities, increase the accountability of local public bodies and build social capital, as well as supporting civic action by citizens in their communities.'[289] Constitutionally speaking, are these not roles which the state is traditionally expected to perform? There is clear overlap in the responsibilities ordinarily allocated to the government, and the parts played by voluntary and community sector. Does this represent a constitutional problem? Is the state delegating tasks and responsibilities that should be undertaken by public authorities – both central and local – onto the voluntary sector, a sector which has no formal or legal democratic accountability?

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288 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 3. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

289 Local Government White Paper, *Strong and Prosperous Communities*, Oct., 2006, cited in Office of the Third Sector, 'Partnership in Public Services: an action plan for third sector involvement', London: Cabinet Office, HM Government, 2006 [accessed via: http://webarchive.nationalarchives.gov.uk/20090130074312/http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/psd_action_plan.pdf (03/07/17)]

A number of relevant issues are worth exploring further. Practitioners have suggested that the sector is used by the state to re-engage citizens. Is the sector seen as a way of addressing claims that there has been a decline in democratic literacy and engagement? It is also alleged that the state is utilising voluntary organisations as vehicles for addressing the critique that the state has not done enough to ensure that matters of equality and justice are placed at the heart of its agendas.

This relates to concerns about the work of the government more generally. The proliferation of organisations that make up the voluntary sector has led to questions about the scope of government work, and the types of areas that it should take responsibility for. It has encouraged discussions about what government does, what it is expected to do, and what it should be doing. For example, whose responsibility is it to enhance democratic engagement and political literacy? To what extent should the sector be expected to perform these functions? Conversely, to what extent should the state be performing these functions, and if responsibility lies more with the government, should it then be relying on the sector to ensure it is fulfilled? Does it form part of the constitutional responsibilities of the state? Of course, it depends on the social model the electorate votes for. Social justice issues and questions of democratic representation have traditionally been affiliated with the left of the political spectrum in the UK. (As Anthony Giddens's work demonstrated.) However, if democratic representation, engagement, and understanding forms part of the government in office's party election manifesto, for example, they can be expected to fulfil it. It then becomes a constitutional issue if they fail to deliver on this promise. It also represents a constitutional problem if the government relies

upon the voluntary sector to undertake this section of work – at least, if this was not originally made clear to the electorate.

Guidance and regulations

Unsurprisingly, a lot of debates have already centred on the campaigning ventures of organisations that are in receipt of government grants, contracts, and tax exemptions. It has not gone unnoticed that the very organisations that rely on the support of the government – through public service contracts, funding grants, tax relief, and legislative protection – can also participate in high-profile critiques of government policies and actions. As such, a number of guidelines are in place to monitor and regulate lobbying work.

Guidance published by the Charity Commission on the rules and boundaries of charity participation in campaigning in the lead up to a general election or referendum implies that charities can remain fairly active as campaigners and lobbyists during this period. For instance, charities are allowed to continue campaigning on issues of their choice, conduct and publish qualitative research into the views of candidates on particular issues, host debates between candidates on issue-specific maters, and publish materials on issues. The guidance also provides definitions on relevant terminology – though these are not universally accepted, and have been the subject of debate.[290] Under charity law, political activity is defined as 'any

290 Accessed via: https://blogs.ncvo.org.uk/wp-content/uploads/2016/03/EU-ReferendumCharity-Commission.pdf.; http://www.nortonrosefulbright.com/files/can-a-political-purpose-also-be-a-charitable-purpose-perspectives-on-the-impact-of-regreenpeace-of-new-zealand-inc-in-canada-pdf-56kb-122672.pdf (30/01/18)

activity that aims to promote or oppose a change in the law or Government policy.'[291]

There are a number of legal requirements and regulations that serve to restrict participation. The most significant are as follows: a charity cannot exist for a political purpose; political activities cannot become the sole reason for the charity's existence; a charity must not give support or funding to a specific political party, candidate, or politician; a charity must make clear its independence from any political party.[292] Political campaigning and activity can thus only be undertaken if it is undertaken as part of the delivery of charitable purposes. It cannot be performed as political campaigning in its own right. It must be part of a wider agenda of the charity. Within this framework, though, charities can campaign for or against specific legislation and policies, though only where such change supports the charity's purposes. In addition to this, action can only be taken in compliance with charity law, and other civil and criminal laws, and codes of conduct – such as the Code of the Advertising Standards Authority – where applicable.

The current regulations require charities to be especially vigilant when participating in any political activity. They are therefore heavily reliant on a sufficient level of understanding, awareness, and cooperation from bodies operating with the voluntary sphere. Unsurprisingly, there is considerable scope for deviation and inter-

291 Accessed via: https://www.gov.uk/government/publications/ speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9 (30/01/18).

292 Charity Commission for England and Wales, 'Campaigning and political activity guidance for charities', Mar., 2008 [accessed via: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities (06/07/17)].

pretation of expected practice. Regulations are complicated by the considerable amount of overlap and potential sources of contention. For instance, there is crossover in categorisation of certain issues. The boundaries of 'political' and 'charitable' subject matters are blurred, and are subject to change. In the last few years, there has been an acceptance that some purposes that were previously regarded as 'political' can now be categorised as 'charitable'. The promotion of human rights since the Human Rights Act 1998 is one example of this. More recently, the Charities Act 2006 saw a number of changes to the legally recognised descriptions of charitable headings. The complexity of the positioning of charities in the political landscape is also demonstrated in extensive official guidance published by the Charity Commission for England and Wales, which exceeds a 12,000-word count. The participation of charities in political activities is far from straightforward.[293] For example, it is not necessarily clear what is even meant by 'campaigning' and 'political activity'.[294]

Even if charities endeavour to comply with the restrictions on campaigning and political activity, there are several risks associated with these contributions to campaigning. The Charity Commission has produced separate guidance outlining the risks associated with participating in election and referendum campaigning. The

293 Charity Commission for England and Wales, 'Campaigning and political activity guidance for charities', Mar., 2008 [accessed via: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities (06/07/17)]

294 Charity Commission for England and Wales, 'Campaigning and political activity guidance for charities', Mar., 2008 [accessed via: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities (06/07/17)]

document sets out risks in relation to policies, publicity, parties, candidates, facilities, and referendums.[295] There are a number of so-called 'grey areas'. One widely-cited example of overlap is in the use of facilities. Some charities – most commonly schools – are required by electoral law to make their premises available for public meetings and to become polling stations, free of charge.

In addition to these risks, there is the obvious possibility that activities could lead to a charity being in breach of legal or good practice requirements, charities that opt to engage in campaigning face the possibility of other damaging repercussions. Furthermore, concerns have been raised by practitioners that charities who have taken, in their opinions, 'too great' an involvement in political activity threatened to diminish their reputations. Participation in political activities can potentially diminish the levels of public trust and confidence in a charity's work, that is often central to the success and progress of the organisation. This is related to the risk of prioritising tasks that might stray from the core values and purposes of the charity.

There is also the risk to independence. Taking lines on politically contentious policies can tarnish the reputation of a charity, and may lead to inadvertent association with a particular political party – albeit unintentional if within the official guidelines – that might have negative implications for future support and fundraising opportunities.

295 Charity Commission for England and Wales, 'Guidance: Charities, Elections and Referendums', Jul., 2014 (new format Feb., 2017) [accessed via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/591355/Charities_Elections_and_Referendums_new.pdf (07/07/17)]

Clearly, there are a number of constitutional issues with current practice that need to be probed. There is considerable scope for overlap and confusion. This, once again, invites questions about the boundaries of the state, and the degree to which the charity sector can sometimes act as an extension of the government and Houses of Parliament.

It also relates to questions about the legitimacy of certain responsibilities that have increasingly become part of the sphere of government work. The regulations and restrictions imposed on non-campaigning bodies in the context of referendums and elections have gradually extended and augmented the control of the state over the practice and behaviour of the voluntary sector. It is not necessarily immediately apparent that work undertaken by organisations such as the Charity Commission is part of the state landscape. The Commission does, admittedly, answer directly to the UK Parliament rather than to Government ministers, but it remains a non-ministerial government department.

How far should this gradual expansion of state power be allowed to extend? For example, is it constitutionally legitimate for the government to place restrictions on organisations that are categorised separately from public authorities – as observed in legislation and official guidance literature? This was a point raised by many in the midst of controversy surrounding the implementation of the Lobbying Act in 2014. Lord Hodgson dedicated a chapter to this question, in his official review of the Act, published in 2015.[296] Similar criticism was voiced in the wake of restrictions placed on advocacy work in the lead up to the 2016 referendum.

296 Lord Hodgson, 'Third Party Election Campaigning – Getting the Balance Right', 2015.

Lobbying Act 2014

In addition to complying with charity laws and requirements surrounding political activity (described in the chapter on legislation, and above), charities must ensure they comply with electoral laws throughout the 'regulated period' before an election or referendum. Voluntary organisations fall within the category of 'non-party campaigners': people and organisations that campaign in the run up to elections but are not standing as a political party or candidate. The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 – passed under David Cameron's Coalition government, on the grounds that the Act would prevent future additional high-profile corporate lobbying scandals[297] – sets out the boundaries of non-party campaigners. The Act changed a number of rules including when the rules apply, the registration thresholds, the types of campaigning activities that were covered, and the spending limits on regulated activities. (A more detailed analysis of the impact of this Act has already been given in the chapter on legislation.)

With regards to its influence on advocacy work, it is sufficient to note that complaints have been made by practitioners of feeling 'trapped' and 'deterred' from campaigning in the run up to referendums and general elections in recent years.[298] In the run up to the June 2017 general election, charities were told by the Electoral Commission that any work that could be deemed 'political' that

297 M. Taylor, 'Greenpeace fined under Lobbying Act in 'act of civil disobedience', *The Guardian*, 18 April 2017 [accessed via: https://www.theguardian.com/politics/2017/apr/18/greenpeace-first-organisation-fined-lobbying-act (12/07/17)]

298 Accessed via: https://www.civilsociety.co.uk/voices/five-things-charities-can-and-can-tdo-at-general-election-2017.html (30/01/18)].

they had undertaken over the past 12 months before the election date would have to be declared, to ensure that they were not in breach of the 2014 Act. Charities were warned that any political activities that were not declared could result in 'civil or criminal sanctions'.[299] This had a significant impact on civil society participation in campaigning.[300]

An anonymous aid worker wrote in to the *Guardian* ahead of the June 2017 general election. They bemoaned that 'The freedoms I fight for elsewhere in the world are no longer my freedoms.'[301] On paper, it might appear that voluntary sector organisations are given a choice of whether they participate in non-party campaigning or not, but the author of this article maintained that in reality, they have no choice at all. They weighed up the options available to their voluntary body: 'we could register as a non-party campaigner but the consensus seems to be that that would threaten the trust that the public have in us and risk our registration as a charity. It

299 M. Taylor and S. Laville, 'Charities may face criminal sanctions as 'gagging law' backdated before election', 21 May 2017 [accessed via: https://www.theguardian.com/environment/2017/may/21/charities-may-face-criminal-sanctions-as-gagging-law-backdated-before-election (14/07/17)]

300 M. Taylor and S. Laville, 'Charities may face criminal sanctions as 'gagging law' backdated before election', 21 May 2017 [accessed via: https://www.theguardian.com/environment/2017/may/21/charities-may-face-criminal-sanctions-as-gagging-law-backdated-before-election (14/07/17)]

301 Secret aid worker, 'Secret aid worker: charities have been gagged in the UK election – this is why', *The Guardian*, 7 Jun., 2017 [accessed via: https://www.theguardian.com/global-development-professionals-network/2017/jun/07/secret-aid-worker-charities-have-been-gagged-in-the-uk-election-this-is-why (12/07/17)]

suddenly says: our aims are no longer charitable.''[302] This begs the questions: what is the difference between a charitable issue and a political issue? Can a charitable issue be a political issue? And if so, at what point does it become such?

Kenneth Dibble, Director of Legal Services at the Charity Commission, admitted that the Commission had struggled to publish adequate guidance to the sector due to the severe time constraints placed on the regulatory body after the official announcement of the 2016 referendum. Dibble explained the difficulties with the guidance literature on the grounds of having 'very little time to prepare it' which resulted in inadequate consultation. As a result, the Commission has accepted that there were problems with the style and language used. While technically accurate, the approach taken resulted in *undue* 'concern within the sector that they might transgress or give regulatory concern to the commission by what they did.'[303]

Confusion surrounding the role of sector organisations and their ability to participate in debates on British policies and agendas has continued. This was clearly illustrated in the line of questioning taken by Lord Foulkes of Cumnock, during an evidence session in 2016. Lord Foulkes admitted his confusion: 'If, for example, a body such as the Salvation Army felt that the policy of a particular political party would harm the kind of poor people it was dealing

302 'Secret aid worker: charities have been gagged in the UK election – this is why', *The Guardian*, 7 Jun., 2017 [accessed via: https://www.theguardian.com/global-development-professionals-network/2017/jun/07/secret-aid-worker-charities-have-been-gagged-in-the-uk-election-this-is-why (12/07/17)]

303 Kenneth Dibble, Select Committee on Charities, Corrected Oral Evidence: Charities, 6 Dec., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/44558.html (11/09/17)]

with and wanted to make representations in relation to that, would that be straying into party politics?' To which Rob Wilson – Cabinet Office Minister at the time – could not provide a direct response. This line of questioning highlights the difficulties with current stance on political involvement. There remains a considerable amount of ambiguity, despite legislative regulations and guidelines. This represents a constitutional problem, if, as critics have suggested, it has resulted in the sector being unable to participate in discussions that the state and members of the British public would benefit from hearing.

Was the treatment of the voluntary sector – and non-party campaigners generally – unconstitutional? Practitioners argued that the decision to backdate all ventures augmented existing uncertainty and confusion surrounding the conditions of the Act. Ordinarily, the period of regulated spending is known ahead of a general election, under fixed parliament rules. It is problematic that the rules were implemented retrospectively. Since a general election or referendum could theoretically be called at any time, voluntary sector organisations could find themselves presented within a regulatory period with no fixed start or end date. As Greenpeace UK's executive director John Sauven noted, 'It's as if the Lobbying Act and its spending cap were now permanently in force, every day of every year.'[304]

Opponents also referred to the additional administrative burden of the regulations. They suggested that the Electoral Commission's ruling meant that voluntary organisations hoping to participate in

304 M. Taylor and S. Laville, 'Charities may face criminal sanctions as 'gagging law' backdated before election', 21 May 2017 [accessed via: https://www.theguardian.com/environment/2017/may/21/charities-may-face-criminal-sanctions-as-gagging-law-backdated-before-election (14/07/17)]

non-party campaigning had to use valuable resources and staff time that could and should have been used on public benefit. They argued that this undermined the ability of charities to complete partnership work and public service delivery on behalf of the state,[305] thereby affecting the quality of services provided to members of the British public.

Are practitioners justified in presenting the regulations placed on the voluntary sector as undemocratic and unconstitutional? Is there evidence to support these claims? And if so, should something be done to promote more constitutionally legitimate practice? There was a considerable absence of charitable contributions to general election subject matters, felt widely by practitioners and politicians alike. For example, the controversial social care proposals, which caused political uproar at the time, went almost completely unnoticed by the leading charities. As observed by Sir Stephen Bubb, of Charity Futures, 'many charity leaders do feel that if they do speak out there will be some form of comeback on them.'[306] Furthermore, these instances caused concern within Westminster circles that the law needs to be changed. It has become a political party issue. Steve Reed, shadow minister for civil society, committed Labour to scrapping the lobbying act if they were voted in power. Norman Lamb, health spokesman for the Liberal Democrats, agreed.

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305 M. Taylor and S. Laville, 'Charities may face criminal sanctions as 'gagging law' backdated before election', 21 May 2017 [accessed via: https://www.theguardian.com/environment/2017/may/21/charities-may-face-criminal-sanctions-as-gagging-law-backdated-before-election (14/07/17)]

306 A. Asthana, 'Charities say 'gag law' stops them speaking out on Tory social care plans', *The Guardian*, 29 May 2017 [accessed via: https://www.theguardian.com/politics/2017/may/29/charities-gag-law-stops-them-speaking-out-tory-social-care-plans (12/07/17)]

The outcries of the sector at the establishment of the Lobbying Act 2014 are demonstrative of a broader shift in relationship between the government and the sector. Several respondents argued that the atmosphere produced by Lobbying Act has been reinforced through 'dependency on funding, formal contract arrangements which include silencing clauses, informal bullying and threatening behaviour, and progressive integration and incorporation into statutory service frameworks.'[307] This is discussed in more detail in the chapter on contracts and commissioning. Karl Wilding, Director of Public Policy and Volunteering, also suggested that the lack of forewarning on the plans for restrictions to lobbying – they were 'just landed on our plate at the end of one summer' – demonstrates a crucial lack of closeness between the two sides. Wilding referred to the Lobbying Act as an instance of how the general relationship between the sector (speaking specifically of the charity sector) and the Government has soured from partnership based on 'constructive engagement in both the delivery of services and the design of politics', to a more 'distant' and 'instrumentalist' relationship, where sector organisations are seen primarily as service providers.[308] Dibble told the Select Committee on Charities that he hoped for a more 'constructive, collaborative relationship' in the future. One that prioritises common objectives in the face of cross-sector

307 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015, p. 11. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

308 Karl Wilding, 'Revised transcript of evidence taken before the Select Committee on Charities', Inquiry on Charities, Evidence Session No. 2, 12 Jul., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/35129.html (11/09/17)]

issues – for example, how the sector and sector representatives will tackle Brexit negotiations.

The anti-advocacy clause

In the last few years, there has been a surge in claims that charities might be using public funds – money made available through government grants– to lobby the government and influence the political landscape. Criticisms manifested in the popular book, *The Sock Doctrine,* written by the Institute for Economic Affairs' Chris Snowdon, who argued that charities had become 'sockpuppets' that were 'taking money from the government to lobby the government.'[309] The Cabinet Office subsequently released a press release, in February 2016, stating that 'organisations receiving government grants will be banned from using these taxpayer funds to lobby government and Parliament.'[310] Labelled as an 'anti-advocacy' clause, the clause was set to only apply to organisations using income from government grants for political activities. Contract-based income was not included. However, as early as April 2016, plans were halted in the face of intense hostility. In December 2016, the government published new standards for grant agreements, to replace the 'anti-advocacy' clause previously proposed. The arguments made both for and against the original clause offer insight into some of the issues that are still voiced about the involvement of the sector in 'political' campaigning. This section briefly outlines

309 O. Bennett, 'Why we've lost faith in charities', *Management Today*, 28 Jun., 2016 [accessed via: http://www.managementtoday.co.uk/why-weve-lost-faith-charities/reputation-matters/article/1369094 (30/06/17)]

310 Cabinet Office, 'Press Release: Government announces new clause to be inserted into grant agreements', 6 Feb., 2016 [accessed via: https://www.gov.uk/government/news/government-announces-new-clause-to-be-inserted-into-grant-agreements (11/07/17)]

the positions of both sides of the debate, and considers the constitutional implications.

There had been a number of high-profile cases of controversy surrounding charity media campaigns. In 2014, Oxfam was subject to criticism for posting a faux film poster on Twitter claimed by critics to be overtly politicised. As part of its wider campaign on poverty in the UK, the charity depicted a stormy sea, captioned: 'The Perfect Storm […] starring zero-hours contracts, high prices, benefit cuts, unemployment, childcare costs.'[311] The tweet was immediately branded as an example of 'highly political campaigning in domestic British politics.'[312] Several Members of Parliament used this example to make general criticisms about the use of 'state-funded' charities to lobby against government policies. They took issue with the fact that Oxfam is part-funded by the state. 'I cannot see how using funds donated to charity to campaign politically can be in accord with Oxfam's charitable status,' exclaimed Conor Burns, writing to the *Telegraph*.[313] Advocates of the clause also highlighted the financial dimension of these arguments. They asked whether taxpayers were aware that money could potentially be used by charities to 'lobby' the government on political matters. This question

311 C. Hope, 'Oxfam: MPs shocked by 'disgraceful' political campaigning', *The Telegraph*, 10 Jun., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/10888966/Oxfam-MPs-shocked-by-disgraceful-political-campaigning.html (08/07/17)]

312 C. Hope, 'Oxfam: MPs shocked by 'disgraceful' political campaigning', *The Telegraph*, 10 Jun., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/10888966/Oxfam-MPs-shocked-by-disgraceful-political-campaigning.html (08/07/17)]

313 C. Hope, 'Oxfam: MPs shocked by 'disgraceful' political campaigning', *The Telegraph*, 10 Jun., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/10888966/Oxfam-MPs-shocked-by-disgraceful-political-campaigning.html (08/07/17)]

is still worth considering: is the system of government grants and funding transparent enough?

In contrast, opponents of the clause argued that the plans encouraged political intimidation and an abuse of the voluntary sector. Patrick Butler, writing for *The Guardian*, argued that the clause was the government's way of saying: 'a charity can lobby but only if it suits us.'[314] Butler drew attention to the fact that individual ministers are allowed to exempt grantees from the clause, inferring that the government still has the ability to pick and choose organisations that are allowed to continue political activities. It is interesting that it was considered legitimate to allow the government to restrict the lobbying of some organisations but not others. Indeed, the government refrained from including all charities in the proposed clause. Is this, and should this, be within the remit of government powers?

The 2016 restriction threatened to diminish the freedom of charities to react and respond according to the needs and wants of their clients. This is of constitutional importance, considering the sector performs a key democratic role in providing a voice for disadvantaged and under-represented peoples. Following this premise, those at risk of being most affected were the UK's most marginalised communities, least likely to have their voices heard or listened to through the standard political mediums and forums available. Objections were politically charged. Margaret Hodge tweeted that the decision smelt of Stalinism. She protested against the decision,

314 P. Butler, 'Charities told: Don't lobby us, unless we like what you say', *The Guardian*, 9 Feb., 2016 [accessed via: https://www.theguardian.com/society/2016/feb/09/charities-lobby-public-funds-sock-puppets-contracts (11/07/17)]

reminded followers that 'Govt Money is our money, not Tory money. They [charities] should be free to advocate on clients' behalf.'[315]

Opponents also raised more general questions, that are still relevant to the present-day climate: are charities expected to behave a certain way as recipients? Does the state have any sway over the types of topics that are chosen by charities to focus on, given its financial contributions? If so, charities would no longer operate as independent bodies, but as part of the party-political system. This would be constitutionally contentious; the state would effectively be using the taxpayer's money to subsidise quasi-political organisations that were not subject to sufficient regulations.

As it happened, in the wake of these criticisms, the clause was dropped. The original plans to introduce a clause were revised and replaced with new government grant standards. As part of the new regulations, government departments must introduce a 'robust' grants approval system, in place for all grants in excess of £100,000. Grants must include terms of 'eligible expenditure'. This essentially prevents charities from using the grants funding to fund lobbying or other listed political activities. It was also announced that a Grants Advice Panel will be created, tasked with considering high risk grants, to ensure that 'taxpayers get value for money for every penny they spend.'[316]

Moving forward, this paper suggests a number of recommendations. Despite the policy U-turn, practitioners remain sceptical.

315 Accessed via: https://twitter.com/margarethodge/status/696021898577256448 (30/01/18).

316 Civil Society, 'Government replaces anti-advocacy clause with new grant standards', 2 Dec., 2016 [accessed via: https://www.civilsociety.co.uk/news/government-replaces-anti-advocacy-clause-with-new-grant-standards.html (11/07/17)]

Neil Cleeveley, Chief Executive of the National Association for Voluntary and Community Action (NAVCA) maintained that new proposals have not reduced the 'chill factor.'[317] Practitioners have complained that the new standards still leave worrying scope for interpretation on the part of government departments. As it now stands, the new grant standards ban 'using grant funds to fund lobbying (via an external firm or in-house staff) in order to undertake activities intended to influence or attempt to influence parliament, government or political activity.'[318] The wording of this is still fairly ambiguous. Members of the voluntary sector have raised concerns that charities might still feel restrained or prevented from undertaking 'political' activities that are – in their minds – vital in holding the government to account over policies and legislation. In this sense, the general atmosphere is still one of repression and intimidation. Clearly, the sector would benefit from a clearer and more straightforward regulatory system. The new grant standards ban should be re-phrased to minimise confusion and unnecessary suppression of sector involvement.

In addition, the fact that voluntary sector organisations were not given the opportunity to contribute to discussions in any public consultation process has been taken as reflective of an alarming trend in state-sector relations. Neil Cleeveley has used the recent grants scheme as an example of how the government is increas-

317 N. Cleeveley, 'The battle to protect charity lobbying must continue', *The Guardian*, 8 Dec., 2016 [accessed via: https://www.theguardian.com/voluntary-sector-network/2016/dec/08/charity-lobbying-government-grant-making-standards (11/07/17)]

318 N. Cleeveley, 'The battle to protect charity lobbying must continue', *The Guardian*, 8 Dec., 2016 [accessed via: https://www.theguardian.com/voluntary-sector-network/2016/dec/08/charity-lobbying-government-grant-making-standards (11/07/17)]

ingly relying on in-house conversations instead of providing any opportunity for open consultation processes with outside players.[319] This is democratically problematic if the voluntary sector is left out of negotiations that have a direct impact of them and their beneficiaries. Considering the vital work undertaken by the voluntary sector as linchpins, bringing together politicians and members of the public, failure to consult with voluntary sector representatives threatens to diminish the effectiveness and applicability of government schemes. Far from improving the transparency and clarity of the system, then, there is evidence to suggest that the regulations have further isolated the sector, and, in so doing, reinforced calls for greater democratic and constitutional legitimacy. It is hoped for all future proposals of this sort, the sector will be given adequate time to participate in the preliminary discussions and policy design ahead of official announcements.

Conclusion

It is widely held that the advocacy work undertaken by the voluntary sector has substantial benefits for civil society and thus, by extension, the government. By providing underrepresented groups with a voice that can be heard by representative bodies, voluntary sector advocacy promotes democracy. It is therefore beneficial to the upkeep and implementation of the UK's constitutional arrangements. The premise, then, that current legislative and regulatory arrangements in place are dissuading voluntary organisations from making critical remarks about the work of the government in office is constitutionally problematic.

319 N. Cleeveley, 'The battle to protect charity lobbying must continue', *The Guardian*, 8 Dec., 2016 [accessed via: https://www.theguardian.com/voluntary-sector-network/2016/dec/08/charity-lobbying-government-grant-making-standards (11/07/17)]

In order to address some of this remaining confusion about the definition of political campaigning and 'lobbying', this paper recommends that more attention is given to preserving the rights of sector organisations to participate in advocacy work. It supports the claims made by the NCVO that constructive advocacy performs a vital role in shaping British democracy and influencing policy agendas.[320] This point was also made by the Select Committee on Charities. In the conclusion of its final report, the Committee described charities as 'the eyes, ears and conscience of any society; advocacy is a central part of their work and a sign of a healthy democracy.'[321] This is central to the country's constitutional development, then, given that democracy is one of recognised cornerstones of the UK Constitution.

This paper also supports the Committee's recommendation that any new regulation or guidance on campaigning activities – particularly in wake of any future elections or referendums – is set out in a clear and accessible way.[322] Speaking in the aftermath of the referendum of 2016, Kenneth Dibble, Director of Legal Services at the Charity Commission, said that 'If there is a lesson to be learned from that piece of guidance, it is about the way we positioned it and our style

320 NCVO Blog, 'Campaigning makes charities stronger', 29 Mar., 2017 [accessed via: https://blogs.ncvo.org.uk/2017/03/29/campaigning-makes-charities-stronger-what-does-the-house-of-lords-report-mean-for-charity-advocacy/ (11/09/17)]

321 House of Lords Select Committee on Charities, Report of Session 2016-17, HL Paper 133, 'Stronger charities for a stronger society', London: HMSO, Mar., 2017, p. 116.

322 House of Lords Select Committee on Charities, Report of Session 2016-17, HL Paper 133, 'Stronger charities for a stronger society', London: HMSO, Mar., 2017, p. 116, Paragraph 495.

of communication.'[323] This measure would thus help to avoid another situation similar to the ambiguous guidance literature published by the Charity Commission to charities hoping to campaign in the lead up to the 2016 referendum. Another practical recommendation is to ensure that on such occasions, sector regulatory bodies need to be given further warning and time to present rules on advocacy work in a clear way to avoid augmenting existing issues with clarity and understanding.

Finally, speaking recently at the NCVO's Campaigning Conference in London in September 2017, Jon Quinn, Chief Executive of the Research Institute for Consumer Affairs, called for the establishment of some sort of 'minimum campaigning standards [for charities] to improve public trust.'[324] The ensuing discussion centred outside of legal regulations and on the general issue of ethics. Leading figures in the charity sphere argued that charities need to prioritise integrity and fairness. Quinn recommended that charities should aim to remove themselves from being perceived as 'part of the establishment' – in other words, distance themselves from the state where and when possible. While it is unclear how a minimum campaigning standards system might work in practice, it is a concept that is worth exploring further.

At the same event, Russell Hargrave, Press Manager at Power to Change, urged sector practitioners to focus on working together

323 Kenneth Dibble, Select Committee on Charities, Corrected Oral Evidence: Charities, 6 Dec., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/44558.html (11/09/17)]

324 Civil Society, 'Charities must set up minimum campaigning standards to improve public trust', *Civil Society*, 8 Sep., 2017 [accessed via: https://www.civilsociety.co.uk/news/sector-must-establish-minimum-campaigning-standards-to-improve-public-trust.html (13/09/17)]

more to ensure that charities were more successful in fulfilling their role in offering an alternative voice. Hargrave stressed the responsibility of charities for popular public perception of controversial issues. He took the example of recent hostility in the media towards immigration to highlight recent failures to produce collaborative campaigning amongst sector practitioners. According to Hargrave, the sector had failed to produce an effective campaign that opposed immigration scare-mongering and in doing so, had failed in their jobs in providing democratic accountability and transparency.[325] It is clear that there is at least some recognition amongst leading figures that the sector has a part to play in informing the public and putting counter-arguments into the public arena. It will be interesting to see whether this speech is the product of a growing trend, marking a new era of renewed efforts in this line of sector work.

325 Civil Society, 'Charities must set up minimum campaigning standards to improve public trust', *Civil Society*, 8 Sep., 2017 [accessed via: https://www.civilsociety.co.uk/news/sector-must-establish-minimum-campaigning-standards-to-improve-public-trust.html (13/09/17)]

Grants, contracts, and commissioning

Commissioning has in part been conceived as a solution to the problem of government being a poor grantmaker[326]

Directory of Social Change, 2011.

There is a long history of state provision of funding for the voluntary sector. Financial support –through grants, funding schemes or contract-based commissioning – is now a well-established part of government spending. Funding has been made available for organisations operating outside of private or public sectors as a means of supporting their existence, and in recognition of specific services and activities that complement or replace state provisions.

The concept of contract-based funding gathered momentum in the late 1980s, when charities were asked to provide evidence of impact in return for government funding and commissioning of services. More recently, government contributions to the voluntary and community sector – in receipt of public services – first received formal recognition in the 2002 Spending Review, in response to a cross-cutting review into the role of the sector in service delivery. At the time, the Government established a target to 'increase the contribution of the voluntary and community sector to the delivery of public services […] by 5 per cent by 2005-06.'[327] In 2006, the

326 Response to the Giving Green Paper: Directory of Social Change, Mar., 2011, p. 10.

327 Available via: http://www.hm-treasury.gov.uk/spending_review.; http://www.homeoffice.gov.uk/documents/.

Cabinet Office committed to 'the principle that where services are commissioned and procured by government, there must be a level playing field for all providers, regardless of sector.'[328]

It is widely held that the last few decades have witnessed a substantial shift in the monetary relationship between state and sector. Changes have taken place in relation to the size and type of funding and grants made available to voluntary organisations. There has been a reduction in the amount of government income spent on the charity sector. The amount spent by the state on grant funding has decreased from the £6.1 billion estimated by NCVO in 2003/04, to £2.8 billion in 2013/14. Whereas the amount spent on government contracts has increased from £5.8 billion in 2003/04 to £12.2 billion in 2013/14.[329] The type of financial support has also shifted from grants-based to contract-based commissions. The recent emphasis on contract-based commissioning has resulted in a high proportion of organisations now relying on government commissioning as a key source of income. These developments have altered the boundaries of voluntary sector work, bringing organisations closer to both public and private sectors. The Work Programme is often cited as an example of the privatisation and outsourcing of the voluntary sector in the delivery of statutory services.

Existing literature has already highlighted some of the problems associated with contract-based commissioning – specifically, issues with bidding for contracts, a reduction in the quality of service delivery, and difficulties in accessing support and guidance on the

328 Cabinet Office, *Partnership in Public Services: an action plan for third sector involvement,* Dec., 2003, p. 3.

329 NCVO, 'UK Civil Society Almanac 2016: Income from Government' [accessed via: https://data.ncvo.org.uk/a/almanac16/income-form-government (22/05/17)]

governance of these smaller charities, as a result.[330] With this in mind, this chapter, instead, focuses on the constitutional implications of recent trends, and discusses areas for further development and improvement.

Government grants and state-sponsored funding

Funding schemes

The state also plays a role in the maintenance and funding of nation-wide funding schemes. The widespread critique of state involvement in systems including the National Lottery Fund reveals the state influences of voluntary sector organisations that might be in line to benefit from such funding and grant schemes. Specifically, problems with state funding and grants schemes have related to concerns about comprised independence and state interference. Practitioners have claimed that the state has used its role in grants and funding schemes to reap financial rewards, at the expense of the sector. This is particularly well illustrated in the high-profile scandals surrounding the funding of the 2012 Olympics, proposed cuts to Big Lottery Fund (BLF) government funds, and the subsequent 2016 consultation on the future direction of this scheme.

The National Lottery – operating as the BLF since 2004 – was originally established to help individuals most in need, using the income generated from lottery tickets to support 'good causes' (the arts, heritage, sport, and communities). Central to the scheme were principles of independence and additionality. Decision-making would be kept separate from the state – to avoid government agendas influencing the choice of recipients, size of funds, and use of grants.

330 Rebecca Bunce in evidence to the House of Lords Select Committee on Charities, London, HL Paper 33, p. 42.

However, these principles have been the source of contention ever since the establishment of the scheme over twenty years ago.

Of primary concern is that National Lottery income has become a source of funding to replace previous grant aid supplied by the state. In response to recent cuts in government grants and funding, organisations have increasingly resorted to National Lottery applications, to replace funding that would have originally taken the form of state support. In what has been described as a 'deliberate disregard for civil society,'[331] the original purpose and set-up of the National Lottery has allegedly been transformed, shifting to reflect the needs and demands of the government at the time. In evidence to the BVSC in 2012, organisations admitted they felt they had 'no choice' in the matter, faced with diminished or complete lack of state provisions.[332]

More problematic still, however, are claims that the state itself has used the Big Lottery Fund to cover costs of government initiatives, as in the case of the 2012 Olympic Games. In the run up to 2012, the government used £675 million from lottery sources to help pay for the costs of the infrastructure and planning needed for the completion of the London Olympics. In June 2006, an initial £410 million was removed from the Lottery good causes – £213 million of which was taken from the Big Lottery Fund, followed in March 2007, by an additional 'raid' which amounted to a total of £657 million of Lottery good causes funds being used. Although the government maintained that the 'funding settlement protects

331 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 40.

332 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', BVSC, Newman University College, 2012, p. 25.

both existing programmes and future resources for the voluntary sector,'[333] these claims were refuted on the grounds that over £100 million was taken in 2007 alone.

In the Conservative Party Green Paper of 2008, the party promised to restore the integrity of the National Lottery, committing to return the lottery to the original four good causes; enforce the principle of additionality; and introduce new legislation to ban government use of lottery resources that future governments would have to repeal if they wanted to use the lottery 'as a piggy bank again.'[334] It also aimed to replace the BLF entirely with a Voluntary Action Lottery Fund. In so doing, it claimed that funds would no longer be diverted to public sector projects, and government interference or surveillance would be minimal, with an emphasis on 'lightly specific, demand-led grant funding.'[335]

However, concerns were again voiced in 2015, when the Department of Culture, Media and Sports proposed significant cuts to arts grants. An anonymous 'Save the Big Lottery Fund' campaign was launched, amidst claims that £320 million of BLF funds was going to be used by the government to compensate for planned cuts to the arts and sport provisions. Speaking out at the time, Ciaran Price, Policy Officer at the Directory of Social Change, placed the fears within a wider trend of government-led grants. He concluded that,

333 Cabinet Office, *Statement by Ed Miliband, Minister for the Third Sector*, 15 Mar., 2007 [accessed via: http://cabinetoffice.gov.uk/third_sector/news/speeches/statements/070315_olympic.asp (29/04/17)]

334 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 41.

335 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 41.

'Unfortunately governments have developed a habit of interfering with the Big Lottery Fund, having already stolen millions from it to fund the Olympics and failing to honour its commitment to repay.'[336]

The NCVO maintained that the BLF should remain independent of government, serving to 'add to public services, not […] backfill spending cuts.'[337] The notion that these funding schemes are being used to replace government spending rather than add to existing grants is constitutionally problematic.[338] The evidence discussed in this section implies that the state has an undocumented degree of authority over work that is not formally recognised as part of its constitutional remit. In order to address this constitutional issue, further work needs to be done to ensure an adequate degree of separation between state officials and personnel, and funding bodies and boards. As the NCVO demanded in its response to the 2016 consultation on the future of the BLF response, 'the Big Lottery Fund's work should therefore not be explicitly aligned with the agenda of the government of the day.'[339] It should remain completely separate

336 Third Sector, Blog, 'Treasury accused of planning to slash £320m from Big Lottery Fund in spending review', 13 Nov., 2015 [accessed via: http://www.thirdsector.co.uk/treasury-accused-planning-slash-320m-big-lottery-fund-spending-review/policy-and-politics/article/1372765 (29/04/17)]

337 NCVO Blog, 'Threat to the Big Lottery Fund', 21 Nov., 2015 [accessed via: http://blogs.ncvo.org.uk/2015/11/21/threat-to-the-big-lottery-fund/ (29/04/17)]

338 NCVO, 'Consultation on new policy directions for the Big Lottery Fund: NCVO Response – August 2016', NCVO, Aug., 2016.; House of Commons Library, Research Paper 09/93, 'The National Lottery – The first 15 years', section 4.4.

339 NCVO, 'Consultation on new policy directions for the Big Lottery Fund: NCVO Response – August 2016', NCVO, Aug., 2016.

from party politics. This paper supports calls for greater transparency and separation of state involvement in such grant schemes.

Cuts to local government funding and grants

Despite a shift in practice from grants-based funding to contract-based commissioning of the sector, it is still within the powers of local government authorities to award grants to voluntary sector organisations. The crucial difference between grants and contracts rests on the degree of freedom afforded to the beneficiary. Grants usually stipulate certain restrictions on the ways in which the money can be spent, but they do not include any strict contractual law obligations. As explained in the official HM Treasury's guidance, 'A grant maker is not contracting for a service that forms part of its own business. It is offering financial support in an area of work designed by the third sector, which it wishes to sponsor. The work would add value to the funder's overall aims and objectives. The organisation retains considerable freedom in the way in which it carries out the work.'[340] Thus, grants are delivered on the principle that the proposal has come from the beneficiary, and not on the basis of an idea that the funder itself has designed. It is important not to see grants as a 'panacea' of current problems the state of the voluntary sector. In practice, grants have always been relatively difficult to come by, even before the beginning of the move towards contracts in the 1980s. This being said, grants do offer a considerable degree of freedom and autonomy to benefactors. The recipient is awarded a degree of independent thought and action that is not usually found

340 HM Treasury, 'Improving financial relationships with the third sector: Guidance to funders and purchasers', Charity and Third Sector Unit, May 2006, p. 15. [accessed via: http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/guidncefunders1505061v1.pdf (30/09/17)]

in contracts and commissioning.[341] This section makes a case for a re-focus on grants.

Local authorities have the most day to day contact and interaction with sector organisations. Although central government is responsible for policy directives and budgetary decision-making, which have a direct impact on local government development, increasingly, local government authorities are responsible for the majority of decisions regarding grants, contracts, and the procurement of voluntary groups within its area. Since the initial contracts of the 1980s and 1990s, a number of changes have been made to the role of the government in the provision of funding, and the types of grants and funding schemes available. Increasingly, practitioners have referred to a tightening of terms and conditions attached to funding grants and contracts, as well as an increase in funding for work that was previously undertaken by the state as part of its legal and constitutional duties. Respondents lamented the decline in the number of core grants made available to voluntary organisations in recent years. Originally established at a time of increased funding, contracts have now dwarfed more traditional grant schemes. There was a consensus amongst practitioners that there is a desperate need for more core funding grants. Sector organisations cannot even consider applying for contracts without well-established funding in place securing their core functions.

Perhaps the greatest source of change is in the reduction in the overall number and size of grants available. This is partly the result of significant cuts to local government funding. Alarmingly, this

341 A. Benson, 'Working Paper 6: 'The Devil that has come amongst us': The impact of commissioning and procurement practices', NCIA: May 2014, p. 20. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Commissioning-and-procurement-final.pdf (26/09/17)]

is a trend that is set to continue.[342] One of the ways in which the state has impacted upon the financial stability of the sector is in the income provided to local authorities. The income from both central and local government has declined in recent years. In March 2012, the NCVO estimated that over 70,000 voluntary sector jobs had been lost between 2011 and 2012 – in part, due to cuts to local government spending, and also the result of outsourcing programmes such as the Work Programme.[343] This has had a knock-on effect on the relationships established between central and local government and voluntary organisations – particularly for those previously in receipt of government grants. Evidence submitted to the House of Lords Committee earlier this year revealed that practitioners have been worried about the extent of cuts in local authority budgets. Several respondents argued that this has resulted in local authorities lacking the experience and expertise to made the right decisions about commissioning and contracts for the relevant services.[344]

Insufficient funding and resources have also resulted in a lack of continuity. Evidence shows that the sector is riddled with organisational change, with high levels of staff turnover, lack of infrastructural stability, and lack of institutional memory and expertise. The Esmee Fairbairn Foundation provides a specific example of this. The recent cuts to funding for youth services have had a significant impact on the ability of the organisations it funds. The reduction

342 A. Marszal, 'Public Service Cuts Still to Come', *Daily Telegraph*, 5th Feb., 2014 [accessed via: www.telegraph.co.uk/news/politics/georgeosborne/10618948/George-Osborne-warned-hugely-challenging-public-service-cuts-still-to-come.html (29/09/17)]

343 K. Wiggins, 'Spending Cuts are 'knocking out' sector's capacity to support Big Society, NCVO head says', *Third Sector*, Mar., 2012.

344 Appendix 6 and Appendix 8 in the House of Lords Select Committee on Charities, London, HL Paper 33.

in government funding has not just had an effect on the services provided, but also the voluntary organisations that were reliant on the youth clubs, buildings, and services as a vital means of helping their beneficiaries.

There is a case to be made for the reinvigoration of local government grants to sector organisations. The House of Lords Select Committee on Charities included a recommendation for more to be granted by local authorities in its report of 2017. The Committee's suggestions are actually one of many numerous past attempts made systematically over the years. Calls for more grants have been part of government policy for a long time. However, these demands have not come to fruition. Practitioners have explained the limited success of efforts to revive the use of grants with reference to the limited funds awarded to local government bodies: 'Reductions in funding for local government have rendered grants as luxuries, while contracts are viewed as essentials. As long as this continues, it is unlikely that practice will change.' This being said, there are some areas of local government where grants have remained central to policy implementation. West Surrey County Council, for instance, funnelled money across a number of voluntary organisations to assist in rural areas. The Council has been highlighted as an example of how the legislative freedom afforded to local authorities can be utilised to allow for greater attention to local needs and sufficient flexibility in funding opportunities. There is hope, then, that some local authorities might be able to act on the most recent calls for a reinvigoration of grants.

There are a number of other possible avenues for change. Historically, the main impetus for change at a local level has been made from central government. The initial move towards

contract-based commissioning was driven by the central state and then adopted by local authorities. Thus in order to precipitate a shift towards a more sector-friendly approach to funding, pressure to change would have to come from Westminster. There is historical precedence for central government support.

Calls for local authorities to change their approaches to grants opportunities need to be supported by central government directives. At one stage, there was a development in government policy, which saw the introduction of community foundations. This saw an attempt to move money into private trusts and foundations. The policy rested on the idea that local authorities could serve as benevolent patrons, funnelling grants into trusts, which would then support voluntary organisations. As it happened, these proposals were never successfully implemented, but it is still a direction that could be adopted.

Past practice also offers other instances of effective collaboration between state and sector. Present-day decision-making for procurement is typically made internally, allegedly based largely on financial requirements. In contrast, respondents spoke of higher levels of cooperation and collaboration between individual local government officials and voluntary practitioners. In one instance, those responsible for commissioning social care facilities for the elderly visited a day centre for older people with dementia – run by a voluntary group – and made their recommendations based on personal visitations. Since the enactment of the NHS and Community Care Act, however, local authorities have been encouraged to prioritise social service contracts, with the emphasis on providers and contractors, instead of suitability. Practitioners complain of little focus on the quality of the service, irrespective of government rhetoric,

and complete separation at a personal level. Another suggestion for better practice, then, is to re-include specialists – those operating at grassroots levels – back into the decision-making mechanisms. This would enable practitioners with experience working with beneficiaries to have a say in deliberations, and place the emphasis back on suitability and quality of services.

Shift from grants to contracts

> *'The move from grants to commissioned contracts is the single most important factor in the progressive co-option of voluntary sector organisations as servants of state plans and policy and, increasingly, as subservient to the profit-making activities of private companies.'*[345]
>
> Andy Benson, National Coalition for Independent Action

As detailed in the introduction, the shift in practice from grants to contracts is not as new as some practitioners suggest, and a shift in government rhetoric can be traced back to the 1980s. However, in the words of one respondent, the last few decades have seen a surge in contract-based relations, to such a degree that the 'local sector has become 'bloated' with contracts.' The Government rhetoric behind this trend was provided in the Open Public Service White Paper, published in July 2011 under the Coalition Government. The Government claimed to be 'ushering in a joined-up programme of

345 A. Benson, 'Working Paper 6: 'The Devil that has come amongst us': The impact of commissioning and procurement practices', NCIA: May 2014, p. 3. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Commissioning-and-procurement-final.pdf (26/09/17)]

increased choice, decentralisation, accountability and fair access to services by opening them up to more providers.'[346] Major examples of outsourcing contracts include the Work Programme, a £3-5 billion initiative introduced by the Department for Work and Pensions in June 2011, which rendered charities to sub-contractor status under multi-national companies like G4S. Oxford Economics estimated that the annual turnover for the outsourcing of public service came to £82 billion in April 2011.[347]

Grants were largely replaced by contracts under the New Labour Government. This trend was later extended under the Coalition government. Thus, while the types of contracts awarded have changed slightly over the last few decades, and trends have been reinforced since 2010, the replacement of grants with contract-based commissioning is a longstanding trend and cause of concern. The shift from grants to contracts has already been a subject of considerable scrutiny amongst practitioners and academics. Work has already been conducted in detail. The National Coalition for Independent Action, an organisation that sought to encourage greater autonomy of the sector in the face of the increasing professionalisation of the sector,[348] with a particular focus on the operational implications

346 L. Ryan, 'Working Paper 5: Outsourcing and the Voluntary Sector', NCIA: May 2014, p. 3. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Outsourcing-and-the-Voluntary-Sector-final.pdf (26/09/17)]

347 Oxford Economics, *The size of the UK outsourcing market – across the public and private sectors*, Report for the Business Services Association, 2011, pp. 6-10.

348 C. Rochester, NCIA Inquiry into the Future of Voluntary Services, 'Working Paper 8: The impact of commissioning and contracting on volunteers and volunteering in Voluntary Services Groups', NCIA: Oct., 2014 [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/11/Volunteering-final.pdf (26/09/17)]

of contract-based work.[349] While this section considers some of these issues, the emphasis is on the constitution and the role of the government.

Critically, the shift from grants to contracts is now recognised as a marked turning point in both relations and practice. Underlying this transition is a change in how the sector is perceived.[350] The dynamics of relations has shifted from the state supporting voluntary sector organisation's own plans and priorities – through the use of grants – to a contract-based model that views the sector as a means of delivering State plans and priorities. This was officially recognised by Rob Wilson, in an article written by Rob Wilson, then Parliamentary Secretary for the Minister for Civil Society.[351] As described somewhat more critically by representatives of the sector, the role of government organisations – operating at both central and local levels – quickly became that of 'contractor holder' or 'commissioning agent'.[352]

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349 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015 [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

350 National Coalition for Independent Action, 'Fight or Fright: Voluntary Services in 2015, Jan., 2015 [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (28/09/17)]

351 R. Wilson, 'We need to find a much more active and responsive system.... we have to help build much more capacity in the (voluntary) sector to be able to deliver what Government is going to need in the future,' Third Sector, Third Sector Magazine, Jan., 2015.

352 L. Huckfield, 'Working Paper 3: The Rise and Influence of Social Enterprise, Social Investment and Public Service Mutuals', NCIA: Jul., 2014, p. 6. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2011/03/Social-enterprise-final.pdf (26/09/17)]

Commentators have also noted a difference in present-day commissioning and procurement processes. Previously, those working at grassroots levels were typically involved in the procurement of voluntary organisations operating as service providers. This allowed for the knowledge and expertise of practitioners to be translated into local decision-making. However, as it currently stands, there is a notable absence of the sector in these processes. Instead, practitioners have criticised the 'mechanical' responsibility of civil servants and local government officers in these decisions.

This has also had an effect on local government approaches to grants and voluntary sector involvement. The Localism Act 2011 gave councils a 'General Power of Competence'. This enabled them to have greater autonomy in the discharging of legal responsibilities and powers in matters such as outsourcing and contracting of providers. The result of this has been considerable regional differences in approach. There are examples of councils that have taken a drastic response to questions about contracting, and opted for a 'total outsourcing' scheme. For instance, in December 2012, the London Borough of Barnet awarded the entirety of its £13 million Development and Regulatory Services contract to the private company Capita. This decision has proved controversial, and a number of individual court cases have been made against it.[353] This move has also been criticised by academics. Laird Ryan, a member of the NCIA, has slammed 'total outsourcing' as a 'major loss to

353 L. Ryan, 'Working Paper 5: Outsourcing and the Voluntary Sector', NCIA: May 2014, p.18. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Outsourcing-and-the-Voluntary-Sector-final.pdf (26/09/17)]

democracy, the public purse and civil society.'[354] Critics argue that the tendency to award contracts to larger, private organisations has prevented citizens from gaining access to more localised support mechanisms that were previously delivered by voluntary groups. It is alleged that this is particularly problematic in lower socio-economic areas of the UK, which typically rely on more voluntary organisations per resident, and are thus more dependent on public funding.[355]

Practitioners have bemoaned the effects these developments have had on the treatment of voluntary groups. Speaking on behalf of the NCIA, Andy Benson described 'the huge damage to the autonomy, independence and, sometimes, integrity of VSGs' and the ability of organisations to serve as representatives of local beneficiaries.[356] Following this argument, voluntary organisations have more or less become 'agents of the state'. While state-sector relations have traditionally always relied on a degree of state direction – the sector has always been expected to comply to certain requirements and regulations – there are now infinite 'strings attached'. Any form of government financial support now comes from state demands. There is little recognition of the work carried out independently of state requirements.

354 L. Ryan, 'Working Paper 5: Outsourcing and the Voluntary Sector', NCIA: May 2014, p.18. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Outsourcing-and-the-Voluntary-Sector-final.pdf (26/09/17)]

355 H. Buckingham, 'On place and justice: distribution matters' saving Humans Blog, Institute for Advanced Studies, University of Birmingham, Dec., 2013.

356 A. Benson, 'Working Paper 6: 'The Devil that has come amongst us': The impact of commissioning and procurement practices', NCIA: May 2014, p. 3. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Commissioning-and-procurement-final.pdf (26/09/17)]

Change also manifested within sector organisations. The move away from grants to commissioning that has dominated public service delivery dramatically altered the sorts of work performed. Practitioners have argued that the emphasis on contracts has prevented organisations from adhering to their values and innovative approach to addressing local issues. Commissioning has allegedly created a transactional approach to the sector; or as Seamus McAleavey, Chief Executive of Northern Ireland Council for Voluntary Action (NICVA), described to the Charities Committee: "We give you money and you carry out certain things for us". This has altered the style and type of methods employed by sector organisations responsible for providing services, as well as affecting their ability to campaign and lobby. Respondents claimed that the existing climate of fear in the wake of the Lobbying Act has been reinforced by contracts and cuts to funding.[357] In this sense, differences between voluntary sector providers and public or private providers have diminished. This has undermined principles of independence and autonomy, that was previously upheld through the use of grants. The Baring Foundation's Independence Panel of 2012 bemoaned that the continued emphasis on contracts has meant that 'Models of funding, regulation and engagement do not sufficiently recognise or safeguard independence; and problems can be compounded when sectoral boundaries are blurred.' The Panel warned of a 'danger that parts of the voluntary sector which deliver public services could in effect become not for profit businesses, virtually interchangeable with the private sector.'[358]

357 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015, p. 11. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

358 Panel on the Independence of the Voluntary Sector, *Protecting Independence: the Voluntary Sector in 2012*, London: Baring Foundation, 2012.

Indeed, tangible changes can be found in the re-fashioning of organisations. According to critics – largely made up of past and present practitioners and academics involved in some capacity in the voluntary sphere – since the 1980s, the state has continually pushed for contracts, with little consideration or distinction between profit and non-profit providers, providing commissioning was based on outcomes and impact measurement. As a result, the sector has suffered from a re-fashioning. Increasingly, sector organisations have been forced to adhere to the standards and internal infrastructure of public and private counterparts. Voluntary organisations that have continued to deliver services (increasingly, public services are delivered by private sector bodies or a 'privatised' voluntary group)

have been subjected to a professionalisation and bureaucratisation of services.[359]

To combat some of these issues, a number of initiatives have been trialled in the UK, with an emphasis on 'co-designed services' or 'whole systems commissioning.' However, as practitioners have noted, these programmes rely on a 'huge amount of co-ordination' between separate third sector services, local government services, and a pooling of budgets, personnel, and administrative systems. Difficulties are particularly likely to arise in scenarios whereby the beneficiary is moved out of an NHS-funded service, for example, back into a local authority-funded service in the community.[360] More attention needs to be given to how decision-making processes are developed, if co-designed services are to be successfully used to help address the problems associated with cuts in government funding.

To address the alleged exclusion of voluntary sector representatives in commissioning selections, more efforts should be focused on changing the current procurement procedural arrangements to include practitioners with experience working at grassroots levels with local beneficiaries.

Other suggestions include focusing on awarding more grants to voluntary sector organisations where possible. Traditionally, grants served as the main source of state funding for the voluntary sector. Grants allowed for a degree of flexibility and manoeuvrability, historically awarded with relatively few stipulations. Grants were

359 National Coalition for Independent Action, 'About NCIA', 2016 [accessed via: http://independentaction.net/about-ncia/ 28/09/17)]

360 Dan Scorer, Mencap, in evidence to the House of Lords Select Committee on Charities, London, HL Paper 33, p. 46.

explained on the grounds that they enabled sector organisations to prioritise areas of work based on the needs of beneficiaries. Autonomy and independence remained intact. The drive for outcome-based contracts – explained in the section below – encouraged local government authorities to focus on contracts ahead of grants. Yet, at least in theory, local government bodies are still capable administering grants to the voluntary sector. While it is acknowledged that severe cuts to funding might render it financially unviable for some local authorities to award grants alongside the commissioning of sector organisations for public service delivery, where possible, it is hoped that local authorities consider giving out grants to organisations operating in their areas. This paper supports the calls made by the House of Lords Select Committee for greater interest and administration of local grants.

Contracts

Procurement contracts

In recent years, practitioners have noticed a rise in a different type of contract-based relationship. Increasingly, the terms 'donor', 'shopping', and 'procurement' are used to describe contracts that have developed out of ideas from sector innovation or needs, where the idea originates from the sector itself. In these scenarios, the State serves as a 'customer' rather than a 'sponsor'. An example of this was given to the PASC in 2008, the voluntary organisation Rainer developed bail and remand services for young offenders. Initially, the state provided financial support for this service, before the scheme was recognised as a statutory responsibility. In turn, Rainer then delivered the same services on behalf of the govern-

ment.[361] Over the last few years, academics have referred to a rise in the number of 'shopping' relationships.[362] This has shaped state-sector dynamics, yielding both advantages and disadvantages on both sides.

A positive result of this recent growth in 'shopping' contracts (see above example) has been that it has benefited organisations that struggle to appeal to public interest and sympathy for donations and support – as in the case of organisations that work with substance misuse.[363] However, the trend has largely been criticised. Central to arguments against the development, is the premise that these contracts tend to magnify the competitive nature of the commissioning and contracting out of services. They exploit organisations, particularly smaller bodies operating in the voluntary sphere, who do not have the resources, in-house knowledge, or experience to rival the private sector competitors. It is also alleged that these contracts place undue emphasis on cost value. In efforts to get the 'best financial deal possible', the government has been criticised for overlooking the ethical problems with this practice, as well as longstanding concerns about the impact on the quality of services, and the extent to which the voluntary sector might lose its ability to remain close to beneficiaries if the commissioning of services is forced.

361 PASC, HC 112-I, 'Public Services and the Third Sector: Rhetoric and Reality', Eleventh Report of Session 2008-08, Vol. I, London: The Stationary Office Ltd., Jul., 2008, p. 11.

362 National Audit Office, *The implementation of Full Cost Recovery*, Jun., 2007.

363 Ev 219, in PASC, HC 112-I, 'Public Services and the Third Sector: Rhetoric and Reality', Eleventh Report of Session 2008-08, Vol. I, London: The Stationary Office Ltd., Jul., 2008, p. 12.

In the 'procurement' relationship, demand comes from the state; the state controls the terms and requirements of the service, and then buys those services from the sector provider. In this scenario, how is the voluntary sector organisation any different to a public sector or private sector provider? According to several of the respondents interviewed for this paper, the differences are indistinguishable.

Outcome-based contracts

There has also been a surge in the number of Social Impact Bonds (SIB), since the initial pilot scheme in 2010. This has been seen as part of a general relinquishing of state control of the delivery of social and welfare services from conventional public providers.[364] A SIB is a Payment by Results (PbR) system – an outcome-based contract between public and private sector bodies, in which private sector organisations pays for an outside body to provide an intervention to advise on improvements to the delivery of social outcomes. The public sector body then repays the private organisations, on the condition that there has been a demonstrable social impact to the intervention. In a SIB model, voluntary organisations are often employed to perform the intervention themselves.

Arguments for the use of SIBs include the premise that voluntary bodies can benefit from SIBs, as a means of reducing the cost of interventions, whilst securing mechanisms for better social outcomes. However, charities only benefit from these agreements if clear social impact has been achieved. While SIBs enable greater experimentation in the types of services provided, and increasing the emphasis on outcomes, they are criticised for increasing the

364 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013, p. 11.

cost and time of service interventions.[365] Difficulties in practical implementation are discussed in detail in the existing literature.[366]

For the purposes of this paper, it is worth noting that SIB viability is dependent upon the measurement of social outcomes. Outcomes-based initiatives pose a threat to the emphasis on social value and community benefit of certain voluntary schemes. The format of outcome-based initiatives allegedly encourages organisations to prioritise the terms of the contract above the needs of their clientele.[367] Critics argue that those most in need of services can be overlooked, due to the difficulties in resources and costs, making way for other clients that are easier to supply for. 'Will it lead to us prioritising certain policy areas simply because they can save us money?' – a question considered in *Pioneers Post* in 2016.[368] In this sense, financial models like SIBs and other outcome-based contracts have the potential to dilute the underlying principles that make the voluntary sector 'distinctive' and worthy of public service delivery.[369] This has caused some practitioners to question the gov-

365 J. Ronicle, 'Social Impact Bonds: are they effective?', *Pioneers Post,* 6 Oct., 2016 [accessed via: https://www.pioneerspost.com/news-views/20161006/social-impact-bonds-are-they-effective (15/08/17)]

366 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013, pp. 247-257.

367 M. Hudson, J. Phillips, K. Ray, S. Vegeris, S. Davidson, *The influence of outcome-based contracting on provider-led pathways to work*, Research Report No. 638, London: Department for Work and Pensions, 2010.

368 J. Ronicle, 'Social Impact Bonds: are they ethical?', *Pioneers Post*, 28 Sept., 2016 [accessed via: https://www.pioneerspost.com/news-views/20160928/social-impact-bonds-are-they-ethical (15/08/17)]

369 A. McCabe, 'Is the third sector so special? What is it worth? Third Sector Futures Dialogues', Big Picture Paper 3, TSRC, Informing Civil Society, 2012.

ernment's ability to ensure broader public values.'[370] They warn of the 'moral dilemmas that can arise when we place a financial value on social outcomes, and begin to see interventions in the light of the money they can save rather than their inherent public value.'[371] In fact, there have been examples of SIB schemes that have become entirely dependent on public contracts for their existence. In 2012, a contractor was criticised under such claims: 'The profits you make come from the taxes that ordinary, hard-working people pay'.[372] There is a danger that people could end up being viewed as commodities.

In fact, a number of questions have been asked about the role of the state in these schemes. Unlike other PbR schemes used in the past, SIBs involve a multi-stakeholder arrangement between the Government, the service provider, and the investor, usually facilitated by an intermediary organisation.[373] In terms of constitutional responsibilities, SIBs represent yet another way in which the state has the ability to influence the voluntary sector. The Government has been instrumental in the development of the systems. The Office for Civil Society has a designated Centre for Social Impact that works with various government departments to develop and commission SIBs. Examples of its contribution include collaboration with the

370 M. E. Warner, 'Private finance for public goods: social impact bonds', *Journal of Economic Policy Reform*, 16, 4, 2013.

371 J. Ronicle, 'Social Impact Bonds: are they ethical?', *Pioneers Post*, 28 Sept., 2016 [accessed via: https://www.pioneerspost.com/news-views/20160928/social-impact-bonds-are-they-ethical (15/08/17)]

372 J. Harris, 'Emma Harrison: nice work if you can get it', *The Guardian*, 21 Feb., 2012 [accessed via: https://www.theguardian.com/politics/2012/feb/21/emma-harrison-a4e-nice-work (16/08/17)]

373 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013, p. 4.

Department for Communities and Local Government on a SIB that supports rough sleepers to find stable accommodation.[374] The Government has recently placed greater emphasis on such schemes, and invested time and resources to promoting SIBs both within and outside of the Westminster estate. SIBs are examples of government-endorsed initiatives that have required the collaboration of a number of different departments, overseen by the OCS. They reveal how the state has an active interest in the role and delivery of services provided by the voluntary sector – as evidence in the establishment of a designated office that takes on responsibility of the oversight of schemes which have a direct impact on the development and success of voluntary organisations.

Furthermore, unlike more traditional PbR models – which tend to preserve the Government's control over the selection of service providers – SIBs dissipate government responsibility. The use of an intermediary enables the Government to outsource services which are used to address social problems. In doing so, however, the Government also outsources responsibility for the selection of providers, and, most significantly, the 'trail of public and democratic accountability.'[375] In this way, the rise in SIBs may have led to a reduction in state oversight and interventions in cases of malpractice. This was demonstrated in the NAO's investigation into allegations made against A4e, a contractor for the PbR Work Programme. The NAO found that the DWP had been made aware of the risk of fraud,

374 Written evidence from the Office for Civil Society, Department for Culture, Media and Sport to the House of Lords Select Committee on Charities, London, HL Paper 33, Mar., 2017.

375 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013, p. 8.

but had chosen not to introduce the necessary checks.[376] Margaret Hodge, then Chair of the House of Commons Public Accounts Committee's investigations, was left 'truly shocked by the glaring holes in the department's detection and prevention of fraud in its employment programme.'[377] In the Committees subsequent report, it was recommended that government departments be responsible for ensuring that 'proper controls are in place when private companies are selected to provide public services.'[378] Evidence suggests that, as of yet, little has been done to ensure such measures are implemented.[379] This paper calls for the PAC's original recommendations to be re-considered.

Evidently, there are problems with accountability. This case study raises a number of questions regarding current practice. Are sufficient safeguards in place to avoid similar incidents happening in the future? Research published by the *Journal of Poverty and Social Justice*, after fraud investigation into the Work Programme suggests that little has been done since 2012. This is particularly crucial, given that SIBs have taken off in the last five years since that case. It is also problematic that SIBs afford private sector organisations a degree of authority in social spheres – already prevalent in the

376 S. Malik, 'DWP 'did not do enough to stop fraud among welfare-to-work companies', *The Guardian*, 16 May 2012 [accessed via: https://www.theguardian.com/politics/2012/may/16/dwp-fraud-welfare-work-companies (16/08/17)]

377 S. Malik, 'DWP 'did not do enough to stop fraud among welfare-to-work companies', *The Guardian*, 16 May 2012 [accessed via: https://www.theguardian.com/politics/2012/may/16/dwp-fraud-welfare-work-companies (16/08/17)]

378 House of Commons Public Accounts Committee, 'Preventing fraud in contracted employment programmes', 15th Report of Session 2012-13, HC 103, Sept., 2012.

379 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013.

provision of health care and the penal system – which further blurs the boundaries between the three sectors, and reduces the autonomy of both the state and the voluntary sector in the provision of services to the public.[380] Where is the democratic accountability in these ventures? How can the Government purport to prioritise the views and needs of British citizens, if the very services they are statutorily obliged to provide are taken out of the state's hands? There is a clear case to improve accountability.

This is particularly important, in the instances where voluntary sector groups are involved in the outsourcing the statutory services. Some have suggested that this involvement of the sector in the provision of statutory duties renders voluntary organisations 'formal and legal agents of the funding body' – the state. The need for accountability and clarity in these cases is paramount, if the state is to deliver its constitutional responsibilities to its citizens.[381]

Inconsistency

So far, specific concerns raised in the wake of recent developments in the contracting and commissioning of the voluntary sector have been explored. This section will now consider the broader, more inherent problems that are associated with the use of voluntary sector contractors. Existing research already covers the myriad of barriers to smaller or localised charities and organisations, which can include problems with monitoring, micromanagement, con-

380 N. McHugh, S. Sinclair, M. Roy, L. Huckfield, C. Donaldson, 'Social impact bonds: a wolf in sheep's clothing?', *Journal of Poverty and Social Justice,* 21, 3, 2013, p. 9.

381 A. Benson, 'Working Paper 6: 'The Devil that has come amongst us': The impact of commissioning and procurement practices', NCIA: May 2014, p. 2. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2014/06/Commissioning-and-procurement-final.pdf (26/09/17)]

tract length, and general restrictions associated with government contracts. These points are covered in the House of Lords Select Committee's 2017 report.[382] Instead, then, attention will now be given to some of the more theoretical and constitutional matters relating to the rise in contract-based relations between the state and the voluntary sector.

In its report published in 2007, the National Audit Office drew attention to the inchoate nature of funding decisions. Basing its conclusions on interviews with 12 of the largest national charities, it observed that decisions about public money are actually made by a myriad of different government bodies: government departments, agencies, local authorities, trusts, and other public bodies, such as NHS Trusts.[383] While the policies are established and enforced by the OCS and Treasury, in reality, research has suggested that funding decisions are often made by individual bodies separate to central authority. Funding is often 'disconnected from or even contradictory to central government's commitments.'[384]

Issues with consistency are particularly acute in local government decision-making. Services provided by non-government organisations are usually commissioned at a local level, by individual authorities, distinct from central government. In fact, the majority of work commissioned and funded by the public sector comes from local authorities. A report by the Charity Aid Foundation estimated

382 House of Lords Select Committee on Charities, Report of Session 2016-17, HL Paper 133, 'Stronger charities for a stronger society', London: HMSO, Mar., 2017.

383 NAO, 'Public funding of large national charities', London: National Audit Office, 2007, p. 6.

384 NAO, 'Public funding of large national charities', London: National Audit Office, 2007, p. 6.

that in England alone, £3.34 billion was spent on voluntary and community organisations by local authorities in 2003-04.[385] This did not even include the money spent on larger charities and voluntary sector services. Significantly, however, 'different [local] commissioners will adopt different practices,'[386] as observed by Compact Voice. The local government set-ups vary across the UK, further complicated in areas with a two-tier system, such as areas with district, town or borough councils as well as county councils. Although this has allowed for more responsive and receptive commissioning, based on local needs, it has also resulted in inconsistent application. Some authorities are more proactive than others in ensuring that VCS organisations are provided with the necessary expertise and support to ensure they have the expertise to develop an offer to the market, regardless of inexperience or lack of resources.

As a result, not all voluntary sector organisations – and, crucially, voluntary sector beneficiaries – are afforded access to the same support mechanisms. An organisation operating in one locality might have a different chance of winning a contract as another identical organisation operating in different region. Members of the British electorate are entitled to receive the same level of care and support from public services, accountable by the UK Parliament they elected. It is therefore a constitutional concern that some British citizens do not necessarily have the same access to services, and / or level

385 Charities Aid Foundation, *Estimates of central government expenditure on voluntary and community organisations, 2002-03 to 2003-04*, report by Charities Aid Foundation to the Office of the Third Sector.

386 Compact Voice, 'Understanding commissioning and procurement: a guide for local compacts', Compact Voice, Jul., 2013, p. 16 [accessed via: http://www.compactvoice.org.uk/sites/default/files/understanding_commissioning_and_procurement_guide.pdf (14/08/17)]

of expertise and support as other British citizens, despite all being part of the same democratic system.

As demonstrated, then, sector success is at the mercy of the wide variations in the practice of local government. Successful bidding for government-led contracts and commissioning is dependent on an understanding and adherence to the local dynamics and politics in which the organisation operates. Links with central and local politics have become increasingly important in commissioning processes, with the funding situation described by one practitioner as 'highly politicised'. In guidance literature distributed to members of the voluntary sector, Compact Voice recommended that any VCS representatives wanting to engage in the commissioning process should first 'understand their local political context and be prepared to get to grips with the language, culture, and drivers of the commissioning body.'[387] Does state involvement in the decision-making and commissioning prevent voluntary organisations from reaching their full potential, in the provision of bespoke and tailored support to those most in need, and in their advocacy work? The importance of central and local political dynamics has augmented claims that the independence of the voluntary sector is being compromised. Longstanding problems with sector independence are augmented by the move away from grants and towards commissioning of organisations for public service delivery.

387 Compact Voice, 'Understanding commissioning and procurement: a guide for local compacts', Compact Voice, Jul., 2013, p. 7 [accessed via: http://www.compactvoice.org.uk/sites/default/files/understanding_commissioning_and_procurement_guide.pdf (14/08/17)]

Mission drift

Another concern, tied into the notion of independence, is the risk of 'mission drift': the notion that organisations might find themselves inevitably 'drifting' from their founding missions.[388] Attributed to the changing financial climate of the last decade, in part the result of the substantial cuts in government grants, some organisations have allegedly responded by taking on projects without the necessary expertise or management structure. According to the chief executive of NGOIndex, Richard Grassby-Lewi, there has been a growing trend of charities drifting into terrain they had not originally intended to cover, in order to win bids for contracts.[389]

Practitioners have not reached a consensus on the extent to which state contracts undermine the sector's ability to continue implementing their core ideologies, often distinct from the objectives of the government. Lord Victor Adebowale, Chief Executive of Turning Point and one of the first People's Peers to be appointed, claims that 'The idea we should turn our backs on those who need a service in order to maintain an ideology of independence is not only misguided but unpalatable.'[390] In other words, disquiet about the ideological differences and clashes between charitable core values and government initiatives does not present the insurmountable

388 S. Hudson, 'Mission drift on the rise as charities go where the money is', Third Sector, 20 Dec., 2010 [accessed via: https://www.thirdsector.co.uk/mission-drift-rise-charities-go-money-is/finance/article/1047274 (06/09/17)]

389 Richard Grassby-Lewis, cited in S. Hudson, 'Mission drift on the rise as charities go where the money is', Third Sector, 20 Dec., 2010 [accessed via: https://www.thirdsector.co.uk/mission-drift-rise-charities-go-money-is/finance/article/1047274 (06/09/17)]

390 V. Adebowale, 'It's the services that matter, not ideology', *Community Care*, 1 Sept., 2015 [accessed via: http://www.communitycare.co.uk/2005/09/01/its-the-services-that-matter-not-ideology/ (06/09/17)]

problem that many purport. While he admits that it is the 'sector's value that makes [it] so effective and so trusted by service users,' he maintains that it is still 'possible to maintain those values and the focus of building services around the client no matter how big an organisation becomes.'[391]

In contrast, other studies have pointed to clear evidence of mission drift.[392] Roger Bennett, writing in the *International Journal of Voluntary and Nonprofit Organisations* in 2008, regretted: 'Given the extensive financial dependence of the sample organisations on government grants and contracts, the question arises as to whether the possession of an excessively rigid mission represents a luxury that, in current circumstances, can realistically be afforded.'[393] Research conducted by Shared Intelligence in 2009, endorsed this premise, revealing that 43 per cent of respondents reported 'having had to change or widen their focus or target groups as a result of commissioning requirements.'[394]

There is a certain irony to these findings. The official reasoning behind the 'third way' initiative, which precipitated an expansion of voluntary sector organisations operating under New Labour (1997-

391 V. Adebowale, 'It's the services that matter, not ideology', *Community Care*, 1 Sept., 2015 [accessed via: http://www.communitycare.co.uk/2005/09/01/its-the-services-that-matter-not-ideology/ (06/09/17)]

392 R. Macmillan, 'The third sector delivering public services: an evidence review', Working Paper 20, Third Sector Research Centre, Jul., 2010 [accessed via: http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-20.pdf (06/09/17)]

393 R. Bennett, 'Marketing of Voluntary Organisations as Contract Providers of National and Local Government Welfare Services in the UK', *Voluntas,* 19, 2009, p. 289.

394 Shared Intelligence, 'Evaluation of the National Programme for Third Sector Commissioning: Final Report', London: IDeA, May 2009, p. 41.

2010), was a promise to offer service users greater choice and control in how their money is being spent.[395] Yet while some have seen the increase in voluntary sector commissioning as a positive step in this direction, others argue that, in reality, the reverse has happened. The various difficulties associated with service delivery, particularly for smaller or medium-sized charities (as identified in the House of Lords Select Committee's Report of March 2017) have arguably undermined the ability of these organisations to deliver services to the promised degree of quality and uniqueness. Although the contracting out of services to the voluntary sector has implications for the levels of democratic accountability on the part of the state – touched upon at various points in this paper – there is also the risk of a decline in the autonomy for service providers. The emphasis on Payment by Results schemes leave little room for manoeuvrability.

Concerns about mission drift present two further constitutional problems. For the state, there are concerns about potential discrepancies between the policy initiatives of the government in office, and actual implementation at grassroots levels, if service delivery is entrusted to organisations that might hold opposing ideological and political objectives. This poses an obvious constitutional problem, if the representative body that has been elected on the basis of set constitutional and ideological frameworks does not choose organisations that can deliver services that fall into the ideological and political remit, as set out in the party's general election manifesto. Can sector organisations operating along often very different po-

395 H. Dickinson, K. Allen, P. Alcock, R. Macmillan, and J. Glasby, 'The Role of the Third Sector in Delivering Social Care', National Institute for Health Research, London: School for Social Care Research, 2012, p. 12 [accessed via: http://www.lse.ac.uk/LSEHealthAndSocialCare/pdf/SSCR-Scoping-Review_2_web.pdf (06/09/17)]

litical and ideological priorities be trusted with providing services on behalf of central and local government? Or, rather, *should* these organisations be trusted, from a constitutional standpoint?

For the sector organisations on the other end of the commissioning process, there are also constitutional difficulties. Does the responsibility of providing services on behalf of government bodies – both central and local – negate the underlying charitable qualities that enable these organisations from providing authentic and responsive services? And if so, do state-sector collaborative efforts to deliver services mean that service users are not afforded the support mechanisms they would have been offered by the same organisations, had they not had to shift financial plans from grant-based funding to contract-based commissioning? (It is worth mentioning, again, that some practitioners have firmly challenged these suggestions, ridiculing the idea that by 'delivering such large-scale services [organisations] somehow morph into another arm of government, losing the independence that makes [them] so effective.'[396]

The potential ideological differences between the values that govern sector organisations and objectives of the government in office is a matter of constitutional interest. Members of the British electorate elect political parties which ground decision-making and policies on underlying political ideologies. If voluntary organisations are not fully committed to these objectives, this could undermine the democratic obligations of the state.

What should or could be done to address some of these issues? Lord Adebowale has argued that anxieties about the risk of conflict be-

396 V. Adebowale, 'It's the services that matter, not ideology', *Community Care*, 1 Sept., 2015 [accessed via: http://www.communitycare.co.uk/2005/09/01/its-the-services-that-matter-not-ideology/ (06/09/17)]

tween an organisation's advocacy work and their contracts with the state have persisted as a result of the dynamics of the relationship between commissioner and service provider. Whereas the approach from the government to the private sector is 'This is the service we need provided, how much will it cost?' Adebowale bemoans that the response the not-for-profit sector receives is 'This is the service we need provided, here's the money we're willing to give you.'[397] This supports the premise that the sector is not treated fairly, in comparison to private and public sector counterparts – despite the efforts to provide equal treatment to all organisations bidding for contracts irrespective of sector origins (initially established under Tony Blair.) More importantly, the argument underlying these comments is that the problem lies in the ways in which voluntary sector organisations are treated by the state, not in the outside factors and activities that the organisation might be involved in. Following this logic, the solution lies with government bodies making informed commissioning based on merit and quality. Adebowale also implies that sector organisations should not shy away from bidding for contracts, for the same reasons.

Some of the recommendations put forward by the House of Lords Select Committee on Charities might serve as solutions. The Committee suggested that the government use 'intelligent commissioning' to get the best from the sector. This includes focusing on improved results rather than cost savings and offering smaller-scale

397 V. Adebowale, 'It's the services that matter, not ideology', *Community Care*, 1 Sept., 2015 [accessed via: http://www.communitycare.co.uk/2005/09/01/its-the-services-that-matter-not-ideology/ (06/09/17)]

contracts and support with bidding for contracts.[398] The Committee urged government agencies to make sure that the decision-making part of the commissioning process is not based purely on financial considerations. Disappointingly, these suggestions echo past calls for changes to the public sector commissioning of services, made by the House of Commons Public Administration Committee in 2008. It is hoped that the government follows through on the suggestions made in the most recent report of March 2017.

Conclusion

The last few decades have witnessed a move away from government grants towards the use of the contracts and commissioning of voluntary and community organisations. The types of contracts have also changed, with an increased use of PbR schemes, specifically Social Impact Bonds. This chapter has considered these constitutional implications in light of the developments in the financial relations fostered between the state and the voluntary and community sector.

Contracts have now taken over government grants as the main point of financial interaction between the state and sector. Amongst concerns raised by practitioners is the premise that contracts have led to voluntary organisations feeling obliged to provide services based on contract requirements, instead of service design based on local needs. Does current practice threaten the unique characteristics – a so-called 'closeness' with beneficiaries – that have come to be expected of services provided by the voluntary sector? Has the

398 House of Commons Public Administration Select Committee, HC 112-I, 'Public Services and the Third Sector: Rhetoric and Reality', Eleventh Report of Session 2007-08, Vol. I, London: HMSO, Jul., 2008 [accessed via: https://publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/112/112.pdf (06/09/17)]

shift from grants-based financial support to contracts disadvantaged some of the smaller, more localised organisations previously heralded for providing the most bespoke and responsive services? And if so, has this growing reliance on the contracting out of services impact upon the quality of said services? It is a democratic issue that some members of the UK might have access to better statutory services than others.

Concerns also centre on independence and accountability. To a certain degree, so long as the voluntary sector organisations relies on some form of state-sponsored funding stream, grant scheme or contract-based commissioning, actions taken by the state are likely to have some sort of knock-on effect on sector practice or relations. This is unavoidable. Actions going forward should be taken to ensure that this degree of influence is acknowledged and coordinated, and necessary restrictions in put in place where possible.

As Compact Voice admitted in 2013, these developing trends in financial support have raised 'new issues around service design, accountability and independence.'[399] This is particularly true of the current reliance of Social Impact Bonds. In a SIB scheme, the traditional autonomy of the government in decision-making is displaced. This could – and, some have argued, has already – had an impact on the ability of those involved to hold these practices to account. It is now increasingly maintained that public and democratic accountability are now at risk. Is further government autonomy in contracts with voluntary and community sector organisations nec-

399 Compact Voice, 'Understanding commissioning and procurement: a guide for local compacts', Compact Voice, Jul., 2013, p. 9 [accessed via: http://www.compactvoice.org.uk/sites/default/files/understanding_commissioning_and_procurement_guide.pdf (14/08/17)]

essary? Would this help to improve the accountability of service delivery and financial support of the sector?

On the one hand, then, calls for greater government involvement, in the wake of concerns about the displacement of past government autonomy and authority in grants and commissioning, associated with the contracting out of services (for the purposes of this paper, focused on the commissioning of voluntary and community organisations.) Yet on the other hand, in light of several high profile incidents with grants and funding schemes, such as the Olympics scandal and alleged 'plundering' of the Big Lottery Fund, there have been demands for government involvement in voluntary sector activities to be limited.

Clearly, there is room for changes to the way decisions are made in the commissioning process. As illustrated in this chapter, the types of services that are required, and the financial models that can be used for supporting them, are flexible, to a degree. Outside of statutory services, the types of services that are 'needed' within local communities is discretionary. Currently, accountability for these decisions lies with local authorities. Following the premise that voluntary organisations are more 'in touch' with some of the communities in the UK, and are thus often better positioned to provide support, should the 'buck lie with the sector'? Should the voluntary sector be the one that sets its own aims and objectives? Would the current level of state involvement throughout the entirety of the commissioning process allow for this to happen, given the financial dependency of many organisations on government bodies? (This ties into the more general question of whether the sector is limited by the scope and support offered by the state. Is this having a detrimental impact on the quality and type of support being offered to

service users?) The House of Lords Select Committee on Charities proposed that, when and where possible, local authorities should revitalise the role of grants instead of contracts, in order to allow local organisations a greater degree of independence.

The evidence examined in this chapter indicates that government grants serve as a better way of supporting voluntary sector organisations in the delivery of public services. A return to grant funding, where possible, would revitalise the sector and improve independence of thought and action that is so vital to the bespoke services the sector is capable of offering. In turn, British citizens would experience a tangible difference in the quality and nature of services provided, and the state could be confident that it is fulfilling its constitutional responsibilities in the delivery of public services. Given the significant cuts to local government funding, grant funding is not the immediate choice for local authorities, understandably, but where possible, it is hoped that the authorities examine the potential of grant funding. This paper backs suggestions for a revitalised role of grants, particularly core funding opportunities.[400]

It also supports calls for the state – most often, local government authorities – to prioritise impact and social value in decision-making ahead of cost.[401] Public sector commissioners to be required to 'account for' rather than simply 'consider' social value – again, another recommendation put forward by the House of Lords Committee. A renewed focus on 'social value' could help to encourage more sector participation and enable more sector organisations to bid for contracts. This would ultimately enhance the quality and uniqueness

400 House of Lords Select Committee on Charities, Recommendation 23, Paragraph 268, p. 111.

401 House of Lords Select Committee on Charities, Recommendation 16, Paragraph 194, p. 110.

of services, bringing the knowledge of local needs and innovation of the sector to the people. This paper therefore also welcomes the government's new review of the Public Services (Social Value) Act 2012, particularly in light of the plans for extension as outlined by Lord Young of Graffham.

This paper supports these recommendations, and calls for central and local government commissioners to re-consider the suggestions proposed by the NAO. In 2007, the NAO called for a centralisation of the funding structure; greater emphasis on collaboration, coordination, and clarification of the fundamental principles of the funding framework. Ten years on, however, evidence suggests that the commissioning of public services is still inchoate in places: the recommendations made over ten years ago still carry weight. In order to address some of these concerns, it is recommended that more attention is given to collaboration schemes.

Respondents referred to best case studies of successful small-scale approaches to counteracting the impact of total outsourcing. Tameside 4 Good, in Greater Manchester, is an example of a partnership between the local CVS, the council, a housing association and small businesses. Tameside 4 Good donations are distributed via the grant scheme that is committed to issuing grants of between £500 and £3,000 available to disadvantaged individuals and community groups. Tameside Council acts as the corporate trustee, working with the Charity Commission to release a number of dormant local charitable trust funds, acting as a key supporter of the fund. Income from dormant funds have successfully been re-invested back to help local communities.[402] These examples of best practice should

402 Accessed via: http://www.cvat.org.uk/sites/data.t3sc.org/files/docs/grants/Tameside4-Good/Tameside%204%20Good%20Grants%20for%20Individuals%20 Guidelines%202015.pdf (30/01/18).

be celebrated, with success shared and discussed at national and multinational levels.[403]

Another direction could be construct a new framework to be used by local authorities when considering the best services for contracts. Penny Waterhouse suggested a 'formula for practical and principled decisions' which sets out whether the service in question allows for the following: provides for 'own governed' spaces and activities; allows the freedom to speak out, defend and extend civil rights, and tackle state and market malpractice; ensures that the state carries out its responsibilities towards its citizens; provides additionality to, but does not replace state responsibilities; and ensures that the terms and conditions for service provision will safeguard the respective responsibilities of the state and of voluntary action.[404] Another take on this idea would be to set regulations in place ensuring that public services are only procured externally where it can be shown that existing services are failing and where previous attempts to address concerns have faltered. Whatever measures are taken respondents were clear that any redesigning of procurement processes should not be formed on the basis of 'accruing short-term savings in public expenditure.'[405]

403 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015, p. 11. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

404 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 7. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

405 NCIA, NCIA Inquiry into the Future of Voluntary Services, 'Fight or Fright: Voluntary Services in 2015', Jan., 2015, p. 11. [accessed via: http://www.independentaction.net/wp-content/uploads/sites/8/2015/02/NCIA-Inquiry-summary-report-final.pdf (26/09/17)]

Public service delivery

'Participation in the delivery of public services is both the greatest opportunity and the greatest threat facing the voluntary sector today.'[406]

Conservative Party, 2007 Green Paper

The state has a long history of working with voluntary organisations to deliver services for the public. Altruism has manifested itself in the form of relief of poverty, education, healthcare, and support for the marginalised and discriminated against. The notion of independent, voluntary, and benevolent action is deep-rooted in the cultures and religions that make up the present-day UK. Early records show voluntary organisations offering services to the public in 1273.[407]

Although specific terms for non-government organisations are relatively new, there is a longstanding precedent for multifaceted interaction between the state and sector. In fact, up until the establishment of the welfare state, charities were primarily concerned with the provision of social services.[408] There is thus longstanding historical precedence for the involvement of the sector in this way. However, the role of the sector in service delivery has fluctuated over time. The twentieth century witnessed a shift in the types of

406 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 52.

407 Q422 submission, in evidence to the House of Commons Public Administration Select Committee, 'Public services and the third sector: rhetoric and reality', London: PASC, Jul., 2007, p. 9.

408 J. McKay and M. Hilton, *NGO's in Contemporary Britain*, Basingstoke: Palgrave Macmillan, 2009, p. 4.

responsibilities and services provided by the state, and the establishment of the welfare state in the post-war decades. The latter allowed for the development of more proficient social services and health care, and led to the state taking on a significant proportion of the roles that had previously been undertaken by charities.

In 1994, Tony Blair– speaking in his capacity as leader of the Opposition – announced that the state was embarking on a new era of state-sector collaboration: 'It is by casting aside the rigid dogmas of the past, that we begin to see a new and exciting role for the voluntary sector – not an optional extra but a vital part of our economy, helping to achieve many of our key social objectives.'[409] Blair portrayed the sector as an effective vehicle for reaching the people of Britain and making sure that services were tailored to the needs of groups that were previously out of reach of the state.[410] It has since been accepted that voluntary and community organisations can play a vital part in helping government bodies to stay in touch with the British public.

Legal framework

According to official literature, 'public services' are 'services that public authorities normally provide or commission.'[411] This is somewhat misleading. Public services are not always provided by 'public authorities'. Ambiguity surrounding the types of organisa-

409 T. Blair, Nov., 1994, cited in F. Prochaska, *New Labour and The Voluntary Sector*, The Social Affairs Unit, 2005.

410 T. Blair, Nov., 1994, cited in F. Prochaska, *New Labour and The Voluntary Sector*, The Social Affairs Unit, 2005.

411 Introduction – 2012 – Charity Commission Guidance for England and Wales', 2012 [accessed via: https://www.gov.uk/government/publications/charities-and-public-service-delivery-an-introduction-cc37/charities-and-public-service-delivery-an-introduction-and-overview (03/07/17)]

tions responsible for providing public services, and the contention between rhetoric and reality has resulted in confusion and ineffectiveness – something that is discussed in greater detail in the chapter on grants and contracts.

The legal framework for public service delivery is complicated and leaves much to be debated. The guidance for charities operating in England and Wales, published by central government in 2012, referred to this in its response to the question 'What does the law say about charities delivering public services? (legal requirement)' Answer: 'Very little.'[412] Charities are not legally prohibited from taking on state obligations to deliver services to British citizens, and this is also true of services that public authorities have a legal responsibility to provide. According to case law, however, charitable funds should be used 'reasonably and prudently' and 'charities must be independent of government and other funders.'[413] (A point developed later in this chapter.)

Further to this, not all public services that are provided on behalf of the state are legally required. Many legal duties of central and local public authorities are not precisely defined in law. The government is not statutorily obliged to provide the entirety of the services that citizens of the UK currently expect to have access to. Some are provided under discretionary powers instead. They are optional additions to the services to which British citizens are legally enti-

412 Introduction – 2012 – Charity Commission Guidance for England and Wales', 2012 [accessed via: https://www.gov.uk/government/publications/charities-and-public-service-delivery-an-introduction-cc37/charities-and-public-service-delivery-an-introduction-and-overview (03/07/17)]

413 Introduction – 2012 – Charity Commission Guidance for England and Wales', 2012 [accessed via: https://www.gov.uk/government/publications/charities-and-public-service-delivery-an-introduction-cc37/charities-and-public-service-delivery-an-introduction-and-overview (03/07/17)]

tled. Further to this, of the services that the government is legally bound to provide, the law does not always specify the level of services that must be provided.[414] There is thus considerable room for manoeuvrability. Public service delivery expectations are also complicated by the democratic and constitutional promises made by political parties in general election manifestos and government in office annual (or bi-annual) statements. While the promises made to members of the electorate are not legally binding, they are democratically and constitutionally significant. Failure to provide services promised by a prospective government in office presents numerous democratic problems. The delivery of services is therefore constitutionally, democratically, and legally complicated.

It is thus unsurprising that public perceptions and expectations about government responsibilities are subject to change. Public perceptions of what the government should provide move in line with the government in office. The same can be said for expectations of the quality and level of these services offered. Public expectations of the roles of the voluntary and community sector in the delivery of public services also fluctuate. Seen from a historical perspective, public authorities have taken over responsibility for the provision of services that were previously delivered by the voluntary sector, and vice versa, in response to public demands and circumstance. Well-known examples include state education, which only came into existence in the mid nineteenth-century, and health services, provided after the establishment of the National Health Service in 1948. As a result, a significant proportion of the services that members of the public now expect to have access to for 'free' were

414 Introduction – 2012 – Charity Commission Guidance for England and Wales', 2012 [accessed via: https://www.gov.uk/government/publications/charities-and-public-service-delivery-an-introduction-cc37/charities-and-public-service-delivery-an-introduction-and-overview (03/07/17)]

previously administered by voluntary organisations and charities, often geographically-specific and not widely accessible. The type and scale of public service delivery is thus a constantly evolving sphere.

Lastly, it is worth considering the distinction between the sector providing *services to the public* and the sector delivering *public services* on behalf of the state. *Public services* are funded by the taxpayer. *Public services* are also responsible for providing services to British citizens. Service which have been promised to them by the elected government in office. *Services to the public*, in contrast, may provide an invaluable form of support and care to the same British citizens, but they are not delivered on behalf of the state. They have not been guaranteed by the government, and the state is therefore not obliged to provide them. Since 1945 at least, with the establishment of the Welfare State and all the rhetoric that came with this, there has been an expectation or presumption that *public services* are provided by the public sector.

Recent developments

The political, social, financial, and cultural context within which these organisations are now working has shifted beyond recognition, changing the type of work undertaken. The last few decades have witnessed a reverse shift back to a more non-interventionist approach to public service delivery.[415] The sector has taken on more responsibility for the provision of public services. Specifically, this has materialised in the commissioning of services – a marked move away from the use of grants or bespoke procurement. So much

415 For more on the historical development of the sector since the 1950s, see BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC.

so that the Public Administrations Select Committee (PASC) has suggested that commissioning services are now 'the primary tool the Government intends to employ in harnessing the third sector's transformative potential.'[416] In part a product of this, practitioners have also experienced some, or all, the following: an increasing politicisation of the sector and in some cases explicit oppositionalism; an increased dependence on the state as a source of funding and as a consequence of this an increased need to 'target' responses and services; and an increased 'professionalisation' in terms of services, structures and management systems.[417]

These changes have met with hostility. Central to official explanations for these shifts – particularly the rise in contract-based commissioning of the sector – is the premise that the sector brings certain 'qualities' which cannot be provided by public or private sector bodies (as identified in the chapter on characteristics and categorisation.) However, the extent to which service decisions are made based on 'what characteristics are needed to get the best outcomes for users and for citizens'[418] is still disputed. A high proportion of practitioners have reported that the commissioning of voluntary bodies to perform state tasks risks undermining these very qualities. To quote Alex Whinnom, Chief Executive of GMCVO, 'As soon as you start to try to bottle it and package it, you have a risk of losing it.'[419] This is partly due to restrictions in the Action Plans

416 PASC, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 15.

417 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 17.

418 PASC, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 35.

419 Alex Whinnom, Q 411, in evidence to the PASC, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 62.

provided by the Office for Civil Society, which allegedly leave 'very little room for manoeuvrability,' according to a respondent to this research. These concerns have been used by practitioners in their arguments against the use of social clauses. Opponents of the use of clauses, and the commissioning of voluntary services more generally, have maintained that lack of flexibility discourages some voluntary organisations from being involved in public service delivery contracts.

The shift from grant-based support to direct commissioning through contracts has also been criticised as a 'value for money' game. At the heart of this premise, is the suggestion that public sector bodies have prioritised contract-based services to lower costs, putting 'cheapness ahead of quality when evaluating tenders.'[420] This has been justified on the grounds of placing the sector 'at the heart of [the] Government's modernisation and productivity agenda,'[421] but opponents claim that this is just a mirage for 'driving down costs.'[422] Voluntary sector organisations are seen as offering a way of delivering support to hard-to-reach communities, whilst also minimising state costs and management. These remarks are particularly poignant, in the wake of the recent tragedy of Grenfell Tower in June of this year.

It is interesting to note that these arguments mirror questions previously raised in the response to the use of the private sector in service

420 N. Garbutt, 'Sticking to the knitting: the real threat to charities', *Scope NI*, 13 Mar., 2015 [accessed via: http://scopeni.nicva.org/article/sticking-knitting-real-threat-charities (30/06/17)]

421 P. Boateng, Chief Secretary to the Treasury under the Labour Government, quoted in B. Davies, 'The New Labour Years: A history of the youth service in England, Volume 3, 1997-2007, 2008.

422 PASC, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 14.

delivery: issues surrounding accountability, responsibility for contact with the public, maintaining a distinction between public sector and companies that are seeking maximum profits, and the quality of provision – all apply to the use of the voluntary sector.[423] These past debates are helpful when assessing the practical and constitutional implications of renewed emphasis on voluntary sector services.

At the heart of arguments made both for and against the use of sector groups in service provision lies discussions about the types of the services that could be deemed 'acceptable' for voluntary services to administer. Are there certain types of services that should remain the sole responsibility of central and local government? At what point do differences in core values and ideologies render an organisation unsuitable as a contractor, sub-contractor or service provider? To cite the question raised by Penny Waterhouse, writing for the NCIA in 2016, 'Behind these specific questions and dilemmas lies the real contested ground – what do we want the role of voluntary services to be?'[424] The following sections will now consider the constitutional and practical implications of the use of the voluntary sector in the delivery of public services.

423 T. Smedley, 'Can private companies ever prioritise the public service ethos over profits?', *The Guardian*, 2 Apr., 2015 [accessed via: https://www.theguardian.com/public-leaders-network/2015/apr/02/private-companies-public-service-ethos-profits (06/10/17)].; R. Wilson, 'The private sector does not always deliver better value in public services', 12 Dec., 2012 [accessed via: https://www.theguardian.com/public-leaders-network/2012/dec/12/private-sector-not-better-value-services-outsourcing (06/10/17)]

424 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 2. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

Challenges to implementation

There are a number of practical challenges that pose a threat to cross-sector partnerships. Some of the problems already identified by researchers apply to any organisation working with the government, irrespective of sector: changes in legislation, policy and direction; competition within an existing market; lack of understanding of other partners' and sectors' priorities and pressures; inequality in partnership, to name but a few. In addition to these, however, there are specific issues to consider in the implementation of partnerships between the state and voluntary sector organisations.

Changes to conduct have been put forward on an ad hoc manner. One example of this is in the introduction of Section 64 in 1968 by the Department of Health – a grant programme which offered funding for programmes that would improve the existing health and social care provisions in England, acting in a complementary capacity alongside statutory services. This grant system is still in place.[425] Those in favour of the piecemeal development of state-sector relations cite the fact that the sector's innovation can be adopted by the state as a means of enhancing existing services, and providing a better quality for service providers. This practice enables the state to choose services that are supposedly in line with the demands of the public, reinforcing the premise that the sector is more in tune with the people of the UK than the state. According to Ed Miliband, who was formerly Minister for the Cabinet Office, it was through this ad hoc interaction between state and sector that led to the development of present-day children services, that are

425 Department of Health, *Section 64 General Scheme of Grants: Funding Priorities for 2008-09*.

now primarily funded by the state.[426] The PASC described this as an example of 'giving' or 'donor type' relationships. Relationships in which the state adopts and supports an idea or service that was initially conceived from within the voluntary sector.[427]

However, there are also disadvantages to this piecemeal adoption of services. Should the state be taking on services that were originally designed as additional support programmes? Although these services have been 'tried and tested' at a grassroots level, the lack of precedence for services not designed for wider application on a national level – whether statutory or otherwise – could lead to disjointed implementation. Differences across the board could result in incoherence and local discrepancies in practice. Furthermore, regulations administered by the primary VCS organisation might not be applicable or adaptable to national initiatives. Practitioners have referred to instances where new services for which the government has taken responsibility and then contracted out to the sector have failed to ensure that sufficient regulations are in place. As observed by some practitioners, there is also the idea that models that were established to be delivered by voluntary organisations in specific areas might not work as well as a statutory service.

Evidence points towards a professionalisation and bureaucratisation of voluntary sector organisations involved in the delivery of services. Charity leaders have bemoaned that the commissioning

426 Q349 in evidence to the House of Commons Public Administration Select Committee, 'Public services and the third sector: rhetoric and reality', London: PASC, Jul., 2007, p. 10.

427 National Audit Office, *The implementation of full cost recovery*, Jun., 2007.; J. Unwin, *The grantmaking tango: issues for funders*, Baring Foundation, Jun., 2004.; House of Commons Public Administration Select Committee, 'Public services and the third sector: rhetoric and reality', London: PASC, Jul., 2007, p. 10.

process is unduly prescriptive. They maintain that the commissioning process instigated by the state might be preventing beneficiaries at local levels from accessing the very best care and support on offer from voluntary organisations. While this may have resulted in a more coherent structure and framework for good practice, practitioners have expressed discontent over the effects that procurement and competitiveness might have to the very incorporation of the sector is intended to promote. Previously, the voluntary sector was perceived as being run according to central visions of respective trustees that held morality and community values at the heart of their work – and this, importantly, set the sector apart from their private sector, corporate counterparts.[428] However, the recent professionalisation of the sector now threatens independence, and risks distortion of mission,[429] negating official reasoning behind the use of sector organisations. For example, efforts to reduce social exclusion and to improve counter-terrorism measures in some of the more marginalised areas of the UK have been based on the cooperation of the voluntary sector. If little separates them from the state, the government loses this justification for relying on voluntary organisations to perform the tasks expected of them by the British electorate.

It has also influenced the tradition of charitable donations and voluntary aid. Are beneficiaries of certain voluntary organisations less likely to be able to engage with their target audience groups if they are known to be associated with the state? Voluntary organisations originally set up to offer bespoke support and care for members

428 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 39.

429 A. Silvestri, 'Partners or prisoners? Voluntary sector independence in the world of commissioning and contestability', *Centre for Crime and Justice Studies*, London: King's College London, Jun., 2009.

of its local community of its own accord have found themselves working on behalf of the government, suddenly taking on responsibility for the provision of services that have been promised by the government. Instead of being able to respond to the needs of their beneficiaries, those working within the charity sector have bemoaned that they have instead had to refer to their unique selling points. Milbourne and Cushman have reinforced these concerns, referring to the extension of governable terrain to support the premise that traditional trust-based relationships between the state and sector are in jeopardy.[430]

Voluntary organisations have also been prevented from performing their work by restrictive regulations already in place. Existing rules on service delivery are based on the assumption that contracts are performed by single organisations. In one case explored by researchers Lawrie and Mellor, a local authority hoping to work in partnership with another party on a procurement case were prevented from discussing their bid with any other potential bidders in the procurement terms of the contract.[431] The authority was therefore unable to work in partnership when putting forward a procurement bid. Similar bureaucracies and regulations have made it impossible for non-government organisations to work together in designing prospective public services. This is constitutionally problematic – both on paper and in practice – given the context of state rhetoric of state-sector collaboration and the contracting out of services.

430 Carmel and Harlock, 2008, cited in L. Milbourne and M. Cushman, 'From the third sector to the big society: how changing UK Government policies have eroded third sector trust', *Voluntas: international journal of voluntary and nonprofit organisations*, 2012, p. 9.

431 Lawrie and Mellor, 2013, p. 27 in H. Kara, TSRC, Working Paper 126, 'Third sector partnerships and capability building: what the evidence tells us', TSRC, Sept., 2014, p. 11.

Arguments have been made that the UK system of governance and existing legal arrangements are not set up to support state-sector partnerships.

'Filling in the gaps'

Another of the main critiques of sector delivery of public services rests on the idea that organisations are simply 'pick[ing] up what the State is walking away from.'[432] The role of the sector in 'filling in the gaps' is not necessarily seen negatively. The sector itself has endorsed claims that the sector can not only fill in the gaps, but is better at spotting the gaps in services. This can be traced back historically to the establishment of the hospice movement, which introduced end of life care at a time when hospitals offered no such service, according to an academic interviewed for this research.

However, others have used this practice to complain that the sector is stepping in to account for inadequate public sector provisions in the area. In particular, deficiencies in social care and health care facilities are particularly rife. According to the NCVO's most recent figures, almost of fifth (18.2 per cent) of all voluntary organisations focus their efforts on the provision of social services. In 2012-13, 29,103 voluntary organisations recorded social services as their principle areas of activity.[433]

If there has been a 'rolling back' of state responsibilities, this needs to be officially recognised. Members of the electorate vote on the grounds that their chosen party will provide them with sufficient

432 Written evidence from People and Work Talwrn to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', Report, March 2017, as quoted on p. 18.

433 R. Keen, 'Charities and the voluntary sector: statistics', House of Commons Library, Briefing Paper, Number SN05428, Jul., 2015, p. 7.

and adequate statutory services. At no point have governments in office officially announced a shift in state rhetoric or commitment to the provision of services. Regardless of whether tangible changes to services are felt at local levels, changes to the type of service provider could result in considerable differences in complaints procedures and internal governance schemes. These could have a direct impact on the quality of services delivered to beneficiaries.

Of course, the sector is not 'forced' to compensate for failures in the state provision of certain areas of support. However, evidence does suggest that some decisions predominantly at local levels by local government authorities – but also central government in certain cases – are made on the assumption that sector organisations will be there to 'pick up the pieces'. The BVSC's report concluded that government reductions to funding and resources have had a detrimental effect on the ability of local government to provide much-needed services.[434] The report suggested that the government had been able to do this, on the grounds that the voluntary sector would simply pick up the slack. Respondents acknowledged, some begrudgingly, that as a result, 'the VCS (voluntary charity sector) would need to be more responsive to the needs of the communities as gaps in public services become clearer.'[435] This reinforces the argument that the voluntary sector is now increasingly expected to pick up the pieces, providing services (particularly in the social and health care spheres) that have purportedly been overlooked or under-funded by government.

434 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 39.

435 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 39.

Needless to say, this is a matter of constitutional significance. First and foremost, because it suggests that areas of weakness and failure on the part of state bodies are not necessarily being addressed. The sector merely serves as a Band-Aid. Instead of tackling the root causes of problems and taking responsibility for them, the state casts off accountability to the service providers operating at grassroots levels. Second, and as observed by the BVSC in 2012, 'the voluntary sector is being invited to compete with the private sector as a delivery agent more sensitive to the needs of local people.'[436] What does this say about the efficacy of the government, in its representation of the British people? Is this not one of the core tasks of the government and Parliament, as a democratically elected body of representatives? Does the rise in the number of voluntary sector organisations taking on contracts indicate ineffectiveness in tailoring public services to fit public needs and demands?

The economic benefits of contracting services out to sector organisations has led some to suggest that the state takes advantage of the sector. It is widely understood that the voluntary sector serves as a cheaper alternative to those operating as part of the public or private spheres. Admittedly, efforts have been made to address any differences in funding and treatment of voluntary bodies. Initiatives have been introduced to counterbalance possible disadvantages. For example, voluntary organisations contracted to provide public services can now apply for payment of the contract ahead of completion, if they lack the necessary resources beforehand. However, consensus amongst practitioners remains that these measures have done little to address the struggles facing organisations, particularly smaller and medium-sized charities.

436 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', BVSC, Newman University College, 2012, p. 34.

This not only puts the voluntary sector at an unfair disadvantage, when bidding for contracts and implementing systems successful contracted services, but it also serves as a constitutional problem. The premise follows that the government is relying on bodies that might be lacking the resources and funds to provide the support and facilities promised to members of the electorate. Without the necessary personnel, time, resources and funding, can members of the public be confident that the quality and delivery of services is sufficient? Some critics have questioned the quality of the services provided by the voluntary sector, referring to the initial struggles faced by some smaller charities and the need for extra mechanisms in place to counteract financial concerns. In spite of the additional measures established which offer charities payment in advance, they have queried the ability and capacity of these organisations to deliver satisfactory services to those in need.

There are issues with the fact that the state is becoming increasingly dependent on a sector that depends on individual donors as the sector's single biggest source of income. According to NCVO data, in 2012-13, individuals (taken to include money raised via donations, memberships, legacies, fundraising and charitable trading – accounting for almost half (46 per cent) of the sector's total income, at £18.8 billion.[437] Based on the premise that the state relies on services provided by the sector – in the form of commissioned contracts, but also bespoke support in areas that are lacking suitable support mechanisms – the state is also relying on private funding from individuals who are already paying taxes. Donations to charities, in this sense, are serving as additional taxation. Are donors sufficiently informed of the fact that their contributions to

437 B. Keen, 'Charities and the voluntary sector: statistics', House of Commons Library, Briefing Paper, Number SN05428, Jul., 2015, p. 14.

voluntary organisations might be helping to fund services that have to be delivered on a statutory basis, irrespective of their donation? Registered charities are required to publish all information relating to funding, donations, constitution, and governance in their Annual Reports, which are made available to the public. Is the information included in the reports easily accessible?

Similarly, the reliance on volunteers to perform key roles in public service delivery is also an issue. Respondents referred to a blurring of the boundaries between professional and voluntary positions, with examples of Ambulance Service First Responders and police officers working voluntarily to man libraries in their communities. The dearth of volunteers available, together with a reliance on the roles performed by volunteers, represents a constitutional issue, if the government expects certain jobs to be undertaken irrespective of the types of individuals responsible. Furthermore, representatives of Age UK Runnymede and Spelthorne argued that charities that are relied upon to deliver services are those most at risk of falling behind.[438] It is just not possible to compel volunteers to work. Reductions in income streams available from the state has left charities even more dependent on voluntary support. As part of the evidence submitted to the House of Lords Committee in 2016 and 2017, witnesses claimed that there was a very real possibility of an over-reliance on volunteers, which risked undermining the success of charities and, simultaneously, impeding the progress of the government in relevant areas.

Broader questions about the reliance – or alleged 'over-reliance' – on volunteers are worth discussing briefly. Convincing arguments

438 Written evidence from Age UK Runnymede and Spelthorne to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, HL Paper 33, Mar., 2017, p. 63.

can be made against the use of a volunteerism test for determining the limits of charitable activity (discussed earlier in this paper). Not least, because some organisations which rely almost exclusively on volunteers perform what some perceive to be statutory responsibilities. The Royal National Lifeboat Institution serves as an example of a charity that relies on volunteers to perform an essential service to the public which the state has not chosen to replicate – as does the RSPCA,[439] Mountain Rescue England and Wales, and local air ambulance services, to name but a few. Should these organisations be placed within the same broad category as charities which deliver localised services that supplement state provisions? The use of volunteers is also problematic when approached from a legal perspective. Charities do not need to establish any formal agreements with their volunteers as they do for employees. They are also under no obligation to deal with discipline issues or grievances that may arise, although it is often advised that some sort of internal complaints procedure is drawn up.[440] In the absence of statutory guidelines, volunteers have little to no formal rights, and may find themselves without satisfactory means of voicing complaints. As explained in NCVO guidance literature, volunteers are treated as members of the public. Charities are required to offer health and safety protection, but any other issues that are ordinarily covered by

439 K. Morley, 'RSPCA will keep powers to prosecute animal abusers, Government rules', *The Telegraph*, 7 Feb., 2017 [accessed via: http://www.telegraph.co.uk/news/2017/02/07/rspca-will-keep-powers-prosecute-animal-abusers-government-rules/ (04/01/18)]

440 L. McLynn, 'Q&A: Charities, volunteers and the law', *The Guardian*, 3 Sep., 2009 [accessed via: https://www.theguardian.com/society/2009/sep/03/charities-volunteers-employment-law-advice (04/01/18)]

employment legislation are not applicable.[441] This is constitutionally important in cases where volunteers are involved in the provision of essential public services that some would argue some be the responsibility of the state-funded organisations and employers.

'The public services you didn't know were run by charities'[442]

As observed by social researchers Alcock and Kendall, the boundaries demarcating the two spheres are 'multi-layered and dynamic, influenced both by horizontal and vertical policy environments.'[443] As a result, it is not often clear who is responsible for administering public services. In May 2016, the *Guardian* published an article entitled 'The public services you didn't know were run by charities,' aimed at challenging readers' perceptions of the voluntary sector.[444] The article drew attention to services that are shared or, in some cases, provided solely, by the voluntary sector. Ten of the 'essential' services – according to the author – included: ambulance services, housing, legal or advocacy advice, health and social care, child sexual exploitation services, probation services, community

441 NCVO, 'Volunteering – what to do if things go wrong', NCVO [accessed via: https://www.ncvo.org.uk/ncvo-volunteering/if-volunteering-goes-wrong#rights (04/01/18)]

442 N. Slawson, 'The public services you didn't know were run by charities', *The Guardian*, 20 May 2016 [accessed via: https://www.theguardian.com/voluntary-sector-network/2016/may/20/10-public-services-run-charities (22/06/17)]

443 Alcock and Kendall, 2011, cited in L. Milbourne and M. Cushman, 'From the third sector to the big society: how changing UK Government policies have eroded third sector trust', *Voluntas: international journal of voluntary and nonprofit organisations*, 2012, p. 8.

444 N. Slawson, 'The public services you didn't know were run by charities', *The Guardian*, 20 May 2016 [accessed via: https://www.theguardian.com/voluntary-sector-network/2016/may/20/10-public-services-run-charities (22/06/17)]

transport, therapy and mental health services, search and rescue, and sexual health services.

Research based on qualitative data supports these findings. Interviews conducted with sector practitioners by BVSC in 2012 revealed that respondents had noticed a significant shift in the line of work and treatment of the sector; an 'unprecedented assault on local government.'[445] They referred to widespread confusion surrounding the boundaries of state work and questions about 'who does what' and 'who is responsible for delivering services.'[446] Taking the case of probation services, for instance, the system was revised in 2014, which resulted in 70 per cent of the work contracts (worth £450 million) being won by providers operating outside the public sector. This included a large proportion of charities, working collaboratively, or independently to help run the government's probation programme. In contrast, community transport provision is run almost exclusively by charities. Buses have been made available to help members of communities – primarily the elderly and disabled – to overcome loneliness and isolation. When Essex County Council cut bus routes on the island of Canvey, a local charity set a community transport bus service to replace it. In the face of cuts to bus routes and an ever-growing ageing population, this work is set to be even more essential in future years. One respondent interviewed for this paper claimed that this example serves to demonstrate the fundamental principle driving the Big Society initiative. The use of the voluntary sector to pick up where the state left off supports the argument made at the time that 'the state didn't

445 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 39.

446 BVSC, 'The voluntary sector: changing priorities, changing ideologies', Newman University College, BVSC, p. 39.

need or couldn't afford to have a 'Big State', where the voluntary sector could pick up the pieces.'[447]

Resulting problems with the quality or accessibility of services are frequently the subjects of media headlines, particularly issues relating to state education and NHS bodies. Critics have referred to examples of NHS-run hospitals appealing for money for radiotherapy equipment, and state schools hosting fundraising events that would have previously been used to pay for school trips and extra-curricular activities to instead pay for essential equipment. The *Guardian* noted that one school in Sheffield launched a fundraising campaign to raise the £100,00 required to fix the roof of the main school building,[448] while another school in Brighton relied on fundraising to pay for every single computer. One example that is particularly pertinent is the use of food banks – particularly in the face of dramatic increases in the number of people dependent on food banks in recent years. According to the latter line of argument, if charities stopped providing these services, people in need would be left with nothing. What would have to happen to force the government to take on responsibility in these areas? How bad would the situation have to be for this to happen? And how many people would suffer in the meantime?

The adoption of public services that were previously provided by government bodies – at least in living memory of British citizens –, and vice versa, has clearly led to some form of a blurring of the distinction between 'state' and 'voluntary' work. The recent

447 Evidence given by a respondent to this paper.

448 J. Harris, 'We carry on giving, but isn't charity an office to basic dignity?', *The Guardian*, 21 Apr., 2017 [accessed via: https://www.theguardian.com.commentisfree/2017/apr/21/charities-omnipresent-where-next-begging-bowl (30/06/17)]

shift from grants to contract-based commissioning has exacerbated these problems. Service provision is now often co-constructed with central and local government authorities. This heightens growing confusion. In evidence submitted to the PASC, the example of work undertaken by the Royal Philanthropic Society (RPS) was used to demonstrate this. The former RPS originally offered pioneering rehabilitative services for ex-offenders dating back to 1788.[449] This service developed into the present-day probation services, that have now been subsumed within the array of services that the state takes responsibility for.

The fluidity of service providers threatens the transparency of the system, leading to insufficient levels of public awareness of the types of organisations providing what are assumed to be 'public' services. This is therefore an issue of democratic accountability. It is constitutionally problematic that the public might not be sufficiently informed on what it can reasonably expect to get from their taxes, what they are entitled to as taxpayers and British citizens, and how these services are provided.

These discussions also raise questions about what is meant by 'essential', and who is – and should be – in a position to make decisions on statutory services provided. Who gets to decide which services are classified as 'essential', and which can be cast aside as 'extra'? Search and rescue teams are a particularly good case in point. The Royal National Lifeboat Institution (RNLI) provides search and rescue and lifeguard services, operating around the clock in both the UK and Ireland. National and local authorities rely on these services – in fact, in recent years they have provided

449 In evidence to the House of Commons Public Administration Select Committee, 'Public services and the third sector: rhetoric and reality', London: PASC, Jul., 2007, pp. 9-10.

vital support in episodes of localised flooding – and yet there is no public service alternative. Does this not constitute an 'essential' service? In another example, cited by the *Guardian*, it was revealed that between 2014-15, £57.6 million was spent by England's 10 ambulance services on private or voluntary services due to increase in demand and pressures to meet targets. If these charities did not exist, would this have a detrimental impact on the ability of the state to provide adequate emergency services? Or would they be forced to intervene? In this scenario, the quality of services would undoubtedly be affected. If these charities didn't exist, would the state be forced to take responsibility for similar such provisions? The presence of charities working in areas like mountain rescue surely takes the pressure off considerations for the involvement of central and local authorities in the funding or delivery of these services. Does the work undertaken by charities in unfunded and overlooked services undermine campaigning efforts, and serve to disincentivise government interest in these areas?

What of the suitability of service providers? Are there some services which voluntary organisations would not be suited to providing? Seamus McAleavey, Chief Executive of the Northern Ireland Council for Voluntary Action, has suggested that there are some services that should only be delivered by voluntary sector organisations. He referred to the prison system in Northern Ireland, where support services for prisoners and their families that were originally provided by Quakers, have recently been procured by the Prison Service, and the contracts have since been won by a private company. According to McAleavey, in instances like this, 'no mat-

ter how good that private company is, it is not the appropriate body to deliver that type of service.'[450]

Although the government has not ruled out specific services that would be unsuitable for sector provision, state officials have suggested, unofficially, that it would be highly unlikely for the voluntary sector to be allowed to run certain services. Ed Miliband, for example, admitted when questioned by the PASC, that the Fire Service would not be run by the third sector. At least during his political career.[451] There is logic in the argument that some services should keep a uniformed pattern of activity and appearance, for consistency and familiarity. The emergency services and defence networks, for example, rely on appearance and public trust. This might be undermined, should the state contract out services to different organisations.

In its 2007 report, PASC asked about the processes used to judge whether it is appropriate for services to be provided by the third sector in specific cases.[452] As it currently stands, the answer to this is still unclear. Despite unofficial claims for individual Ministers that some areas are 'off limits', there has been a reluctance to put this in writing. Change in practice takes place on an ad hoc, incremental basis. It is partly dependent on independent state ministers in office, and Cabinet Office at the time. This begs questions about *who* should be in charge of making the final decisions about which

450 Seamus McAleavey, Select Committee on Charities: Correct oral evidence: Charities', 8 Nov., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/43318.html (11/09/17)]

451 Q 347 in evidence to the PASC, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 19.

452 Public Administration Select Committee, 'Public services and the third sector: rhetoric and reality', PASC, 2007-08, 2008, p. 21.

services should be contracted out, and which should remain in the hands of the authorities? If one follows the premise that the voluntary sector has a better understanding of the local and individual needs of members of the public, then surely the sector should have a say in the final decisions being made? How far can one extend the argument that the sector is better equipped to look after the public? Is this not what Members of Parliament are elected for? To represent their local constituencies and individual within it?

Independence and transparency

Clearly, based on the evidence discussed in this chapter, the use of the sector in the delivery of public services threatens to undermine the alleged degree of separation between the two sides. These issues relate another inherent problem with the position of voluntary sector organisations operating in conjunction with the state and private sphere. It is another clear illustration that the boundaries between state and sector are unclear in places. The voluntary sector lies on the borders of several spheres of activity: there are numerous overlaps with the state, the market, and the family. This confusion invariably translates at local levels. As already discussed, the idea that some service users might not realise where they are getting their services from – be it a state body or voluntary organisation – can be problematic in the face of malpractice, owing to differences in complaints procedures and protocol.

Although there is historical precedence for this cross-over in state and voluntary remits, the shift from grants to contracts, and the rise in the number of organisations providing 'public services' on behalf of the state heightens existing questions of legitimacy. Commissioned by the state and contracted to provide services on its behalf, voluntary organisations are now often inter-related to

both central and local authorities. This not only leads to questions about the constitutional role of the voluntary sector, but also raises concerns about declining independence of the sector. Independence from the state is one of the defining features of the voluntary and community sector. Yet research carried out by the National Programme for Third Sector Commissioning found that 37 per cent of the participating organisations were concerned 'about the effect delivering public services had on their independence.' Of the same study, 41 per cent were 'worried about conflicts of interest between their role as service provider and their role as an advocate for service users.'[453]

It is concerning that service users and beneficiaries of either side of the partnership are unclear as to the core values and objectives of the body working with them. For example, is it clear to the members of the electorate that the government uses voluntary organisations as a means of providing vital services for the public? In the current climate of indisputable animosity towards the charity sector from some sections of society – in the wake of the Kids Company closure and numerous fundraising scandals – would knowledge of the use of charities in the delivery of *statutory* services have factored in the voting decisions of the people?

What of the boundaries of the state? Has the voluntary sector has become an established part of the machinery of governance in the UK? And if so, is this role sufficiently recognised? Is the voluntary sector actually a sub-section of the state? Can it be seen as a separate entity? What separates the voluntary organisations providing public services on behalf of the government from the public bodies and

453 National Programme for Third Sector Commissioning, cited in C. Hughes, 'The role of the third sector in delivering and improving public services', York: HACT, Mar., 2010, p. 4.

private organisations providing the same, if not identical, services? At what stage do voluntary sector organisations, used to provide seemingly identical services to those previously delivered by state bodies, become mere extensions of the public authorities? When do they become another state auxiliary? These are some of the questions already considered by the existing literature on these topics.[454]

Accountability

The fact that sectoral boundaries are not always clear-cut also complicates lines of accountability and responsibility. Difficulties in demarcation of responsibilities and 'territories' have been realised in problems with decision-making, accountability in the face of complaints and failures to deliver, and government of the partnership. Where is the line of accountability in these instances of quasi-government roles being adopted by sector organisations? Where does the responsibility and accountability for these services lie? What falls within the remit of state power and responsibility? There was general consensus amongst respondents that it is not always clear which body is liable, in the face of malpractice. One practitioner gave the example of leisure facilities. Local authorities typically shift responsibility for leisure services into separate Leisure Trusts, some of which rely on the services of voluntary organisations. In the case of malpractice, respondents were not sure whether accountability lies with the provider of the service or the contractor.

454 Carmel and Harlock, 2008, cited in L. Milbourne and M. Cushman, 'From the third sector to the big society: how changing UK Government policies have eroded third sector trust', *Voluntas: international journal of voluntary and nonprofit organisations*, 2012, p. 9.

Interestingly, one school of thought suggests that the 'incorporation' of voluntary organisations into the machinery of government through commissioning and outcome-based contracts has actually helped to improve levels of accountability. It has been suggested that public service contracts have 'Formally integrated through clearer accountability expressed through contracting for services and adopting management styles and strategies imported from the private sector.'[455] On paper, this makes sense: professionalisation might address inchoate procedural arrangements, encouraging greater emphasis on management, outcomes, and measurable targets that have helped to deal with complaints and incidents.

However, in practice, the majority of practitioners complain that this trend has actually weakened accountability. There have been rising concerns about inconsistency in complaints procedures. Differences in systems of regulation and governance have the potential to result in some recipients of services being eligible for better compensation or support in cases of malpractice than others in the same predicament. In the case of complaints or incidents, for instance, practitioners have questions whether service users are fully aware of complaints procedures in place. Is it clear to members of the public that these services are not provided for by the government? Who oversees these services to ensure that complaints protocol is satisfactory, and in keeping with procedures in place for public service equivalents? It is problematic that even if the standards are in line with similar service delivery in other areas – in this case, other bus routes provided by the Council – customers using the bus in one area are subject to different systems of complaints and accountability to those using a bus ten miles away in the same

455 BVSC, 'The voluntary sector in transition: changing priorities, changing ideologies', Newman University College, BVSC, 2012, p. 17.

local authority. Opponents of the shift from grants to contracts have argued that contracts have provided the government with a way of shifting the accountability from the state to the sector. The move to contractual agreements with the voluntary sector has shifted the type of accountability. Voluntary sector organisations working as contracted suppliers are no longer subject to direct political accountability.

Alarmingly, these problems with accountability were acknowledged by PASC in an issues and questions paper on 'Commissioning Public Services from the Third Sector' in 2007. Over ten years ago, then, it was recognised that the shift towards contractual agreements might result in difficulties with replacing direct political accountability. As part of its inquiry, the Committee asked the following questions: 'Is loss of accountability a threat of commissioning services? If so, how can this best be managed? Will close involvement with service provision prevent third sector organisations retaining the ability to be critical of government? Is there a risk that third sector organisations will lose their independence, their identity or their distinctive ethos? Does the state risk losing control of service delivery in a way which might be damaging?'[456] The last question in particular is particularly relevant to the current line of inquiry. It touches on a democratic issue. When members of the British public exercise their democratic rights and vote for their chosen government, they do so with the assumption that the democratically elected government will have authority and control over the services it is statutorily – and discretionarily – expected to provide. There is little evidence to suggest that these questions have been answered in the ten years since publication. Clearly, more work needs to be done to ensure

456 Public Administration Select Committee, 'Commissioning Public Services from the Third Sector: An Issues and Questions Paper', PASC, Mar., 2007.

that there are effective and comprehensive mechanisms for holding service providers to account.

In addition to operational concerns, there are also theoretical problems which directly undermine some of the key principles of constitutional practice in the UK. One of the main responsibilities of the state is to ensure that the needs and rights of British citizens are met, as individuals and as a whole. Public services fall within this requirement. In contrast, voluntary organisations are under no legal or constitutional obligation to provide any such services. Although historical precedence might encourage some to expect a certain degree of support from voluntary groups, it should not be assumed that voluntary organisations are there to provide any such service, nor are they in a position to accept any such duties. There is no form of democratic accountability for services provided by the voluntary sector – and the private sector for that matter. This is the sole responsibility of the state, as a democratically elected entity. In fact, Penny Waterhouse – writing on behalf of the NCIA – used this point to argue that 'Voluntary services cannot be relied on, structurally or operationally, to meet these responsibilities.'[457] Waterhouse put forward a convincing argument: the very nature of the 'voluntary' work undertaken by sector organisations is that they are discretionary, not statutory. They are not legally bound to deliver them. Following this reasoning, is it constitutionally acceptable to allow either voluntary or private sector organisations to administer statutory services, given that members of the British public have not had any say in the development, maintenance, and make-up of these institutions? As this paper has unfortunately demonstrated,

457 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 5. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

the stability and security of present-day voluntary organisations is at the mercy of the state and market.

Conclusion

Although there is a long history of voluntary organisations providing the public with services of some kind in the UK, recent developments have ensured that the sector now performs a central part in the service design, provision and responsibility of public services. The UK government relies on the sector to provide a certain proportion of services on its behalf. This is easily demonstrated in the growing number of contracts between government bodies and sector organisations, but also in the clandestine responsibilities entrusted to charities and community groups.

The rise in state-sector contracts has been justified in several ways. The use of voluntary sector service providers is based on the idea that there is something intrinsically different in scope and approach of sector organisations. As Lord Adebowale has stated: 'Delivering services to the public is not the same as becoming a public service.'[458] Voluntary and community organisations are often pitched as being better at reaching 'hard-to-reach' communities than state counterparts. As a result, they are described as being more in tune with beneficiaries, and therefore able to provide more bespoke services that represent the needs of the people. Others have argued that the use of sector organisations helps to improve productivity. In other words, there is a financial incentive underlying the use of sector organisations to deliver certain services.

458 V. Adebowale, 'It's the services that matter, not ideology', *Community Care*, 1 Sept., 2015 [accessed via: http://www.communitycare.co.uk/2005/09/01/its-the-services-that-matter-not-ideology/ (06/09/17)]

However, in reality, evidence suggests that voluntary sector organisations often feel like they are being 'taken advantage of,' to quote several respondents. One of the primary concerns raised by commentators is the premise that the state has begun to take advantage of the sector as a 'filler of gaps'. This idea rests on the critique that the rise in sector provision of services is the product of inadequacies of the part of the government. This chapter has revealed instances where community groups have felt obliged to take on services that were previously the responsibility of local authorities, in response to cuts to services and resources. These claims are particularly problematic in situations where sector organisations are taking on services considered 'essential' or 'statutory', such as mental health services. There have been cases where members of communities have been left without services which they would deem to be 'essential' to their physical or mental well-being. Is it constitutionally acceptable for government authorities to curtail funding or service provision, on the assumption that voluntary organisations operating in the area will 'pick up where they left off'? This is constitutionally and democratically problematic, if members of the British public were not given sufficient information and prior warning to these cuts. Greater transparency in these situations may have resulted in different voting patterns.

Issues also revolve around the reasons behind the gradual increase in the number of services provided by voluntary and community organisations. Is the state relying on the sector to perform essential tasks that the state has previously been responsible for, as a means of delegating control, and freeing up government resources and finances? One respondent was keen to point out that there have been mutually-beneficial cases where the sector has taken over state-run services. The Rivers and Canals Trust was mentioned as an example

of this: Formed in 2012, the Trust took on responsibility of canals, rivers and docks in England and Wales that were previously run by a government-owned operated, British Waterways.

However, this appears to be an exception. The majority of respondents referred to complaints that services are being cut by the state on the assumption that they will continue to be administered on an ad hoc basis by voluntary organisations in those localities. It is problematic that financial decisions might be being made based on a questionable reliance on voluntary organisations – groups that are indebted to the support of individuals, volunteers, and pro bono contributions. It is also an issue that contract decisions – usually made by local authorities – are based on financial considerations instead of quality of service.

Another problem relates to the idea that the shifting of responsibility often takes place on an ad hoc basis. If a sector organisation has successfully bid for a government contract, this is, of course, constitutionally legitimate (although there are separate problems that can occur in these situations, as explained in the chapter on grants and contracts.) However, as the evidence in this chapter has revealed, sector provision of services is not restricted to services that have been officially commissioned or contracted out. This leads to inchoate and inconsistent service delivery, with some areas of the UK left unsupported. This is constitutionally significant, given that members of the British public are legally entitled to receive the same level of state support if they meet the legal criteria.

Furthermore, piecemeal adoption of public service has heightened confusion surrounding implementation and provision. Beneficiaries are not necessarily aware of the origins of the services provided, which is a matter of democratic importance. Evidence suggests that

the use of voluntary organisations to deliver essential or statutory services puts undue pressure on time, finances and resources on smaller organisations that might not be able to cope. If smaller, localised charities cannot provide the services expected of them, this surely negates the use of sector organisations in the first place, if the quality or delivery of services is adversely affected. Piecemeal adoption has also led to concerns about disjointed practice, overlaps and duplication of the same services, lack of consistency across the country, and inconsistency in complaints procedures, safety measures and baseline assessments. It could result in services that were originally designed for one locality being used across the country, despite not being suited on a national scale.

Increasingly, there are instances where members of the public or beneficiaries are unable to establish the origins of services being provided: whether they are delivered by a government body, on behalf of a government body, or independent of the state. Considering the system of UK governance and democracy rests on the principle of transparency, this is significant. Members of the British electorate are entitled to know how and why the government makes decisions; particularly when it comes to the decision-making that influences how the money from their contributions as taxpayers is spent. Members of the public have a right to know how their money is being spent.

Irrespective of whether state responsibilities can be identified from contracts and regulations outlined in UK legislation, if members of the British electorate are not able to easily establish spheres of state responsibility, this represents a serious democracy issue. The blurring of the distinctions between the two sides poses a threat to the independence, transparency, and accountability of the services

being delivered and, more generally, both state and voluntary providers. At what point does a body stop being a charity and become merely a public sector deliverer? This was a question asked by Peers during an evidence session run by the Select Committee on Charities in 2016. The respondent, Lord Hodgson of Astley Abbotts agreed that there were difficulties in establishing when an organisation ceases to be a charity. The existence of volunteers, it seems, is a distinguishing feature.[459] Similar questions have been discussed in academia from a theoretical standpoint, as in the work of David Billis.[460]

Moving forward from these discussions, this paper offers a few points of action. In terms of recommendations, for some of the respondents to this project, the voluntary sector should not be participating in the delivery of statutory services. The use of the voluntary sector in the delivery of statutory public services jeopardises one of the fundamental principles of the British system of governance: the belief in public services run by publicly accountable institutions.[461] Members of the National Coalition for Independent Action, in particular, firmly maintained that voluntary organisations are here to offer *complementary* services. The sector serves to question, challenge, and, where necessary, provide additional support to existing services administered by public bodies. It is not responsible for replacing the state in any area of service delivery. This not only threatens practice at a practical and operational level, but

459 Lord Hodgson of Astley Abbotts, Select Committee on Charities, 'Corrected oral evidence: Charities', 1 Nov., 2016.

460 D. Billis (ed.), *Hybrid organisations and the third sector: challenges for practice, theory and policy*, Basingstoke: Palgrave Macmillan, 2010.

461 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 3. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

also compromises the role of voluntary organisations as democratic oversight bodies – a subject discussed in greater detail in the chapter on advocacy.

While this argument does raise a number of important constitutional problems with voluntary service provisions, it does not offer a viable solution to the issues discussed. In the current financial and political climates, it is unlikely that voluntary sector organisations will begin to turn down public service contracts and commissioning opportunities. More practical solutions include some of the following suggestions.

Levels of transparency in operations and relations could be improved by the implementation of a better system of communications. Attention should be given to guidance literature available to the public. Information should outline the details of service delivery and any changes to the type of service provider – irrespective of whether the type of service delivered is being altered. It needs to be readily available and clearly explained to all citizens that could potentially be affected. All of these improvements require concerted commitment on the part of state authorities.

Following discussions about the types of services that are best suited to being incorporated into the work of the voluntary sector, this paper also recommends that guidelines are put in place detailing the types of services that can be contracted out to the voluntary and private sector. There is a clear need for an official document – approved by both state and sector representatives – outlining boundaries and guidelines, and delegating responsibility for decision-making.

In terms of accountability, it is alarming that the questions asked by the PASC over ten years ago still need to be resolved. How can loss

of accountability be managed? Does the state risk losing control of service delivery in a way which might be damaging? What are the implications of this on the experiences of beneficiaries? It is hoped that the report of the PASC will be re-considered and re-examined. The state would benefit from a re-examination of the 2007 PASC report, and ensure that the government gives an adequate response, in light of recent shifts in state-sector relations.

This paper also calls for more serious consideration of the operational problems associated with service delivery. There are a number of important questions that remain unanswered or unprobed by experts and practitioners. The limitations of the use of voluntary organisations need to be discussed in greater detail. Although the sector has been involved in contracts with the state since the 1980s, there has been a rise in the commissioning of voluntary organisations. This trend and the repercussions of this development have not been adequately analysed. There is a risk that local authorities may become dependent on voluntary organisations in the provision of statutory services that the government, on paper, are officially responsible for. Would the government be able to introduce cuts to funding if they didn't have the services provided by voluntary organisations to fall back on? Are local authorities becoming reliant on the voluntary sector to perform tasks that fall within the remit of local and/or central government? At what point does this reliance on voluntary bodies become too much? Are safeguards in place to address cases where voluntary organisations were beginning to be taken advantage of? Are there guidelines and procedural arrangements that outline the boundaries of the roles that are performed by the sector? What constitutes 'too much' work being performed by these bodies? These questions need to be subjected to further scrutiny by practitioners and state representatives.

Local government and devolution

Relations fostered between the state and the voluntary and community sector are influenced by local dynamics and devolved systems of governance. The diversity and complexity of the local government infrastructure complicates state-sector relations. An understanding of how these systems of governance affect and sculpt sector practice is therefore essential to any study of the voluntary sector.

A number of trends have developed in recent years. Academics have traced the increasingly prescriptive treatment of local authorities by central government. First identified with the Local Area Agreements, and later the Comprehensive Performance Assessment, commentators have criticised these developments for the alleged 'downgrading' of local Compacts. As explained by Zimmeck et al in 2011, 'in a system where performance is prescribed and meeting targets is mandatory why should local authorities be interested in an agreement [the Compact] that does not have to meet central government requirements or does not require them to demonstrate that they have met targets?'[462] Another change felt acutely by sector organisations has been in the reduction in local government grants and support for the voluntary sector, realised in both number and monetary value. Practitioners have also noted a shift in the dynamics of relations between local government authorities and those

462 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 132 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

working in the sector, with an increase in use of local voluntary services in the wake of cuts to state provision.

Developments in devolution have also added to existing complexities. The last two decades have seen continued and renewed efforts to establish greater autonomy away from Westminster. In 2017, mayoral elections established another layer of devolutionary power in the South West, Midlands, and North-East regions of England. Although some suggest that devolution offers new opportunities for better sector delivery, it also has the potential to undermine the coherence in the application of policies, interactions, and approaches to sector engagement and interaction with the state, if not treated with due caution.

Local government and the voluntary sector

The majority of state-sector engagement and work takes place in the localities. To a certain degree, then, local government interactions with voluntary organisations are more significant than central government. Yet the dynamics of the relationships fostered between local government and the voluntary sector are not always straightforward, and descriptions of relations vary widely. It is unclear how relations between local government authorities and voluntary sector organisations can be described. Some have used the term 'paternalistic'. Defined as 'the policy or practice on the part of people in authority of restricting the freedom and responsibilities of those subordinate to or otherwise dependent on them in their supposed interest,'[463] the use of the term 'paternalistic' suggests that at least some local authorities perceive themselves to have taken on a managerial, governing position when dealing with voluntary

463 Oxford Dictionaries, Definition – Paternalism [accessed via: https://en.oxforddictionaries.com/definition/paternalism (26/05/17)]

organisations operating in their areas. It implies that the connection between the local government and voluntary sector is hierarchical. It also suggests a form of oversight undertaken by government authorities – evident, to an extent, in the regulatory role of the Treasury and Department for Digital, Culture, Media and Sports.

In its evidence submitted to the House of Lords Select Committee on Charities, however, representatives from Greater Manchester Combined Authority (GMCA) claimed that a shift has taken place in recent years away from the 'paternalistic' relationship that they alleged to have previously been maintained between local authorities and charities. This argument prompts broader questions about the nature of local government relations more generally. If relations have changed, how have they, and why have they? How does this compare to relations between the sector and central government bodies? Is the fostering of relations between local government authorities and sector organisations the responsibility of central government, more specifically the Office for Civil Societies (OCS)? If not, who is responsible for asking these questions, and overseeing the relationship?

These difficulties are symptomatic of broader problems in the delineation of roles and responsibilities. There are various points of interaction and different types of relations maintained between voluntary sector organisations and local government bodies. This in itself is constitutionally problematic: in the absence of a written constitution, the remit of state powers and responsibilities are not easily defined. Although the state takes on responsibility for the delivery of statutory services, its role in the implementation of this and the part it plays at every stage of the commissioning process is not easily identifiable. Different local authorities approach the

same tasks in different ways. The involvement of voluntary sector organisations is subject to the intricacies of local political dynamics and state agendas.

One of the defining features of present-day local partnerships throughout the UK is the use of the sector in the delivery of services and initiatives (as evidenced in other chapters.) The sector plays a vital role in local communities, successful not least because voluntary sector bodies have access to parts of the community beyond the reach of local authorities. This role is somewhat contradictory: the same bodies contracted to deliver public services on behalf of the government are often engaged in 'challenging local authorities and public services, challenging the status quo and bringing innovation into play.'[464] As Daniel Hurford from the Welsh Local Government Association (WGLA) relayed to the House of Lords Committee, both sectors can benefit from this type of scrutiny.

In areas of best practice, it has enabled local governments to rely on charities to provide more tailored and bespoke services, keeping local bodies in touch with the needs of the residents within their reach. There are also regions where local government bodies have utilised the innovation and initiatives suggested and adopted by charities operating in local areas as a means of compensating for government cuts to funding and services. Hurford praised the system that has developed in Wales, based on 'co-production where the third sector and charities work very closely with local authorities

464 Daniel Hurford, Q141, quoted in the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 90.

in designing and delivering services.'[465] This example serves as a best practice model, and there is clearly scope for further practice of this kind. It could be said that the relationship between both is mutually beneficial. Another example of cross-sector negotiations is found in Newcastle City Council's incorporation of innovations. This scheme has helped to provide community benefit as well as helping with 'cash-flow efficiency', according to the voluntary organisations themselves.[466]

These cases demonstrate some ways in which local bodies can play a part in the championing of charities in their areas. Does this fall within the core remit of the state? Are the local government authorities that are particularly successful in engaging and incorporating sector organisations into the day-to-day running of the region going above and beyond their remits? Or, conversely, are they merely fulfilling their constitutional responsibilities? Are local bodies that fail to engage with the sector in the same way falling short of theirs?

Unfortunately, however, these examples are exceptions. Existing research reveals that the majority of sector organisations have experienced difficulties establishing and maintaining working relations with local government bodies. In contrast to notions of cross-sector collaboration, sector representatives have complained of the increasing reliance on the sector. In evidence to the House of Lords Committee, representatives from the Young Barnet Foundation spoke of a 'widespread expectation that charities will

465 Daniel Hurford, Q141, quoted in the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 90.

466 Councillor Robert Light Q142, quoted in the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 90.

take responsibility when statutory local services are reduced or removed due to funding cuts.'[467] They were particularly concerned for voluntary organisations that lack the infrastructure – such as technology, staff, data analysis tools, and evaluation and impact assessment systems – needed to keep up with the local government demands. This, again, reinforces the premise that some members of the British public have access to better or additional services and support mechanisms than others. This is constitutionally problematic – especially in cases where concerns are being raised about services that the state is officially obliged to provide. This paper recommends that 'champions' of collaboration – such as Newcastle City Council – are used as best practice models for other local government bodies to change cross-sector interactions.

As it currently stands, the dearth in successful engagement mechanisms has resulted in organisations 'picking up the slack' in roles traditionally performed by local authorities. There have been cases of local authorities duplicating services, unaware of existing sector efforts and commitments. For example, Age UK Runnymede & Spelthorne noted that in their area the County Council had introduced new 'hubs' that were established to provide advice services, despite existing services provided by a number of charities in Surrey.[468] Cases like this clearly illustrate the lack of communication and collaboration between local authorities and the sector. The

467 Written evidence from Young Barnet Foundation, CHA0101 to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 90.
Councillor Robert Light Q142, quoted in the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017.

468 Written evidence from Age UK Runnymede & Spelthorne, CHA0028 to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017.

sector is not always part of local policy formation or the delivery of wider policy agendas. Despite the potential advantages that sector practice and experience can bring to policy development, then, improvements still need to be made to foster cross-sector work.

A further constitutional issue relates to the geographical inconsistencies in application and provision of charitable support systems. There are significant differences in the number of voluntary and community organisations in operation in certain areas of the country in comparison to other regions. The South East currently has the highest number of any region of England. Approximately 24,300 organisations were recorded as running in 2012-13, making up 15.2 per cent of the UK total number of charities. In contrast, Northern Ireland had the lowest number in a single area, with just 3,900.[469] This is potentially constitutionally problematic. It is not unreasonable to assume that despite being part of the same democratic system of representation, some areas offer residents more support services and programmes than others. Citizens living in the South East of England might be able to access the services provided by a high proportion of charities that members of the same electorate in Northern Ireland cannot.

There are a number of different national and local organisations affiliated with the state that provide support and guidance to the voluntary sector. In England and Wales, the local Council for Voluntary Services (CVS) and Rural Community Services (RCS) offer similar mechanisms of support. However, these services have diminished in recent years, in response to a demise in the amount of funding available. This has led to inconsistency in the accessibility of these schemes. Voluntary organisations operating in the larger

469 R. Keen, 'Charities and the voluntary sector: statistics', House of Commons Library, Briefing Paper, Number SN05428, Jul., 2015, p. 5.

metropolitan areas, such as London, still benefit from these services, but elsewhere they have been declining. This has left some areas left without vital support and advice mechanisms. Arguments for greater support from local government for these organisations have been made along these lines. These efforts can be placed within a wider agenda for support, in response to the move of central power to local authorities.[470]

These concerns are supported by research into the implementation of national and local Compact agreements. Evidence has drawn attention to potential issues with divisions within the VCS.[471] Researchers have suggested, somewhat ironically, that the differences between organisations that make up the voluntary sector might actually hinder the very efforts to be inclusive and accessible that the Compact was set up to improve. There have been suggestions that some types of organisations still tend to dominate the sector. In light of arguments made about the Compact, this is partly a product of fragmentation within the sector, and a perception on the part of some groups that the Compact is primarily there for bodies involved in health and social care. Researchers have voiced concerns that this may be discouraging smaller organisations and BAME organisations from active engagement with Compact agree-

470 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, HL Paper 33, Mar., 2017, p. 61.

471 G. Craig, M. Taylor, N. Carlton, R. Garbutt, R. Kimberlee, E. Lepine, and A. Syed, Home Office Research, Development and Statistics Directorate, 'The paradox of Compacts: monitoring the impact of Compacts', London: Home Office, Jan., 2005, p. 65 [accessed via: http://eprints.uwe.ac.uk/10166/1/rdsolr0205.pdf (22/07/17)]

ments, due to lack of relevance and association with other larger organisations.[472]

All these factors augment the risk of inconsistency, heightened by regional and local irregularities in accessibility, quality and design of support systems. This is constitutionally problematic. Differences in the set-up and methodologies used by sector organisations in particular threaten to destabilise the concepts of equality and accessibility centred at the forefront of the UK's representative democracy. Differences in local government systems and developments in devolution, amidst ever-growing calls for further devolutionary powers, threaten to further de-stabilise these problems. In order to address some of these problems, this paper supports calls for more cross-sector initiatives that are aimed at engendering greater interaction between LGAs and sector organisations.

Devolution

Devolution has the potential to serve as both a help and hindrance state-sector relations. On the one hand, it presents an opportunity for voluntary organisations to foster new relationships with local commissioners and authorities, enabling a greater focus on the needs of the local beneficiaries. Policy devolution has created important new space for policy development for the third sector across the UK, as observed by Peter Alcock.[473] Yet on the other hand, existing local issues – and central issues centred on devolutionary powers –

472 G. Craig, M. Taylor, N. Carlton, R. Garbutt, R. Kimberlee, E. Lepine, and A. Syed, Home Office Research, Development and Statistics Directorate, 'The paradox of Compacts: monitoring the impact of Compacts', London: Home Office, Jan., 2005, p. 65.

473 P. Alcock, 'New policy spaces: the impact of devolution on third sector policy in the UK', *Social Policy and Administration*, Vol. 46, No. 2, Apr., 2012, p. 220.

pre-dating partnerships between the voluntary sector and the state can be exacerbated by efforts to utilise the voluntary sector for state partnership ventures as part of wider devolutionary agendas.

The historical trajectory of sector activity and practice far extends the changes in constitutional powers in the political devolution of 1999. Differences in organisational structure for the voluntary sector, and the legal and constitutional landscape across the four countries have resulted in differences in practice and policies. The extent of these differences should not be overstated. Existing literature points to the continuing power of Westminster and Whitehall in policy development. Researcher Peter Alcock maintains regardless of devolutionary trends, Westminster and Whitehall still sets the policy agendas, concluding that 'although there is evidence of significant structural change in the forums for engagement flowing from devolution, there has been less to suggest significant policy divergence within these, with English policy initiatives still pervading across the new national borders.'[474] The organisational systems and policies currently in place are remarkably similar. All four countries now have the equivalent of the English and Welsh Office for Civil Society. There are noticeable parallels in policies as well. In 2004, a Futurebuilders Scotland programme was established in Scotland, much like the Futurebuilders and ChangeUp initiatives in England.

Growing calls for further independence and a move towards greater devolution directives threaten to widen existing differences, resulting in noticeably disparate practice in the UK. Since 1997 there have been differences in the infrastructure of voluntary sectors. Each country has its own offices, institutions and policies that provide

474 P. Alcock, TSRC, Working Paper 2, ''Devolution or divergence?': Third sector policy across the UK since 2000', London: IPPR, Sept., 2009, p. 16.

different support and funding systems and oversight. There are also tangible distinctions in practice. In England, the use of sector organisations and service providers has been a significant cornerstone of central government policy directives. Whereas in Scotland, local government has proved more instrumental in the support of the sector, and in Wales, oversight of policies and delivery of services has remained the responsibility of service departments.[475] In Scotland, the sector is more extensively funded by government than the sector in England, and within this, a significant proportion of funding is provided by local government authorities.[476] In Wales, although there is a separate infrastructure in place to a certain degree – with the WCVA and Community Enterprise Wales – devolution has been put into effect to a lesser degree. In the case of Northern Ireland, local government has taken on a limited role, owing to an alleged divided local democracy, said to have been affected by periods of re-imposed direct rule.[477]

Another difference is in the provision of statutory funding. The voluntary sectors of all three devolved administrations rely on income from the state, but the extent of funding varies. Whereas in Scotland statutory funding makes up 39 per cent of sector income, and slightly higher at 44 per cent in Wales, state funding accounts for 61 per cent in Northern Ireland. This is not in itself surprising, given the higher levels of public spending in Northern Ireland, but it does point to a much higher level of dependency on the state. Professor Pete Alcock has also warned that future cuts to public

475 P. Alcock, TSRC, Working Paper 2, ''Devolution or divergence?': Third sector policy across the UK since 2000', London: IPPR, Sept., 2009, p. 15.

476 P. Alcock, TSRC, Working Paper 2, ''Devolution or divergence?': Third sector policy across the UK since 2000', London: IPPR, Sept., 2009, p. 9.

477 P. Alcock, TSRC, Working Paper 2, ''Devolution or divergence?': Third sector policy across the UK since 2000', London: IPPR, Sept., 2009, p. 10.

spending and funding – akin to those imposed across the UK at the time of the Coalition Government might undermine public sector development, and lead to increasingly different practice across the four countries. Cuts to public spending are clearly at odds with political declarations of cooperation and partnership by the Coalition Government, and more recently, by Theresa May and the 'shared society' initiative. This would prove particularly difficult for these policy regimes and the development of voluntary sector practice and services, should further reductions in public spending by Westminster be implemented.

As a result, each devolved authority has developed distinct state-sector relationships. Evidence suggests that in comparison to the English system, the SCVO, WCVA, and the NICVA have a closer working relationship with practitioners working in the national government offices, which has allegedly given sector practitioners much greater say in decision-making and policy directives.[478] This has had a positive impact on the development of the sector in the devolved states, for those organisations that operate locally with devolved state bodies. It has created new policy spaces and opportunities for the development of more constructive relations between state and sector, fostering an emphasis on engagement and negotiation. This experience has served to strengthen existing relationships within devolved administrations between sector members and the devolved Parliaments.

In particular, respondents interviewed for this paper referred to the Welsh Government as a best practice example. They alleged that in principle, at least, the Welsh Government serves as a forerunner for its attempts to create reasonable relations with local govern-

478 P. Alcock, 'New policy spaces: the impact of devolution on third sector policy in the UK', *Social Policy & Administration*, 46, 2, Apr., 2012, p. 227.

ment authorities and sector organisations. (Although in practice, respondents held reservations about the extent to which this has been successful.) Similar efforts were noted to have been made in Scotland, where there has been an attempt to build infrastructure for the sector. Intermediaries have been set up with the intention of providing better representation for sector groups and improve relations with government authorities. However, respondents did also warn of the danger that well-resourced intermediary bodies can create an illusion that state-sector relations are better than they are in reality. The use of intermediary groups is something that has the potential to improve practice, and the extension of similar schemes is worth considering in England.

Evidence of successful relations between the sector and the state in the devolved administrations support claims that devolution has had a positive effect on sector development. A number of respondents suggested that the elected mayoral systems recently established across the UK might provide new opportunities for better interaction and engagement between local authorities and sector organisations. The success of cross-sector ventures is often so dependent on the individuals involved at either side. By seeking new ways of collaboration and encouraging sector organisations to contribute to discussions about regional developments, the new regional combined authorities offer scope for much more cross-sector work.

However, other research suggests it has also precipitated a deterioration in relationships between sector representatives and practitioners operating in Westminster. In fact, several respondents mentioned the metropolitan mayoral elections of 2016 as examples of instances where the voluntary sector were afforded very little

involvement in the preliminary discussions. This was despite the magnitude of the regional changes that are sure to have a considerable impact on the everyday work of organisations operating in those areas.

In an evidence session held by the House of Lords Select Committee on Charities, Lord Lupton said that he was 'very struck' by the evidence submitted by the SCVO, which pitted the 'robust and friendly' relations between the Scottish voluntary sector and the Scottish Government against the Scottish sector's 'episodic and adversarial' engagement with the UK Government.'[479] These observations have been reinforced by Martin Sime, Chief Executive of the Scottish Council for Voluntary Organisations, who has admitted that the implementation of Universal Credit led to a 'very difficult relationship, and not one where we have found a ready willingness from UK Ministers to listen to the experiences of people who are facing those problems.' The lack of effort made by the Westminster official to consider the impact this policy might have had on people from low socio-economic groups in Scotland was criticised by practitioners. Sime relayed that members of the SCVO have since been discouraged from having anything to do with UK regulatory structures: 'the environment in Westminster was quite toxic towards charities, and they did not feel that they wished to be associated with that.'[480]

479 Lord Lupton, Select Committee on Charities, 'Corrected oral evidence: Charities', 8 Nov., 2016 [accessed via: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/select-committee-on-charities/charities/oral/43318.html (12/09/17)]

480 Martin Sime to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017.

For some areas, lack of engagement and collaboration on the part of central government has resulted in a deterioration of state-sector relations. Unless further efforts are put into including devolved sector organisations within decision-making processes, sector differences could have a damaging impact on the overarching relationship between Westminster and its devolved administrations. (And in doing so, contributing to growing and continuous demands for further independence.)

Legislation and policy development

Similar problems can be found in the implementation of legislation and regulation. Although charity law is a devolved matter, the considerable proportion of legislation enacted in Westminster has a direct or indirect impact not only on voluntary organisations operating in England and Wales, but also in the devolved administrations (as highlighted in the chapter on legislation.) It is alarming that the SCVO and NICVO have complained that 'a whole range of things never hit [their] agenda at all,' resulting in legislative decisions that might impact upon their beneficiaries and citizens being made without their input.[481]

Policies relating to taxation, company legislation, fundraising – and the regulation and self-regulation – and data protection have all been highlighted as legislative areas that often have an impact on voluntary bodies, but are not considered by central government as sufficiently 'relevant'. Practitioners working in Northern Ireland and Scotland have argued that this tendency to overlook the implications of policies on the sector is particularly acute within the devolved states. Seamus McAleavey, from the NICVA, has com-

481 Seamus McAleavey to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017.

plained that 'a whole range of things never hit our agenda at all […] we often find out about them too late. If something is likely to impact on Scotland, Wales or Northern Ireland, people need to be thinking about that and flagging that.'[482] The Northern Ireland Commission has also highlighted instances of tax and company law where Westminster has failed to consult with the sector in Ireland until the very last minute.[483]

Evidently, UK legislation does not always take account of the impact on the charity sector in devolved areas. This author extends this argument in relation to voluntary organisations operating in England and Wales as well, in the wake of the mayoral elections that took place in a number of English regions in early 2017. If the establishment of the GMCA is anything to go by, changes of this nature have undoubtedly had an impact on the nature of existing partnerships between local bodies and sector. In the GMCA region, the devolutionary process involved an amalgamation of existing local authorities, and while advocates argued that this would make for a more comprehensive system, it did simultaneously draw power away from more localised organisations, reliant on smaller scale projects and interactions. Critics suggested that this has since weakened some of the ties between local authorities and the voluntary sector.[484] In the face of further plans for devolution, as part of a wider government agenda, it is likely that this problem will be faced by a number of different areas UK-wide. The impact this shift

482 Seamus McAleavey, Q122 to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 91.

483 Frances McCandless, Q112 to the House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 91.

484 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 92.

in governance is having on various voluntary organisations should be the subject of further study.

From a constitutional perspective, this is problematic for a number of reasons. It suggests that some nations are more dependent than others. It follows that treatment of the sector within countries is not the same. Democratically, considering all citizens of the UK are members of the same electorate, voting for the same party in office and central government, is it not unconstitutional that some citizens live in areas that benefit from additional public spending and have access to different services and support? This point can be made for the use and funding of voluntary sector organisations more generally, but it is particularly poignant when considering differences in said funding. It can be assumed that differential reliance upon public funding might result in some countries – and their residents – being left more vulnerable to changes in public spending reductions than others. Voluntary sector organisations operating in Northern Ireland would feel the effects of cuts to state funding than the other devolved authorities, simply because they rely on over half of their income stemming from the state. If one considers arguments about independence and involvement of the state in decision-making and sector practice, it could also be argued countries with higher levels of spending dependency might be at greater risk of being challenged by state 'interference'.

In sum, differences in sector policy direction and practice between devolved administrations have resulted in inconsistency and inequality in provisions and services. This represents a constitutional problem. It undermines the 'one nation' approach currently taken by the Government; the promise that everyone, irrespective of

different variables, should be able to access the same quality and variety of baseline services, support and facilities.

While the author recognises the potential for devolution to strengthen existing state-sector relations and establish new partnerships – particularly for those organisations active in one authority – devolution of the third sector has the potential to undermine partnerships and further complicates relations between state and organisations working within the 'voluntary' sphere. If central government does not commit to incorporating devolved sector organisations into preliminary discussions and strategy, the current situation could support calls for further devolution. Not least, because regionalised state-sector relations can enable countries to be more responsive and adaptive to the needs and demands of its citizens.

A more comprehensive and systematic approach to informing and consulting charities is needed to improve the relationship between state and sector, and make way for a more efficient and effective state-sector partnership. This should be considered for England and Wales, but especially in the devolved administrations. There is clearly room for improvement in the treatment of devolved states in the application of legislation and regulatory enforcement of voluntary organisations.

Conclusion

The majority of the work undertaken by the voluntary sector takes place at a local level. An examination of the local relations and devolutionary trends is therefore centre to this study of the relationship between, and constitutional significance of, the two. The sector clearly plays a part in the application and delivery of essential services, not to mention the formulation of policies. These are

all responsibilities that are ordinarily attributed to the state. This is both democratically and constitutionally contentious. Is the British public sufficiently informed of the roles undertaken by a sector that is known for being distinct from the state? Further clarity is needed, so information is readily available on the types of organisations that are involved at grass roots levels in the development and delivery of services. This would enhance the transparency and accountability of the decision-making processes initiated by the elected government of the UK.

In terms of local government, without a clear understanding of where both sides stand in relation to each other, it is unsurprising that there are differences in approach and interaction. This can lead to misunderstanding, miscommunication, and lack of adequate appreciation for the roles undertaken by both. Greater transparency of the parts played out on either side would provide for a more efficient, collaborative, and successful partnership, and improve efficacy of both state and sector. Charities would be far more likely to be able to provide useful services – whether on behalf of the government or independently – if the guidelines laying out the specifics of the relationship were set in stone and carried legal weight. This paper recommends that more efforts are placed on improving the types of communication and deliberation methods employed by central and local government authorities.

Both state and sector would be well to take heed of the best case examples. A few localities have been commended for their style of implementation and application methodology. A policy paper prepared for the Liberal Democrats' 2011 Spring Conference highlighted the success of certain areas of the country in the application and adherence to local Compacts. Specifically, attention was given

to the work undertaken by the Liberal Democrat-led Council in Leeds, praised for these methods in 'adapting and implementing the Compact.'[485] Internal and cross-sector systems of communication need to be improved, if best (and worst) practice examples are to be shared with effect.

Devolution offers the potential for voluntary organisations to develop closer relations with local commissioners and authorities, and in doing so, improve existing services that cater to the needs of the beneficiaries. The move towards further regional devolution presents an opportunity for the sector to have an ever greater say in the design and provision of services.

However, at the same time, evidence suggests that in some areas, devolution has created further hostility and disparity in application of policies and services than benefits. Practitioners have complained of numerous problems with inconsistency, lack of awareness of legislative changes, and – according to some – a deterioration in relations between devolved administrations and Westminster. Significantly, this is a specific problem between Westminster officials and sector representatives working in devolved regions.

In order to reap the potential benefits of devolution, this paper supports calls made by the House of Lords Select Committee on Charities for better understanding on the part of central government

485 Liberal Democrats, *Community Futures: Policies on the Voluntary Sector and Volunteering*, Policy Paper 98, London: Liberal Democrats, 2011, p. 19.; M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 136 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

of the impact of policies on the voluntary sector.[486] The Committee recommended that more focus was placed on ensuring that consultation with voluntary organisations is part of conversations with devolved areas, and specifically any prospective devolutionary plans. As demonstrated in this chapter, it is clear that central government needs to ensure that the devolved administrations are included in discussions and decision-making processes, where relevant. Charities and other sector organisations operating in the devolved assemblies – and in England and Wales – need to be considered at every stage of legislative change and policy processes. Inclusion of the regional administrations in this way should help to improve dialogue between the sector and state authorities.

The use of intermediary bodies in Scotland and Wales has been praised by some practitioners, and evidence suggests that if introduced carefully, could be successful in improving state-sector relations and enhancing sector practice in all regions of the UK. As it currently stands, reservations remain concerning the limited influence of representative bodies. Critics argue this is partly because they cannot claim to represent the entirety of the sector, and partly because the dependence on, and support given by, the devolved states have rendered their actions increasingly 'benign'. Therefore, intermediary bodies have the potential to dramatically improve state-sector relations, as long as they do not become state-sponsored. There is a need for separation and independence from either side for their function to be successful. This would need

486 House of Lords Select Committee on Charities, 'Stronger charities for a stronger society', London, Mar., 2017, p. 92.

to be considered, if this line of practice was to be adopted in other areas of the UK.

This paper thus supports calls for better systems of consultation and collaboration in the development of legislation on both reserved matters and central policies that might have a direct or indirect impact on voluntary organisations operating in the devolved administrations. Only then can devolution serve as a help and not a hindrance to state-sector relations. This could be done through better coordination and collaborative efforts between the office for Civil Society and the Department for Communities and Local Government at a central level.[487] Alternatively, examples of good practice include existing cross-border regulation of charities. Regular bilateral and multilateral meetings and various memoranda of understanding have enabled the regulatory bodies from each of the devolved areas to engage in information-sharing ventures. There is scope for improvement, but practitioners state that, already, relations are improving thanks to constant communication and commitment from both sides. The adoption of this mentality by Central Government representatives and Ministers might work just as well in fostering better working relations and much-needed transparency.

487 House of Lords, p. 115, paragraph 463, recommendation 34.

Conclusion

There is a long-running history of engagement between voluntary organisations and the UK Government. As explored in this paper, the state interacts with voluntary and community sector bodies in a number of different ways, and continues to benefit from its longstanding contributions which have helped to sculpt and mould what is expected of the state. This is most evident in the shifting responsibilities of sector and state in the delivery of public services and campaigning work.

It has long been recognised that the voluntary and community sector serves as an essential part of the fabric of a healthy society. Yet, interestingly, representatives from the state and the sector were uncertain of the constitutional significance of voluntary sector work. This paper has presented cross-sector interactions from a new perspective, demonstrating that sector organisations contribute to the UK Constitution on several fronts. As well as the more practical roles in the delivery of services, they also perform a critical role in holding the government to account. Based on grass-roots experiences and insight, the advocacy work undertaken by campaigning organisations strives for the best possible social outcomes, whether that is in shedding light on areas that are in need of improvement or additional support, or demanding continuity or change to existing government policies.

Voluntary bodies also provide another platform of public expression and in so doing, offer an additional layer of democratic representation. They also play a part in democratic transparency, in the sense that the civil society concept revolves around the promotion

of inclusivity, encouraging members of society to become involved in collective activities. The idea that VSOs provide a forum, or fora, then, is a form of democratic representation.

As one respondent concluded, voluntary services exist to do the things that government cannot, will not, or should not, do, to meet social needs. Their proper role is to augment and complement state services, and to ensure that the state takes responsibility for its citizens. Here, they alluded to mounting concerns that the state is progressively encroaching on the sphere of sector influence.

The multitude of relationships that have evolved – and continue to evolve – between the state and sector organisations are constitutionally relevant. The ways in which these relationships are developed and maintained are of manifest constitutional significance. The following sections detail the conclusions that have been reached in this paper, after which more general trends and suggestions for best practice are discussed.

The Compact

'worthy in its aims but [...] in practice neglected.'[488]

Sir Bert Massie CBE, Former Commissioner for the Compact

On paper, the Compact appears to offer the foundations for better working relations between state authorities and sector organisations. However, as it currently stands, the implementation of the Compact has proved difficult and, in most areas, unsuccessful. Respondents intimated that the Compact is 'more or less cast aside as redundant'.

488 House of Commons, HC 536, Commission for the Compact: Annual Reports and Accounts 2008-09, London: The Stationery Office, Jun., 2009, p. 4.

Reasons for this include problems with adherence to the document – within central government departments and local authorities – in part, the product of the lack of legal standing and weight attached to the agreement. Dependency on individuals to implement components of the Compact and ensure that the principles are observed has also resulted in inconsistencies in application, leading to stunted, piecemeal adoption across localities in England and Wales. At the core of these problems lies a general reluctance on the part of state officials to commit to the agreement. Respondents cited lack of enthusiasm from central government as the main factor that has rendered the Compact 'largely dead in the water'.

Despite apathy from key players, the Compact is still significant. It stands as the only form of agreement between the state and the sector that sets out the parameters of their relationships. The principles set out in the agreement provide a comprehensive framework for dealing with some of the key issues – detailed in this paper – that are still inhibiting the development and maintenance of state-sector relations. For instance, the Compact addresses problems with the allocation of resources, funding arrangements, commissioning and the co-designing of services. In theory, at least, the Compact provides an essential guide for the fostering of productive collaboration and communication. If the Compact was successfully implemented, it would provide an accessible and comprehensive piece of guidance literature that would regulate practice and develop a more accountable and transparent system.

What is needed to rejuvenate the Compact? Those responsible at central and local levels need to be pushed to reinstate a commitment and enthusiasm. The OCS and government departments need to re-focus on ensuring that the Compact serves as a key component

in state-sector relations. Practitioners on both 'sides' need to tackle some of the practical and operational difficulties with implementation. Without a new drive from central government, it is unlikely efforts will succeed. The success of the Compact – and, by extension, the success of the management and growth of state-sector relations – is dependent on government initiative.

Given the considerable parts performed by the sector in several areas of state work, it follows that there should be some form of guidelines governing this engagement. The Compact, if implemented properly, would ensure the sector knows what it can expect from the sector, and, on the other side, help public servants to have an idea on what and how they should tackle consultation and collaboration.

Governance and regulation

There is no formal means of regulating the voluntary and community sector. As such the regulation and general management of voluntary groups operating in the UK is piecemeal and inconsistent. The sector is governed by a range of different bodies, all performing some sort of regulatory function. Within this, the role of the government is also riddled with confusion. Respondents generally maintained that the state does not have a constitutional responsibility towards the sector. Yet, in practice, the state performs oversight of sector organisations in a number of ways. The fact that this constitutional role was not recognised by respondents to this paper is alarming, and indicative of underlying ambiguity surrounding the role of the government and its relationship with the sector.

Accountability for the closest forms of representative, oversight bodies technically lies with the state. One of the largest regulatory bodies the Charity Commission – which represents and regulates

registered charities operating in England and Wales – is, itself, a non-ministerial government department that answers directly to the UK Parliament. The OCS performs a more visible form of government oversight, though commitment and effectiveness of this body have been subjected to growing criticism (branded as a 'hotch-potch of programmes and officials syphoned off from other departments.)'[489] The OCS is often seen as the 'go-to' for calls for change by the government; as demonstrated in the recommendations put forward by the House of Lords Select Committee on Charities. Questions about the commitment of this body to the development of cross-sector relations throws doubt on its ability to address some of the problems it has been tasked to resolve.

Difficulties in practical implementation and engagement with sector organisations render the oversight and accountability of some organisations ineffective. It is a matter of constitutional importance if voluntary organisations instrumental in the provision of public services or active in policy development through campaigning are not properly regulated. These problems need to be addressed, if sector work is to be sufficiently transparent and accountable. It is also concerning that some sector organisations are subjected to more regulations than others. For example, registered charities operating in England and Wales are represented and managed by the Charity Commission, but they make up only a sliver of the voluntary and community organisations active in the UK. The result is that some organisations are subjected to more levels of oversight and accountability than others. This is both practically and constitutionally problematic, given that a small but significant minority of

489 A. Singh, 'New charities minister? Who cares, when government isn't interested in civil society', *The Guardian*, 16 Jun., 2017 [accessed via: https://www.theguardian.com/voluntary-sector-network/2017/jun/16/new-charities-minister-government-civil-society (04/10/17)]

sector groups are involved in performing work on behalf of central and local government authorities.

These questions about current practice have led to discussions about the appropriate role of the state in the governance and regulation of the voluntary sector. There are arguments that can be made both in support– and in opposition – of the strengthening of state responsibility in the governance and regulation of the sector. Several high-profile scandals, most notably the involvement of senior government officials in the demise of the Kids Company, have prompted calls for more stringent rules in place to ensure that practice is legitimate and democratically accountable. If responsibility for the regulation and oversight of the sector lies with the state, should there be an official body that is tasked with this role? Currently, the OCS has a variety of different responsibilities that have allegedly been prioritised at the expense of cross-sector relations. One suggestion voiced by respondents was that a new *independent* body could be established – modelled on some of the successful features of the Commission for the Compact and the Office for Civil Society Advisory Body – that would take official responsibility for holding the sector to account, whilst ensuring that it kept sufficient distance from practitioners from both voluntary sector, the state, quasi-state organisations and private sector organisations, in order to ensure independence and transparency.

Legislation

Legislation is another facet of government management of the sector. Responsibility for the legal standing of voluntary activities contributes to setting out the legal and regulatory framework within which voluntary sector organisations can operate in the UK. UK legislation affects voluntary practice both ‘directly’ (laws that set

out specific regulations for voluntary and community groups) and 'indirectly' (laws that are not specifically designed with the sector in mind, but might affect the types of work and key interests of some voluntary organisations.) Despite the longstanding contributions of voluntary groups in the UK, the legislative framework surrounding sector practice has developed on an ad hoc basis and, as such, the legal status of sector organisations remains ambivalent in places. This disjunctive picture is further complicated by the fact that charity law is largely – thought not wholly – devolved.[490]

Voluntary organisations are subjected to a range of different legislative decisions. The Charities Acts of 2006 and 2011 are the most recent and more relevant pieces of legislation that map out the position of charities operating in England and Wales. However, confusion regarding definitions – for example, the meaning of the term 'public authority' – has led to questions and concerns about consistency in application. These Acts also only apply to organisations which fall within the legal definition of 'charitable status', excluding the myriad of different groups operating along slightly different voluntary and community lines. In some cases, this ambiguity has resulted in illegitimate practice and a loss of access to fundamental human rights. This is clearly a matter of constitutional concern.

In order to address these issues, greater clarity is needed in the terminology used in existing and future legislation. As far as

490 For example, the National Assembly of Wales does not have legislative competence to pass laws on the regulation of charities, an exception under paragraph 4 of Part 1 of Schedule 7 to the Government Wales Act 2006. Welsh Government, 'What is devolved?', LawWales [accessed via: http://law.gov.wales/culture/culture/what-is-devolved-culture/?lang=en#/culture/culture/what-is-devolved-culture/?tab=overview&lang=en (04/10/17)]

possible, more attention should be given to considering the effects legislative proposals might have – directly or indirectly – on the status and work performed by voluntary groups. Better consultation methods are needed to ensure that sector representatives are included in law-making procedures, particularly at the design stage. Theoretically, this falls under the control of the Office for Civil Society, although concerns have already been discussed about its effectiveness in engaging and promoting cross-sector discussions across government departments.

Taxation

Taxation is another way through which the government has a say in the management and regulation of the voluntary sector. With regards to taxation, the main areas of contention relate to tax exemptions given to organisations with charitable status. Tax relief as a particularly controversial area. Arguments have been made against the use of tax relief for individual donors, on the grounds that tax relief makes little difference to donation considerations, and yet are relatively costly to the government. Sources of concerns regarding the clarity and implementation of legislative terminology – as discussed in relation to the principle 'public benefit' – have fuelled discussions about who should be able to benefit from these tax breaks, and the degree to which they are a good use of the taxpayers' money.

These problems are indicative of broader contention surrounding the status of voluntary groups: what is meant by the term 'voluntary', 'charity', and 'community'? What is meant by 'public benefit'? These questions lie at the heart of recent debates about the charitable status of – and tax exemptions offered to – fee-charging schools. The status of think tanks and faith-based organisations has

also been subjected to disquiet. Uncertainty about the status of certain types of voluntary organisations reinforces existing problems about status, legal standing, and the regulation and oversight of these bodies.

A green paper released by the Department for Education in 2016 proposed that Charity Commission guidance should be revised to include a number of requirements that have to be met by independent schools in receipt of tax relief. Should 'charities' be required to meet some sort of requirements, in order to be able to benefit from charitable privileges? Alternatively, should a more quantitative approach to the measurement of 'public benefit' contributions be applied to voluntary organisations in the UK? More thoughts should be given to the implementation of a 'public benefit' system, as found in America, which offer different forms of tax relief for different types of organisations, or as in the public benefit test currently used in Scotland.

It is also worth considering the impact taxation policy can have on the work performed by the sector and the state. For example, does the provision of tax relief on donations influence the behaviour of charities in ways that might undermine their effectiveness or inhibit their willingness to engage in campaigning for long-term reforms aimed at, for example, poverty alleviation? Such as lobbying or advocacy work? If this is the case, taxation policies might be preventing some voluntary groups from questioning government policy, challenging existing protocol, and, generally, holding the government to account. Little research has been undertaken into these issues, and this report calls for further investigation into the implications of taxation and tax exemptions on the conduct of sector work.

It is hoped that sufficient consideration will be given to the recommendations published by the House of Lords Select Committee on Charities earlier this year. In particular, a focus for closer collaboration between the OCS and HMRC on issues such as the value of Gift Aid, future changes to VAT and the NLW, and the availability of payroll giving.

Politics

Separation from the state is often heralded as one of the key cornerstones of voluntary practice. Organisations claim that distance from the central government and local authorities is what enables them to represent some of the UK's more 'hard-to-reach' communities. The various points of interaction discussed in this paper challenge this rhetoric. In practice, the sector is engaged in various forms of political involvement. Perhaps the most obvious example of this is in the advocacy work undertaken by a significant proportion of voluntary organisations – or at least, the proportion that receives the most media coverage. The significance of this campaigning merits a separate chapter, and is detailed in the section below.

Advocacy aside, the political significance of the sector is evident in the central roles performed by voluntary groups in the implementation of government policies and agendas. The government depends upon the cooperation and support of sector organisations in the formation and application of central initiatives – the Big Society venture and Community Cohesion incentives are clear examples of this. This practice is constitutionally and practically problematic on several fronts. Fundamental differences in ideological principles, methods of practice, and governance easily lead to difficulties with consistency, accountability, monitoring, and impact measurement.

Connections between voluntary sector organisations and political parties have also been criticised. Some of the issue explored earlier in relation to the status and treatment of think tanks are symptomatic of broader disputes about the political significance of work undertaken by voluntary sector organisations and practitioners. Commentators writing from the political right, in particular, have cited instances of partisan convergence and cross-sector collaboration, claiming that certain political groups have 'warped the independence of the third sector.'[491] Similar concerns about the involvement of the sector in the political sphere have also been raised with regards to relationships between individual from central and local government and political parties, and practitioners working in the voluntary sector.

These claims highlight the vulnerability of the sector, easily swayed by the political environment, and undermines independence and accountability as non-government bodies. It is also constitutionally problematic that members of central government and key political parties might be working beyond the scope of their official positions to influence outside organisations for internal political gains. Concerns about these forms of interaction reveal ambiguity regarding the boundaries of state work, and, on a practical note, the need for better means of cross-sector communication and transparency in collaboration.

Although the addition of sector insight and experience undoubtedly improves the quality of state initiatives in the majority of cases,

491 C. Hope, 'Half of Gordon Brown's 'spads' work for charities lobbying Coalition, as Tories condemn 'revolving door'', *The Telegraph*, 15 Aug., 2014 [accessed via: http://www.telegraph.co.uk/news/politics/11037088/Half-of-Gordon-Browns-spads-work-for-charities-lobbying-Coalition-as-Tories-condemn-revolving-door.html (30/06/17)]

for the purposes of this study, involvement of non-state organisations that might operate along very different ideological lines to the democratically-elected government in office is constitutionally problematic. The UK government must operate on a transparent and accountable basis. If sector groups are involved in the delivery of state policies, should members of the electorate be entitled to have a say in the running and governance of these organisations? A case can certainly be made for the addition of some form of guidance framework that sets out best practice ideas, to ensure that any political engagement is performed in a straightforward and unambiguous manner.

Advocacy

Linked to some of the issues raised in relation to the political involvement of voluntary groups is the subject of advocacy and campaigning work. In fact, for some organisations, campaigning efforts represent the main reason for their existence. This paper maintains that voluntary groups campaigning for legislative or policy changes contribute to the development of UK democracy, and thereby perform a key constitutional function. The advocacy work performed by a significant proportion of the 'sector' feeds into longstanding traditions of voluntary organisations serving as representative bodies for the common people. Organisations have long claimed to represent the everyday people, giving them a voice and bringing the opinions of those from so-called 'hard-to-reach' backgrounds to the fore. In this sense, the sector is instrumental in promoting democratic practice in the UK, undertaking work which overlaps with the core function of the UK Parliament. Does this emphasis on sector representation and participation in local and central political discussions indicate inherent problems with

the level of representation and public trust of the official system of British parliamentary democracy?

Having established that voluntary organisations can and do participate in holding the government to account, the debates centres on the extent to which this constitutional role should be part of their remit. Critics have lamented the involvement of groups – specifically those in receipt of tax relief – and supported the recent surge in regulations placed on sector campaigning. Conversely, others have criticised demands for greater restrictions. This was seen most acutely in the aftermath of the enactment of the Lobbying Act 2014 and proposals for an anti-advocacy clause. The multitude of grievances made in the wake of these developments demonstrates the vulnerability of the sector, and the numerous ways in which the freedom of organisations can be restricted by the state. Questions surrounding levels of transparency in general election and referendum campaigning, for example, indicate areas for improvement.

These arguments boil down to fundamental questions about the role of voluntary organisations, and the ways in which they engage with the state. Can the recent attempts to introduce greater restrictions on 'political' activities represent be seen as evidence of the state overstepping its constitutional remit by becoming too involved in the regulation of the sector? Does the management of voluntary organisations come under the unwritten constitutional conventions mapped out for the UK government? For the sector organisations in question, there are also concerns about the impact advocacy work has on the independence and claims of public representation. Does participation in campaigning activities threaten to weaken personal and individual relations with members of the public, whose involvement with charities is based on the notion of state separation?

Another side to this is the premise that sector participation in political debates undermines democratic practices and weakens systems of governance – discussed previously in the section on politics.

In terms of recommendations, more attention could be given to the protection of the rights of sector organisations. Cases have been made for new guidance on campaigning activities, to ensure that requirements are set out in a clear and accessible manner, with little room for uncertainty. These debates about campaigning regulations serve as yet another instance of problems regarding ineffectiveness in cross-sector communication and involvement. Representatives from the voluntary sector have demanded an input into all future legislative proposals that might influence sector practice.

Grants, contracts, and commissioning

The government has long provided some form of financial support to voluntary organisations operating in the UK, in the form of funding schemes, central or local grants, contracts, and commissioning. Although state assistance has changed considerably through time, a segment of voluntary groups still benefits from government-supported funding schemes and grant systems. However, practitioners have bemoaned a decline in the quality and accessibility of this style of support. Growing concerns have centred on cases of malpractice and state interference, specifically, in the wake of the high-profile scandal concerning the 2012 Olympics, and the 'plundering' of the Big Lottery Fund (BLF). At the heart of these cases is the idea that the state has been using funding schemes to replace grant aid and compensate for cuts to state funding. Underlying these claims are serious allegations of breaches of state trust and transparency.

Cuts to local government funding have been another source of disquiet. This development has had a direct impact on cross-sector work, given the weight attached to relationships maintained at local and individual levels. Evidence suggests that cuts to local funding have exacerbated growing trends in contract-based commissioning, which practitioners suggest have forced smaller organisations out, and placed undue emphasis on finance and market value ahead of quality and the needs of beneficiaries.

Alongside the gradual move from grant-based funding to contracts and the commissioning of voluntary organisations, there has been an increased emphasis placed on outcome-based contracts, such as Social Impact Bonds. This trend has been criticised as responsible for the dissipation of government responsibility, posing a threat to overall accountability of contracts, with an increased chance of fraud, and diminished quality of services. Practitioners have also complained that the focus on outsourcing has resulted in voluntary groups being excluded from the commissioning process, particularly at the design stage.

These changes present practical and theoretical difficulties. The emphasis on outcome-based contracts has arguably prevented citizens from benefiting from sector services designed by voluntary groups on the basis of longstanding relations and experience working at a grassroots level. Evidence also points to mission drift: instances of charities changing existing objectives in order to meet contract stipulations instead of focusing on delivering services that meet the requirements of those most in need. This undermines one of the core justifications used to explain the involvement of voluntary organisations in the delivery of public services. More generally, one should consider whether sector organisations operating along often

very different political and ideological priorities can be trusted with providing services on behalf of central and local government? Or, rather, *should* these organisations be trusted, from a constitutional standpoint?

In order to address some of these concerns, this paper supported the recommendations put forward by the House of Lords Select Committee. These included the use of 'intelligent commissioning', with an emphasis on improved results rather than cost savings and offering smaller-scale contracts and support with bidding for contracts.[492] It also encouraged local government authorities to offer grants to voluntary groups, to revitalise the sector and allow for greater flexibility in support services. It is hoped that, where possible, local governments will take on board this suggestion. Finally, to address the alleged 'banishment' of the sector from the commissioning process, efforts need to be directed to including sector representatives in the initial stages of contract design and development.

492 House of Commons Public Administration Select Committee, HC 112-I, 'Public Services and the Third Sector: Rhetoric and Reality', Eleventh Report of Session 2007-08, Vol. I, London: HMSO, Jul., 2008 [accessed via: https://publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/112/112.pdf (06/09/17)]

Public service delivery

> *'We are convinced that charities and social enterprises can make a huge difference to the effectiveness and humanity with which public services are delivered, but recognise the harm that a controlling and exploitative relationship with an overbearing state could do – and in many cases is already doing.'*[493]
>
> *Conservative Party, 2007 Green Paper*

Voluntary organisations have delivered services to British citizens for centuries, and in doing so, have influenced the types of support and quality of services that the state is expected to provide. Promises made by, and subsequent demands placed on, central government are constantly evolving. As such the types of services that are provided on a statutory and discretionary basis vary, and with them, the role of voluntary groups in service delivery.

The fluidity of public services has resulted in several difficulties. There have been general challenges with implementation, such as the impact of the 'professionalisation' on the ability of voluntary groups to offer localised, bespoke care for beneficiaries. These problems are constitutional as well as practical, in the sense that citizens might not be receiving the levels of support they have been promised by their democratically elected government in office.

Perhaps the main source of contention amongst practitioners relates to the use of the voluntary sector to 'pick up the slack'; to com-

493 The Conservatives, Responsibility Agenda, Policy Green Paper, No. 5, 'A stronger society: voluntary action in the 21st century', London: The Conservatives, Jun., 2008, p. 52.

pensate for gaps in public sector support, inadequate services, and a lack of government funding. Examples where voluntary sector groups have taken on the provision of services that were previously delivered by the public sector support claims that the government unofficially factors in the local support from voluntary groups in funding considerations and policy-making. There are countless examples of voluntary organisations that have felt obliged to adopt responsibility for services that were previously funded and provided by local government authorities, in the wake of cuts to funding and services. Would some of these state-led decisions have been made, if government bodies were unable to assume that voluntary organisations would be there to fill in these gaps?

These suggestions are alarming. This practice might be hiding underlying problems, such as inadequate local government grants and funding, and failure on the part of central government to follow through on party mandates and election promises and unwritten constitutional obligations. From a grassroots perspective, there is also the fundamental problem that central and local government might be failing in their constitutional responsibilities to ensure that British citizens have access to adequate levels of care and support.

Another key issue is the lack of transparency in the delivery of public services. It is often unclear whether services are being provided by a public sector organisation, private company, or voluntary or community group. Some respondents argued that members of public are unlikely to care about the type of organisation that provides services, as long as access to these services and baselines levels of support are met. However, it is constitutionally problematic that recipients of services are not always aware of the origins of service delivery. These issues with transparency might also manifest in

more tangible problems: high turnover of staff; constantly evolving types of services; and inconsistent regulatory and procedural arrangements. There are also inherent problems with accountability, as identified by the PASC in 2007. For example, differences in complaints procedures could result in a recipient of a public service delivered on behalf of one local authority not having access to the same rights and claims as another recipient of the same supposedly 'identical' service in another locality.

There are broader issues of constitutional significance that come out of these discussions. Is it constitutionally viable for organisations that operate along potentially opposing ideological and political lines to the democratically elected representative government bodies are delivering statutory services on behalf of the state? (The use of the private sector in service delivery is equally problematic in this sense; indeed, a separate discourse already exists on this subject.[494]) Is the British public given sufficient say in the decisions and administration of public services? Are there some types of services that should only be provided by government-led bodies? Phrased another way, are there some tasks that the voluntary sector is not 'qualified' to administer – for either constitutional and democratic, theoretical, or practical reasons? Who is qualified to make these types of decisions?

Ways of addressing some of these issues could include the introduction of further measures to enhance transparency in practice,

494 P. Martin, 'Time for a debate on private sector's role in delivering public services', 7 Jun., 2009 [accessed via: http://www.telegraph.co.uk/finance/comment/5469277/Time-for-a-debate-on-private-sectors-role-in-delivering-public-services.html (06/10/17)].; D. Julius, 'Private companies can provide a public service', *Financial Times*, 14 Jun., 2013 [accessed via: https://www.ft.com/content/61e40394-eae4-11e2-bfdb-00144feabdc0 (06/10/17)]

with literature outlining details of service delivery and complaints procedures. Government policy on the use of voluntary sector organisations in the delivery of services, and the interaction between central and local government bodies with these groups, should be improved. Official decisions should be made on the types of groups that are eligible for providing services, and, equally, the areas that public sector bodies should retain responsibility. Greater emphasis should also be placed on the quality and level of localised care and support where possible, instead of cost effective measures. In part, this is dependent on a re-thinking of cuts to local government funding.

Local government and devolution

Interaction with local authorities is often the first – and sometimes only – point at which immediate relations are engendered between the government and a voluntary sector organisation. Local government dynamics have an obvious impact on the ways in cross-sector work is performed – as revealed in this paper's examination of public service delivery, state-led grants and contracts, and the implementation of the Compact. Much of work undertaken by voluntary sector organisations is regionally specific. As such, the political, economic, and social make-up of an area risks leading to inconsistencies in the implementation of charitable support systems. For instance, differences in the type of organisations and the supply of services available have resulted in considerable variation in access to levels of support. The same is true of access to local government voluntary initiatives; residents of larger metropolitan areas, such as London and Greater Manchester, typically have access to more support and advice systems than those living in more rural settings. To minimise these differences, improved systems for

sharing information between local authorities would help to highlight particular discrepancies in practice, and encourage bodies to give more attention to examples of best practice.

The effects of devolution on state-sector relations are the source of dispute amongst practitioners and academics. Advocates see local and multinational devolution as an opportunity for closer working relations between government authorities and commissioners, and commissioners and members of the public. In theory, the move away from the central state has the potential to put the needs of local people at the fore of decision-making. Conversely, critics have argued that the developments in devolution that have taken place recently have fuelled existing irregularity in state-sector relations, inconsistent application of central policy initiatives, and uncertainty for voluntary sector organisations working at grassroots levels.

Possible ways of capitalising on the positive results of devolution, whilst minimising risk of additional challenges, feed into the recommendations put forward throughout this paper. Namely, calls to strengthen systems of communication and collaboration between the four devolved administrations, and between local authorities within these – which is particularly significant in light of the establishment of Greater Manchester Combined Authority, and 2017 Metro Mayoral elections. This would ensure that good practice examples are shared and copied, and authorities are better equipped to highlight areas for improvement, and ameliorate problems with greater efficiency and success.

Themes

A range of more general conclusions can be drawn from these specific observations. One of the recurring themes central to the

voluntary discourse is the premise that some voluntary organisations clearly 'stretch' the public's idea of a charitable institution. Examples include the RSPCA – which reserves the right to prosecute against animal abusers, some have argued to prevent the transfer of expenses to the public Crown Prosecution Service – and the National Trust – which is afforded considerable sway over the management and maintenance of British land and rural affairs as one of the largest landowners in the United Kingdom. Attention has also been given to the legal and financial ambiguity regarding the position of charitable organisations that claim tax receipt, specifically fee-charging schools, FBOs, and think-tanks. It is clear in all of these cases that several types of charitable organisations subvert popular conceptions about the role of charities active in the UK. This is constitutionally problematic when considering the role of the government, and types of services that both central and local state bodies are responsible for providing, managing, and regulating.

Involvement

For some interviewees, current relations between state organisations and the sector could be improved with renewed focus on partnership working. A few suggested that difficulties stemmed from a 'mutual incomprehension' on both sides, with lack of understanding and a reluctance to initiate genuine dialogue in favour of 'channelling their own objectives.' However, the majority of evidence suggests that that sector representatives are often left out of decision-making processes, including those which might have a direct impact on their work. This raises questions about the efficacy of current state infrastructure: are existing systems in place to support and

encourage greater communication and collaboration between the state and the sector?

Respondents claimed that the drive under New Labour to bring more practitioners into preliminary policy discussions and programme designs has long been discontinued, resulting in demands for more sector input. The Baring Foundation's 2011 publication which looked at the Commission for the Compact supported this premise. The report revealed weaknesses in existing mechanisms for liaison, citing lack of annual meetings and representative gatherings.[495] There is a clear need for better and more frequent consultation, as evidenced in the case of Grenfell Tower. This paper supports the calls put forward by New Philanthropy Capital in its 2017 provocation paper, which sought to address the dearth of cross-sector collaboration by 'Giving civil society a seat and a voice at the table of governance locally: Making it part of every unitary local government and regional government set up to have a third sector chamber or other means of having a voice.'[496]

The recently established metropolitan mayors in several regions of the UK also provide new opportunities for better working relations, though this is largely dependent on the individuals involved. Newly-elected mayors and council leaders have the potential to prioritise the inclusion of voluntary sector organisations – as well as private sector bodies – in local infrastructure of their regions. More specifically, those responsible for administering budgets could en-

495 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 133 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

496 NPC, The 'Shared Society' needs a strong civil society, Chapter 4: Giving civil society a boost – an agenda for change', Apr., 2017, p. 15.

gender a more collaborate approach, bringing together a range of sector stakeholders and establishing more effective communication mechanisms. In the words of one respondent, 'as is so often the case, the buck lies with the individuals.'

Independence

Conversely, pitched against these demands for renewed partnership is the premise that the sector is suffering from too much state intervention. Other respondents claimed that partnership ventures in the past had resulted in 'unmitigated disasters.' This school of thought sees increased state regulation and state legislative and financial involvement as a threat to the sector's ability to criticise and innovate. It follows that the state has increasingly relied upon the sector to continue in the provision of essential public services, in the wake of significant cuts to local government funding and a reduction in government grants. In order to address these concerns, it has been suggested that there should be a renewed recognition that the sector should be independent, and not a beholden of the state.

Certainly, there is merit in establishing more stable parameters to safeguard the sector from state influence. The current regulatory and legislative framework goes some way towards ensuring that sector organisations are still able to advocate and campaign – particularly since the repeal of the anti-advocacy clause – but there are still fears that trends in the outsourcing of services and contracts might result in further loss of independence and hidden state agendas.

Representation

One means of securing a greater degree of separation would be the establishment of a body entirely independent from the state and the

sector. This would also address continuing concerns that the larger representative organisations do not carry the interests of smaller locally-based bodies. A significant proportion of respondents held reservations about sector representation. They highlighted a need for more second-tier organisations; voluntary sector councils for smaller charities, which would also allow for more efficient partnerships and dealings with the state. Lack of representation was identified on both sides. Researchers in 2012 raised concerns about the inadequacies of the relevant machinery of government – the OCS – amidst claims of being completely overstretched, with too few staff members devoted to the work of the Compact and voluntary sector dealings.[497] Similarly, existing literature has also pointed to problems with sector representative bodies. with claims that 'the organisations these spokespeople represent have gained prestige and resources from their ability to contribute to the government's agenda for the sector and they have been careful not to rock the boat.'[498] Multifaceted issues with representation have undermined the effectiveness of the Compact, discredited because those claiming to represent either side have no official mandate.

Indeed, the establishment of an independent body would also tackle the challenges that face the Compact. The New Philanthropy Capital recently recommended that a new regulatory and improvement agency could be implemented that would help to 'promote

497 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 133 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

498 M. Zimmeck, C. Rochester, and B. Rushbrooke, 'Use it or lose it: A summative evaluation of the Compact', Commission for the Compact, March 2011, p. 134 [accessed via: http://baringfoundation.org.uk/wp-content/uploads/2011/12/CompactUIOLI.pdf (04/10/17)]

good practice and stamp out bad practice,' and in doing so, enable the Charity Commission to adopt a narrower focus on charity regulation and data collection. This paper agrees that the role of the Charity Commission could be altered, but suggests, instead, that greater attention should be given to its advisory role. Currently, evidence suggests that the Commission prioritises regulation ahead of its advice and guidance function.

Some respondents hoped that a new independent, representative body could be introduced, modelled on the Commission on the Compact, which existed between 2007 and 2010. The strengthening of the Commission was previously proposed, but plans were rejected. In its short-lived life, however, respondents maintained it was successful and operated 'genuinely independently, unafraid to criticise the sector and the state alike.' Irrespective of whether these suggestions come to fruition, practitioners were clear that further research should be conducted into the possibility of establishing a new body, or, alternatively, improving the existing work undertaken by the Charity Commission and the OCS.

Boundaries

The voluntary sector lies on the borders of several spheres of activity; and as a result, there are numerous overlaps in responsibilities. The boundaries between state and sector are unclear in places. Although a few respondents described differences between private sector, voluntary and community sector, and state organisations as 'artificial', the majority were keen to emphasise distinct characteristics. Ambiguity surrounding sector status offers a certain degree of leeway, which respondents argued encourages invention and innovation, enabling pioneering trials that can result in positive changes to government practice. However, this factor has been

highlighted by academics as a contributory factor in the inherent difficulties in definitions and terminology. This confusion manifests at local levels. According to one academic interviewed for this paper, the idea that some service users might not realise where they are getting their services from – be it a state body or voluntary organisation – is not really a substantive problem. If they are unhappy with the quality of services provided, there should be some sort of complaints procedure in place. However, this author maintains that this theoretical issue could have tangible consequences. There is the potential for practical difficulties to arise for individual beneficiaries, in the case of different and inadequate complaints procedures distinct from those in operation in state-run bodies.

An organisation that relies almost exclusively on state funding, or one that is responsible for providing public services on behalf of the state is 'fettered in its freedom to challenge excesses of power and poor policy.'[499] This premise is supported by leading theorist David Billis, who has suggested that such organisations 'compromise their unique structural and democratic jobs and can become instruments for other agendas;'[500] and in so doing, undermine their ability to perform constitutional roles. Similar concerns about the growing professionalisation of the sector – in the wake of greater competition for contracts – were raised amongst respondents. The democratic health of the sector, and by extension, society, 'depends on safeguarding and nourishing a space for citizens to act separately from the state and the market, in particular in the interests of care,

499 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 5. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

500 D. Billis, *Hybrid Organisations and the Third Sector: Challenges for Practice, Theory and Policy*, Basingstoke: Palgrave Macmillan, 2010.

justice and equality amongst people and for the planet,' as argued by Penny Waterhouse.[501]

Accountability

Difficulties in the demarcation of sector boundaries also presents problems with accountability. There are difficulties – both practical and constitutional – when something goes wrong. In cases where voluntary sector organisations are involved in the delivery of public services, it is sometimes unclear who is liable in instances of malpractice. Service users might not be able to tell what type of organisation is responsible for the provision of their care until there is a problem with the service. At this point, the fundamental difference between the two sectors is that public authorities are constitutionally bound. They have a legal and formal basis with regulatory systems in place. This give them a status that voluntary organisations don't have. These differences in complaints procedure and accountability were most obviously demonstrated in the demise of the Kids Company. As this example revealed, if a voluntary organisation fails in its provision of services, it is the state that is left to mediate the situation. The young beneficiaries of the Kids Company ended up being looked after by local authorities. This episode illustrates many of the tensions inherent in the subject analysed in this paper. The stakes are high and it is important that these issues are addressed.

501 P. Waterhouse, 'Thinking out loud – the job of voluntary services', NCIA: Feb., 2016, p. 3. [accessed via: http://independentaction.net/wp-content/uploads/sites/8/2015/12/The-job-of-voluntary-services-final.pdf (26/09/17)]

Research Paper

The Voluntary Sector and the UK Constitution

Lucy Atkinson

This research paper considers the constitutional role of the voluntary sector, and state responsibilities to the sector. Through examining the UK government's history of working in tandem with voluntary and community groups, the paper looks at the constitutional framework in which charities operate when providing essential state services.

This paper aims to complement existing studies by examining the key points of interplay between voluntary sector organisations and the UK state. Based on first-hand accounts by practitioners and a secondary literature review, it offers a new approach to the discourse, exploring the relationships between the state and sector from a constitutional perspective.

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