



JOINT COMMITTEE ON HUMAN RIGHTS INQUIRY: FREEDOM OF SPEECH IN UNIVERSITIES

*Further written evidence submitted by the Charity Commission for England and Wales
February 2018*

The Charity Commission is the independent regulator of charities in England and Wales. We work to increase public trust and confidence in the charitable sector, promote compliance by charity trustees with their legal obligations, promote the effective use of charitable resources, and enhance the accountability of charities to donors, beneficiaries and the general public.

The Commission is constituted as a non-Ministerial government department, directly accountable to Parliament for the way we operate and use of our funding. We regulate against the legal framework, as set by parliament in the Charities Act 2011 and the obligations of trustees in statute and in the common law.

The way in which we apply that framework, and our assessment of risk, is the same across the charitable sector, although the exact application will naturally depend on the circumstances. We do however work with sector specific stakeholders and umbrella bodies, to ensure the framework is understood by charities in relation to their environment and context. In that vein, we are proud of the working relationship we have with NUS, HEFCE and the Department for Education, and will endeavour to create a strong relationship with the new Office for Students.

In light of evidence heard during the inquiry, the Commission has already committed to reviewing our guidance 'Protecting your charity from harm' to ensure that it is read and understood in the manner in which we had intended- to support trustees both to recognise, and then to manage and mitigate risks to their charities. Furthermore, we will review our internal Operational Guidance on students' unions (OG48), to ensure a clearer distinction is made between the trustees of students' unions, student societies and the members. We hope the Committee finds these assurances helpful.

The Commission has provided both written and oral evidence to the Committee and following our evidence session, we committed to providing further evidence, set out in the following document.

Section 1 sets out what we mean when we talk about the charity law framework; including the statutory functions and duties of the Commission as set out by Parliament; the fiduciary duties of trustees, developed through centuries of common law; the meaning of 'advancement of education' in charity law; and the legal framework as applied to students' unions.

In section 2 we provide evidence on the Commission's approach to decision making, covering our Regulatory and Risk Framework, and how the Commission determines whether it has a regulatory role.

Finally in section 3 we explain how the charity law framework and the Commission's approach to decision making works in the context of our engagement with students' unions.

As requested, we have provided information on our students' union casework from the last two financial years, in the Appendices. Please note that these case studies contain sensitive data and are only to be shared with the Committee members. We request that, as such, the Appendices are not published and remain confidential.

Please note that we have copied this evidence to the Department for Digital, Culture, Media and Sport, as the department responsible for policy matters relating to civil society, and to the Attorney General's office, as the Attorney General has the responsibility to intervene in certain proceedings to protect charities in the public interest.

We hope this evidence is of use to the Committee, and we look forward to engaging further on this matter.

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1. The charity law framework

- 1.1.1 The Charity Commission is the registrar and regulator of charities in England and Wales.
- 1.1.2 The Commission's statutory objectives, functions, powers and duties are set out in the Charities Act 2011 (referred to in this document as "the 2011 Act") as amended by the Charities (Protection and Social Investment) Act 2016. Our regulatory approach is designed to meet our responsibilities under the law effectively, in line with the resources made available to us, in accordance with Parliament's wishes.
- 1.1.3 As of December 2017, there were 168,237 registered charities in England and Wales, plus an approximate 200,000 non-registered charities for which we are also responsible. The annual income of the sector is over £75 billion, and the sector holds over £280 billion in assets. In 2016, there were 121 students' unions in England and Wales registered with the Commission.
- 1.1.4 The Commission focuses on promoting compliance by charity trustees with their legal obligations, holding charities accountable, promoting public trust and confidence in charities, promoting trusteeship and the effective use of charitable resources and ensuring the integrity of the register of charities. The law of charity dates back some 400 years and is not codified in one place. The legal obligations of charity trustees are to be found in statute, the common law of charity and the general law.

1.2 [Charity law](#)

- 1.2.1 In a letter dated 30 January 2018, the Committee asked the Commission to explain what is meant by the term "charity law".
- 1.2.2 Legal recognition of the concept of charity began with the Charitable Uses Act 1601. Since that time, much of this body of law has been developed in decisions of the courts to regulate the administration of trusts which were created not for the benefit of particular individuals, but for purposes which were beneficial to the public.
- 1.2.3 This body of law has a long and detailed history, and is the subject of a number of specialist legal textbooks¹. In this document we have limited discussion of this topic to the key points which we feel are relevant to the Committee's questions.
- 1.2.4 "Charity law" refers to the body of law specifically relating to charities. This includes what constitutes a charity for legal purposes; the legal duties of trustees of charities; legal requirements relating to what charities can and cannot do; and the regulatory regime of the Commission. It is drawn partly from charity-specific legislation and case law, and also from other areas, including in particular trust law, which governs the role of trustees and the administration of trusts. Much of this is derived not from statute but from the common law, developed in court judgments over time.
- 1.2.5 There are also other areas of law which may impact on charities if constituted in a particular form (e.g. company law) or with particular purposes and activities (e.g. education law). Charities, like other bodies, also remain subject to general legislation e.g. equality law.

¹ For example, "The Law and Practice Relating to Charities", Hubert Picarda QC, Bloomsbury Professional 4th edition 2011; "Tudor on Charities" ed. William Henderson and Jonathan Fowles, Sweet & Maxwell, 10th edition 2015



- 1.2.6 Much of the regulatory framework for charity law is now consolidated in the 2011 Act, although the common law is still relevant to how this law is interpreted and applied². The legal duties of charity trustees are not set out in the 2011 Act, but are drawn from the common law, and in some cases set out in other relevant statutes³.
- 1.2.7 In England and Wales a charity is an institution which is established for exclusively charitable purposes, for the public benefit, and which is subject to the charity jurisdiction of the High Court⁴. The “purposes” are the purposes which it is set up to achieve, and will be determined by the individuals or organisations who establish it. The purposes will in most cases be set out in the legal document which governs the institution.
- 1.2.8 In many cases where the Commission refers to a “breach of charity law”, this will be a reference to trustees having acted in breach of their legal fiduciary duties as charity trustees. This may include having operated their charity in a way which does not properly further its charitable purposes, or having failed to manage their charity’s resources responsibly.

1.3 Statutory objectives, functions and duties of the Commission

- 1.3.1 The Commission and its predecessor organisations have existed since the mid-nineteenth century. In its current form the Commission is established pursuant to the 2011 Act. It is a non-ministerial Government department, and carries out its functions on behalf of the Crown⁵. The Commission is constitutionally independent of Ministerial control⁶.

1.3.1 The statutory objectives of the Commission are set out in section 14 of the 2011 Act:

14. The Commission’s objectives

The Commission has the following objectives—

1. The public confidence objective

The public confidence objective is to increase public trust and confidence in charities.

2. The public benefit objective

The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

3. The compliance objective

The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

4. The charitable resources objective

The charitable resources objective is to promote the effective use of charitable resources.

5. The accountability objective

² See for example section 3(3) 2011 Act in relation to the interpretation of descriptions of purposes in the 2011 Act.

³ For example, the statutory duties of company directors, which apply to the trustees of charitable companies under the Companies Act 2006.

⁴ Section 1, 2011 Act

⁵ Section 13(3), 2011 Act

⁶ Section 13(4), 2011 Act



The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

1.3.2 The statutory functions of the Commission are set out in section 15 of the 2011 Act:

15. The Commission's general functions

(1) The Commission has the following general functions—

- 1. Determining whether institutions are or are not charities.*
- 2. Encouraging and facilitating the better administration of charities.*
- 3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.*
- 4. Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.*
- 5. Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives.*
- 6. Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives.*

(2) The Commission may, in connection with its second general function, give such advice or guidance with respect to the administration of charities as it considers appropriate.

(3) Any advice or guidance so given may relate to—

- (a) charities generally,*
- (b) any class of charities, or*
- (c) any particular charity,*

and may take such form, and be given in such manner, as the Commission considers appropriate.

1.4 Trustees' fiduciary legal duties under charity law

1.4.1 Charity trustees are subject to a number of legal duties. As explained above, these are largely derived from the law as interpreted by the courts over time. The Commission's Guidance 'The Essential Trustee' (CC3)⁷ gives guidance to charity trustees about the role of being a trustee, including the main duties to which they are subject, as set out below⁸.

1.4.2 Trustees must:

- Ensure that their charity is carrying out its purposes for the public benefit⁹;

⁷ *The essential trustee: what you need to know, what you need to do* (last updated July 2015)

<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3/the-essential-trustee-what-you-need-to-know-what-you-need-to-do#trustees-duties-at-a-glance>

⁸ Given that the Committee has asked the Commission to explain the legal basis for its position, we have where relevant provided references to significant reported court judgments which provide the legal basis for these duties.

⁹ *Harries v Church Commissioners for England and Wales* [1993] 2 AER 300



- Comply with their charity's governing document¹⁰ and the law¹¹; this includes complying with charity law requirements and other laws that apply to the charity
- Act in their charity's best interests to carry out its purposes¹²;
- Manage their charity's resources responsibly¹³, including avoiding exposing the charity's assets, beneficiaries or reputation to undue risk;
- Act with reasonable care and skill, making use of their skills and experience¹⁴ and taking appropriate advice when necessary¹⁵;
- Ensure their charity is accountable¹⁶.

1.4.3 As noted above, one of the Commission's statutory objectives is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities. These duties apply to all charity trustees regardless of the type of activity being carried out, although what will be needed to satisfy each obligation will vary depending on the circumstances. These duties therefore apply to the trustees of students' unions.

1.4.4 In the case of some categories of charity, trustees may be subject to duties which are not found in specific charity law. For example, where a charity is established as a company, its trustees are also subject to statutory duties in their capacity as company directors¹⁷. These include duties to act in accordance with the company's constitution and within their powers, to promote the success of the company for the furtherance of its purposes, and to act with reasonable skill, care and diligence.

1.5 Meaning of 'advancement of education' in charity law

1.5.1 During the Commission's evidence session, the Committee asked about the Commission's application of its functions, in relation to charities with educational purposes.

1.5.2 The advancement of education is one of the 13 recognised charitable purposes under the 2011 Act. As referred to in our previous evidence, there are almost 90,000 charities registered with the Commission whose purposes include the 'advancement of education'. As of 2016, when the Commission undertook a review of the register, 121 of those charities were students' unions.

1.5.3 For a purpose to be charitable it must be within the descriptions of purposes in section 3 of the 2011 Act and for the public benefit¹⁸. "Public benefit" is a technical concept in charity law which is not defined in statute. During the passage of the Charities Act 2006 (now consolidated into the 2011 Act), Parliament discussed the advantages and disadvantages of defining public benefit in statute, and concluded that it would not define it allowing it to be continued to be defined by the common law. Section 17 of the 2011 Act requires the Commission to produce guidance in order to promote awareness and understanding of the requirement for purposes to be for the public

¹⁰ *Andrews and another v M'Guffog and another* (1886) 11 App Cass 313

¹¹ This is derived from the duty to act in the best interests of the charity and from other general legal duties.

¹² *Cowan v Scargill* [1985] Ch 270,

¹³ *Speight v Gaunt* (1882) 22 Ch.D. 72

¹⁴ *Ibid.*

¹⁵ *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260

¹⁶ The 2011 Act provides a statutory framework with which charities must comply, including the submission of accounts and reports to the Commission.

¹⁷ Companies Act 2006, ss171-177

¹⁸ Section 4, 2011 Act.



benefit. The current versions of this guidance, which is in three parts, are available on the Commission's website¹⁹.

- 1.5.4 Where any of the terms used in the descriptions of purpose has a particular meaning in charity law (as interpreted by the courts over time), that term has the same meaning when interpreting section 3 of the 2011 Act²⁰. Many of the terms used in section 3 do have a "particular meaning" in charity law, drawn from court judgments over time which have developed the scope of charitable purposes.
- 1.5.5 In a number of reported judgments, the courts have considered the meaning of the term "education" in charity law. In one leading case, the Court held that the term should mean what it means in ordinary speech, and because of this, that meaning can evolve over time, in line with contemporary circumstances²¹.
- 1.5.6 Education is not limited to classroom education; it can also include, for example, research²² or training²³. A mere increase in knowledge is not charitable, unless combined with education²⁴; to be educational, a purpose must advance people's education in a meaningful way²⁵.
- 1.5.7 A charitable students' union can, in furtherance of educational purposes, encourage students to develop their political awareness or to acquire knowledge of, and to debate, and to form views on, political issues²⁶.
- 1.5.8 An education charity does not need to be absolutely neutral in all matters, and can base its education on widely accepted principles; but beyond this, a body set up to advance a particular point of view will not be advancing education in the charity law sense²⁷. Although there is no clear definitive legal position on what constitutes widely accepted principles, there are examples where this has been attempted. In one case the Court held that education based on an irenical perspective, that is to say peace is preferable to war, would be charitable. However the promotion of pacificism is political and not charitable. The courts have also determined that political propaganda is not education²⁸.
- 1.5.9 The quotation we have used in our written submissions to the Committee to describe the advancement of education is as follows: "to promote, sustain and increase individual and collective knowledge and understanding of specific areas of study, skills and expertise". This phrase is used in our published guidance "The Advancement of Education for the Public Benefit"²⁹. This is the Commission's interpretation of the law as set out above.

¹⁹ Public benefit: the public benefit requirement (PB1) <https://www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1>; Public benefit: running a charity (PB2) <https://www.gov.uk/government/publications/public-benefit-running-a-charity-pb2>; Public benefit: reporting (PB3) <https://www.gov.uk/government/publications/public-benefit-reporting-pb3>

²⁰ Section 3(3), 2011 Act.

²¹ *Inland Revenue Commissioners v McMullen* [1981] AC 1

²² *Re Hopkins Will Trusts* [1964] 3 All ER 56

²³ *CITB v Attorney General* [1971] 1 WLR 1303

²⁴ *Re Shaw* [1957] 1 WLR 729

²⁵ *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 169 DLR (4th) 34

²⁶ *Attorney General v Ross* (1986) 1 WLR 252

²⁷ *Southwood v Attorney General* (2000)

²⁸ *Re Hopkinson* [1949] 1 All ER 346

²⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358536/the-advancement-of-education-for-the-public-benefit.pdf



- 1.5.10 In two reported cases, the High Court has granted injunctions to prevent charitable students' unions from giving funds for political purposes which were outside their objects:
- Funds for a campaign against the Gulf War, and affiliation to a non-charitable organisation³⁰;
 - Funds for a campaign against the proposed withdrawal of free milk for school children, and funds for another charity with different objects³¹.
- 1.5.11 Although the substance of these cases related to the application of funds by the relevant students' unions, they were decided on the basis that it was not open to those unions to support these campaigns as to do so would have been outside of their educational charitable purposes.

1.6 Charity law framework as applied to students' unions

- 1.6.1 The courts have recognised students' unions as charitable since at least 1972³². Even where students' unions are not explicitly established for exclusively charitable purposes, the courts have held that, if established to further the purposes of the university or college to which a union is connected, it may nevertheless be a charity³³. As a matter of fact, many unions now have explicitly educational statements of purposes in their governing documents.
- 1.6.2 Before 2009, students' unions were 'exempt from charity registration'³⁴ with the Commission, but were still charities. Since 2010 students' unions which are charities have been required to register with the Commission if their income exceeds £100,000. Students' unions whose annual income is below £100,000, though not required to register or submit annual returns to the Commission, are still subject to regulation by the Commission.
- 1.6.3 Charitable students' unions can establish, or support the establishment of, clubs and societies, in furtherance of educational purposes. The High Court has explicitly endorsed this point of principle³⁵. Such clubs and societies can promote debates and discussions, and may in some cases wish to promote particular political points of view. The Commission also recognises and accepts that a lot of these debates can be on controversial or sensitive topics. A charitable students' union can permit this, but cannot provide support for it except to the extent that doing so is in furtherance of educational purposes, and its trustees must only permit it to do so in accordance with the legal duties of trustees.
- 1.6.4 As with most sub-sectors of charities, students' unions may take one of a number of different legal forms, such as trusts or companies. Each will be governed by a body of charity trustees³⁶, and will have a membership comprised of students of the affiliated university. Those students may or may not have a legal role in the constitution of the union (analogous to shareholders in a company), depending on the legal structure.
- 1.6.5 The legal position of individual students as members of a union will depend on the constitutional structure of the individual union, and this will vary from case to case. In many cases, individual students will be members but not trustees, and so not bound by the same legal framework as trustees.

³⁰ Webb v O'Doherty; The Times, 11 Feb 1991

³¹ Baldry v Feintuck [1972] 1 WLR 552

³² Ibid.

³³ London Hospital Medical College v IRC [1976] 1 WLR 613

³⁴ <https://www.gov.uk/government/publications/excepted-charities>

³⁵ Attorney General v Ross (1986) 1 WLR 252

³⁶ The persons having general control and management of the administration of the charity – section 177 2011 Act.



1.6.6 Our Operational Guidance document OG 48, which is internal staff guidance, but is made publicly available, gives more detail regarding students' unions as charities³⁷. The Commission recognises that this guidance requires a review and update to set out more clearly some of the legal principles that apply to charity trustees of students' unions, as opposed to its members.

1.7 Committee's further questions

1.7.1 In a letter dated 30 January 2018 the Committee referred to a passage from the Commission's written submission to the Inquiry and asked that we explain our use of the term "charity law" and separate out what is the law relating to charities, what derives from the general law and the Commission's view of how trustees should interpret that law.

1.7.2 The statement referred to (with emphasis added) is:

"in order to manage compliance with charity law and the risks involved, if the purpose of an event or debate is educational then the charity should ensure that sufficient controls are in place to manage the event, and that issues are discussed in a balanced and reasoned manner with opposing views and opinions being expressed so that those in attendance can make up their own minds. The law is clear that educational or other activities by charities should not unlawfully interfere with other people's human rights or result in non-compliance with other legal duties, nor should those activities unlawfully interfere with the right to freedom of speech".

1.7.3 Where we refer to managing compliance with charity law in this specific context, we refer primarily to ensuring that trustees have complied with their duties. Principally this refers to their fiduciary duties under charity law as outlined above, and separate duties under other legal regimes, including their duties to:

- ensure that their charity is furthering its purposes (and not non-charitable political purposes);
- comply with the law; and
- manage their charity's assets and reputation responsibly.

1.7.4 The reference to law regarding educational and other activities by charities is to the general law, with which charity trustees have a duty to comply.

1.7.5 In a letter to the Commission dated 2 February 2018, the Committee asked the Commission to address a number of further questions, listed below.

- "What are the benefits of student unions having charitable status?"
- What would be the practical consequences if a student union operated in one of the following ways:
 - Operated as a non-charitable organisation, e.g. as a company limited by guarantee;
 - Or operated only its student welfare services as a charity, and its other activities as a non-charitable organisation.

³⁷ Charity Commission: OG 48 Students' unions <http://ogs.charitycommission.gov.uk/g048a001.aspx>



- Where other organisations have a role relating to free speech, why does the Charity Commission act as well, e.g. in cases where university authorities investigate practices or cases where the police investigate alleged criminal activity?
- What is the added benefit of this duplication?"

We have addressed these questions below.

What are the benefits of students' unions having charitable status?

- 1.7.6 There may be considered to be benefits to students' unions having charitable status both for students' unions themselves and for public policy. For students' unions, they may enjoy financial advantages, including in their tax treatment and in the availability of funding from other charities, including universities; individual unions may also consider that they have other advantages depending upon their particular circumstances. From the perspective of public policy, it may be thought that the transparency and accountability arising from charitable status is beneficial in protecting the assets held by students' unions for their educational purposes.
- 1.7.7 As a matter of law, when an organisation is established, it will be a charity if, and only if, it meets the statutory test referred to in paragraphs 1.5.2 and 1.5.3 above. Whether or not it does will depend upon choices made by the founders in setting up the constitution of the students' union.
- 1.7.8 An organisation which is not charity can, at any time after establishment, choose to become a charity by changing its purposes so that they are exclusively charitable. Charitable organisations, including students' unions, once established, cannot choose not to be charities³⁸.
- 1.7.9 It is likely that, at the point of establishment, most students' unions will be charities in law.
- 1.7.10 In summary, where those in charge of an organisation have a choice as to whether or not it should be a charity, the benefits to that organisation of deciding that it should be a charity include:
- A favourable tax position,
 - Reputational benefits which apply to charities,
 - The presence of a regulatory framework, whether through the Commission, a principal regulator or otherwise, which supports accountability and good governance.
- 1.7.11 However, it is not the place of the Commission as independent regulator to take a view on whether or not certain categories of organisation should or should not be charities. The test for whether or not an institution is a charity is a legal test set by Parliament, as referred to elsewhere in this document.

What would be the practical consequences if a student union operated in one of the following ways:

- ***Operated as a non-charitable organisation, e.g. as a company limited by guarantee;***
- ***Or operated only its student welfare services as a charity, and its other activities as a non-charitable organisation?***

³⁸ See, in relation to students' unions, Baldry v Feintuck [1972] 1 WLR 552



- 1.7.12 As noted above, it is not open to a charity to choose not to be a charity. It is also not possible for a single legal entity, such as a students' union, to be partly a charity and partly not³⁹.
- 1.7.13 Charity trustees are bound by law to apply the assets of their charity for its charitable purposes. If the trustees of a charitable students' union were to operate the union in a non-charitable manner, this would constitute a breach of trust, and the trustees could be personally liable for this, including being liable to repay to the charity any sums spent in breach of trust.
- 1.7.14 The law does not allow for a charity to change its purposes so that they cease to exclusively charitable. If a students' union were to attempt to do this, that purported change would not be legally effective⁴⁰.
- 1.7.15 Many universities are themselves charities. Where a students' union receives funds from its affiliated charitable university, the university will need to ensure that this funding can only be used to further the university's own charitable purposes. On this basis, even where a students' union is established as a non-charity, the university would need to ensure that its funds cannot be used for non-charitable purposes of the union, including any political purposes which a non-charitable union might further.
- 1.7.16 There are a number of charities which operate as part of a group structure with non-charitable associated bodies, such as subsidiary companies. A charity can do this where the subsidiary will further the charity's purposes, or where it will be a financial investment by the charity. In these situations there must be a clear separation between the activities of the charitable and non-charitable bodies, the charity must ensure that the arrangement does not involve any non-charitable expenditure by the charity, and the charity trustees must properly comply with their legal duties.
- 1.7.17 It should be noted that some students' unions, and many other charities, do operate as companies limited by guarantee, while also being charities.

Where other organisations have a role relating to free speech, why does the Charity Commission act as well, e.g. in cases where university authorities investigate practices or cases where the police investigate alleged criminal activity?

- 1.7.18 As noted above, the Commission regulates compliance with charity law, including the duties of trustees. This is in support of our statutory compliance objective as well as to support the trustees in fulfilling the duties incumbent upon them under statute and common law as it relates to charities, which is exclusively the Commission's role. Incidents where a breach of charity law may have been committed may also include issues affecting free speech, but the Commission's role is not to regulate speech in itself. It will respect and support those principles insofar as there is no conflict with other laws in doing so.
- 1.7.19 The Commission acts similarly in a targeted manner in other areas where there may be an overlap with other regulatory functions and areas. For example in relation to cases involving abuse of beneficiaries or cases of serious breaches of safeguarding issues, the Commission will not examine the extent of any actual abuse but will look at what the trustees have done or could have done in ensuring they have protected the charity adequately and in some instances the beneficiaries directly from harm. The Commission will look at trustee decision making, and a

³⁹ Section 1, 2011 Act – ““charity” means an institution which (a) is established for charitable purposes only”.

⁴⁰ See, in relation to students' unions, Baldry v Feintuck [1972] 1 WLR 552



charity's policies and procedures, but it will not, and cannot look into whether criminal offences have been committed, and would not be responsible for taking these forward e.g. to prosecution.

- 1.7.20 Often in these cases criminality cannot be established, and there is often a role for the Commission specifically in ensuring that adequate protection measures are put in place for the benefit of the future administration of the charity rather than simply looking at any offences that may have been committed. This principle applies in a number of other legal areas as well, such as where there has been a breach of equality law, or other non-charitable civil offences which fall short of criminality.

What is the added benefit of this duplication?

- 1.7.21 The Commission does not duplicate the work of other regulators. The Commission regulates compliance with charity law, in accordance with its own objectives as set by Parliament. Many charities are subject to more than one regulatory regime (for example, those which operate in the health, care, or social housing sectors). In addition, all charities, as with any other organisation operating in England and Wales, are subject to the criminal law as well as charity law.
- 1.7.22 The benefit of the Commission's role is that it focuses on the running of the union in a way that is not currently caught by other regulators, notably in relation to the application of specific charity law duties, the public benefit and charitable purpose requirements, and ensuring transparency and accountability in the running of the union according to charity law.



2 Commission's decision making in its application of charity law

2.1 Regulatory and Risk framework

- 2.1.1 The Commission's Strategic Plan⁴¹ sets out its strategic priorities. This includes priorities relating to risks present within the sector. The Commission uses its Regulatory and Risk Framework as the starting point for both its targeted proactive and reactive work. This includes developing policy and guidance as well as one-to-one regulatory engagement with charities where needed.
- 2.1.2 The purpose of this Regulatory & Risk Framework is to outline:
- how the Commission operates as a risk-led regulator;
 - how it decides when and how to engage;
 - the possible outcomes of its engagement.
- 2.1.3 The Commission's Regulatory and Risk Framework⁴² is used as the starting point for considering and deciding on both the proactive and reactive work that it undertakes. This includes developing policy and guidance as well as one-to-one regulatory engagement with charities.
- 2.1.4 The Commission's Regulatory and Risk Framework document explains the principles of how we assess risk in deciding when and how to deal with individual cases, in both advisory and compliance contexts. The most up to date version is dated February 2018. Prior to 2018, there was a previous version of the Risk Framework, dated January 2012 and an accompanying document called the '*Application of the Charity Commission's Risk Framework*' which provided more information for Commission staff about how to apply the Risk Framework in practice when dealing with individual charities. However there are no material changes to note in this regard for the purposes of this submission.
- 2.1.5 This Regulatory and Risk Framework helps ensure the Commission's regulatory engagement with charities is proportionate, accountable, consistent, transparent and targeted as required by the 2011 Act.

2.2 Understanding risk in the charity sector

- 2.2.1 Risk-led regulation requires the Commission to develop an understanding of the nature and level of risk in the charity sector. The nature and level of risk it is addressing affects whether the Commission engages in relation to an issue and what action it takes to address it. When assessing and managing risks within charities, the Commission's starting point is that:
- charity trustees are publicly accountable for the funds they receive and the privileges that their charity enjoys because of its charitable status;
 - responsibility for administration and management of charities rests with trustees;
 - most trustees are doing a good job in managing and administering their charities and undertaking activities which further their charitable purposes for the public benefit.
- 2.2.2 The Commission expects trustees to manage the risks their charity faces responsibly, and to avoid exposing it to undue risk. While this does not mean they should be unduly risk averse, trustees should have appropriate processes in place for identifying and assessing risks, and

⁴¹ <https://www.gov.uk/government/publications/charity-commission-strategic-plan-2015-18>

⁴² <https://www.gov.uk/government/publications/risk-framework-charity-commission/regulatory-and-risk-framework>



deciding how to deal with them. Where needed, trustees must be able to demonstrate that they have such processes in place.

- 2.2.3 The Commission may become involved in a number of instances depending on the nature and severity of the concern raised with it. The Commission often receives complaints and will assess these complaints against its Regulatory and Risk Framework. Often the Commission becomes involved when there is information to suggest that the trustees are not fulfilling their duties towards their charity. This includes failing to manage risk appropriately, which could include risk to assets as well as the charity's reputation, and in some instances, risk to beneficiaries. In some cases such failures occur because either the trustees do not understand their duties, or because they are not willing or able to meet them.
- 2.2.4 The Commission's current priority regulatory risk issues are:
- **Fraud and financial abuse** - fraud and other financial abuse of charities (including abuse arising out of conflicts of interest), including money laundering;
 - **Safeguarding** - serious harm to, and the abuse of, children or adults in connection with a charity and/or the failure by a charity that works with or has regular contact with children or adults at risk to have adequate and effective safeguarding policies and procedures in place;
 - **Terrorism and extremism** - misuse of a charity for terrorist purposes or to promote extremism (including charity links with or support for terrorism, financial or otherwise, and connections to a proscribed or designated organisation, person, or entity);
 - **Public trust and confidence** - other significant breaches of trust, non-compliance or decisions made by charity trustees that significantly affect public trust and confidence in charity.
- 2.2.5 In its regulation of charities the Commission is fulfilling the role which Parliament has set for it, in the interests of ensuring that charities operate lawfully and for the public benefit. We will engage with a charity where we receive complaints from the public, serious incident reports from trustees, or referrals from other agencies, or where the Commission proactively spots matters which may be of regulatory concern.
- 2.2.6 We consider complaints received in our assessment of potential regulatory risks about charities. The Commission has a duty to consider engaging with charities that may be subject to a risk or concern, regardless of the source of the material or complaint. We would not take enforcement action against a charity or its trustees unless there was an identified risk to the organisation or to others.
- 2.2.7 Where concerns are raised, but the Commission finds that it has no regulatory role or concerns, we will make this clear, and in doing so defend charities from baseless or incorrect claims on breach of charity law.
- 2.2.8 The Commission's approach to complaints is set out in its publication in CC47⁴³.

[2.3 Determining whether the Commission has a regulatory role](#)

- 2.3.1 The Commission will determine whether an issue is within its regulatory remit by considering whether it falls within its statutory objectives and functions. If the Commission determines that it

⁴³ <https://www.gov.uk/government/publications/complaints-about-charities/complaints-about-charities>



does have a regulatory role, it will consider the appropriate engagement based on its assessment of the nature and level of risk relating to the issue.

- 2.3.2 Where trustees' decisions have the potential to unduly damage the reputation of the charity, we may need to seek assurances from the trustees that they have managed and mitigated the risks to ensure that they have or will comply with their duties, and to enable public trust and confidence to be maintained.
- 2.3.3 Where trustees' decisions are lawful there is likely to be no issue of regulatory concern or interest to the Commission.
- 2.3.4 Whenever the Commission is considering regulatory engagement with charities, the conduct and response of the trustees is likely to affect its risk assessment and the outcome. This includes considering whether the trustees have acted honestly and reasonably, or the extent of any evidence to suggest they have been careless or reckless, or whether there has been deliberate or wilful wrongdoing or abuse. These matters are relevant to whether or not trustees have complied with their duties to act with reasonable care and skill.
- 2.3.5 Where the Commission decides to engage, the level of that engagement and the outcome will depend on the circumstances of each case.
- 2.3.6 If the Commission is satisfied that the trustees have already taken appropriate steps to address points of concern, it may decide that it need take no further action. However, where the nature and level of the risk demands it, the Commission will take strong and effective action.
- 2.3.7 Where the Commission has engaged with a charity, there are a number of possible outcomes of our regulatory work. These include, for example, taking no further action, working with the trustees and their advisers to address regulatory concerns, providing regulatory advice and guidance and, in serious cases of regulatory concern, opening a statutory inquiry and/or exercising the Commission's statutory powers to protect the charity.
- 2.3.8 The majority of the Commission's operational compliance casework is resolved through the provision of regulatory advice and guidance, issuing Action Plans and/or obtaining assurances from charity trustees to take action to remedy failings or weaknesses in a charity's governance and administration. The Commission's power to open a statutory inquiry, its most serious form of engagement, is discretionary. Before taking the decision to open an inquiry, the Commission will apply its Regulatory and Risk Framework.
- 2.3.9 The Commission has not, to date, opened a statutory inquiry into any students' union. Similarly, and as set out in the case studies accompanying this response, the Commission has not exercised any of its compliance powers in cases involving students' unions but rather has sought to engender change or recognition of applicable duties through dialogue and written correspondence.
- 2.3.10 Evidence has been submitted to the Committee which suggests that charitable students' unions may "lose" charitable status as a result of the Commission's engagement regarding specific events or activities undertaken by unions or societies. As explained above, the test regarding charitable status is one of an organisation's purposes and not its activities, and the Commission does not have power to remove charitable status as a sanction for non-compliance by charities with aspects of charity law. We would be pleased to respond individually to any students' union



which has concerns that its charitable status may be in doubt as a result of our regulatory engagement.



3 Freedom of Speech; the Commission's regulatory engagement with students' unions

3.1 Regulatory Concerns

- 3.1.1 As referred to above, charity trustees are responsible for the administration of their charity and decisions about the activities it undertakes. The Commission regulates charities according to the charity law framework, as described in section 1. The Commission will also consider where risks are higher for particular charities or charitable subsectors (for example, charities working with children). Our approach to risk in the charity sector is outlined in section 2.
- 3.1.2 The Commission has no regulatory remit to promote or restrict freedom of speech. The Commission's role lies in furthering its statutory objectives, as determined by Parliament. Civil society, of which charities are a key part, is an important place for the free exchange of views, advocacy and debate. Some charities provide specific mechanisms for constructive debate and social action to build a strong civil society.
- 3.1.3 With regard to specific charitable activities, a charity may choose to campaign on an issue or take a stance that not everyone agrees with. It may choose to host a speaker who espouses views that some beneficiaries or members of the public may find offensive or not agree with. The Commission has always accepted that controversial speakers can be invited and can form part of rigorous debates and discussion on a wide range of educational topics. Regardless of the activity, charity trustees must ensure that this is done in line with the charity's purposes and complies with charity law. In addition to complying with their fiduciary duties under charity law, trustees must comply with their legal duties under the general law including criminal, human rights, equality law and defamation. This means ensuring that the charity's decision-making and risk assessment procedures take account of the relevant law as it applies to their charity. We also advise charities to follow the trustee decision-making principles as set out in the Commission's guidance "It's your decision: charity trustees and decision making" (CC27)⁴⁴.
- 3.1.4 Where activity is not conducted in the furtherance of the charity's objects, this may be a breach of charity law and, where this comes to the Commission's attention, the Commission will consider this in line with its Regulatory and Risk Framework, as referred to above.
- 3.1.5 As discussed by the Committee, the Commission is not responsible in law for regulating any potentially unlawful acts or omissions other than under the law relating to charities. For example, the Commission does not make judgements on breaches of equalities legislation, or the criminal law in themselves. If the Commission were to have concerns in this regard, we would refer these matters to the relevant expert regulator, agency or statutory body. In the case of students' unions, the Commission has, and will continue to, work alongside relevant regulators or umbrella bodies such as HEFCE or NUS in order to ensure that any intervention is not duplicated or over burdensome for students where this needs to occur.
- 3.1.6 However, such breaches of the broader legal framework may indicate to the Commission that the trustees are in breach of their fiduciary duties, and as such constitute a breach of charity law. A breach in the broader legal framework may also put charities at risk of reputational or financial damage, and damage public trust and confidence in the sector as a whole.

⁴⁴ <https://www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making>



3.1.7 In this instance, the Commission is likely to seek to have regulatory engagement with the charity, as described in section 2.

3.2 Controversy, extremism, discrimination and other competing rights

3.2.1 During the Commission's evidence session the Committee was keen to understand why the Commission was concerned with the idea of 'controversial' speakers.

3.2.2 The Committee will appreciate that in some cases it may not be clear whether activity conducted by charities may constitute a criminal offence or a breach of equalities legislation, for example. The Committee will see from our casework, described in the Appendices, that the Commission often receives a number of competing and contradicting complaints and allegations from beneficiaries and the public or other sources.

3.2.3 Complainants may assert that a single speaker has used discriminatory language, breached equalities legislation or used hate speech. In direct contradiction to those complaints, other complainants may assert that others are attempting to suppress free speech within charities by alleging discrimination.

3.2.4 In these instances, the Commission will seek to ensure that the trustees have considered the scope of their legal duties and some key considerations, such as how their beneficiaries might respond and react to a speaker or what any mid to long term impact could be on such beneficiaries or the reputation of the charity. A speaker is often already deemed 'controversial' by the beneficiaries and the public – and often expressed to the Commission through complaints. The Committee should note that there is no universally accepted definition of "controversial speakers" or indeed what an "extremist" speaker is, apart from the policy statement in the Prevent Strategy, which the Commission uses as a starting point in its interpretation where needed.

3.2.5 It is precisely because this is a difficult area that the Commission often will not focus on whether or not the speaker or event is in fact controversial or goes beyond the point of being controversial to being considered "extreme", but instead will look at how and to what extent the trustees have considered the risks that are likely to arise in deciding to host such events or persons and how these can or will be managed in the best interests of the charity.

3.2.6 The Commission is clear in its guidance for charities that someone with controversial views can be invited to a charity event to speak. Where this happens the trustees must be clear about how this will further the charity's objects and take active steps to manage any associated risks.

3.2.7 The Commission's view on this is helpfully supported by a joint legal opinion from leading Counsel commissioned by the NUS which can be found online.⁴⁵ It is recommended that the Committee read this document.

3.2.8 Trustees have duties to act in the best interests of their charity, ensure that it only undertakes activities which further its charitable objects, and in doing so, manage their charity's resources responsibly, including making sure the charity's assets are only used to support or carry out its

⁴⁵ <http://www.uklfi.com/UKLFI%20-%20student%20anti-BDS%20guide/Opinion%20-%20Christopher%20McCall%20&%20Raj%20Desai.pdf>



purposes. Trustees must avoid exposing the charity's assets, beneficiaries or reputation to undue risk.

- 3.2.9 The fact of whether a speaker is controversial is relevant to the Commission to the extent that an event, and/or activities connected with it, may present risks to the charity, or indicate potential breaches of charity law (for example, the application of funds for non-charitable purposes). It is not the speaker in themselves, or individual statements which a speaker may make, but the way in which the trustees manage their charity, which is relevant to the Commission.
- 3.2.10 Where the Commission receives complaints about a speaker, we assess how the trustees have assessed and mitigated those risks, and the policies and procedures they have in place to do this in a thorough and consistent manner.
- 3.2.11 **There is no reason in principle why as a result of charity law and its proper application, or by the actions of the Charity Commission, prudent and responsible charity trustees should not be able or willing to invite controversial speakers or carry out activities which rely on freedom of speech or expression. It is clear that educational charities can engage in educational activities which may be regarded as controversial.**⁴⁶
- 3.2.12 In our experience, students' unions have demonstrated an appetite to understand charity law and their legal duties and responsibilities. There is already available useful guidance produced by many of the HEIs and NUS directly, such as the NUS guidance on the restrictions under charity law on political campaigning⁴⁷.
- 3.2.13 The Commission is mindful of ensuring that trustees of students' unions do not feel overburdened with guidance. It will however consider how it can effectively cover the same points when reviewing its Operational Guidance in due course.

3.3 Commission's approach to guidance

- 3.3.1 The Commission produces guidance that supports trustees to comply with the law and manage risks. This is the same approach we take with all our guidance, and is something on which we have received positive feedback. Our guidance is generally not specific to individual categories of charity. It is the role of sector-specific bodies and umbrella groups to then support their members and affiliates with good practice and practical examples of the application of their legal duties within any particular subsector.
- 3.3.2 During the Committee evidence session, the Commission's guidance, specifically "Protecting Charities from Harm" was criticised for being considered restrictive in its language in parts. The guidance as a whole does explain that different parts will be more applicable depending on the risks presented by the activity being carried out by the charity.
- 3.3.3 The aim of the guidance was to provide clarity as to what steps could or should be taken by trustees in common instances. The Commission however had not intended for the guidance to come across as restrictive, and it is more than prepared to review it and to consider making changes in parts which clarify and support the principle that freedom of speech is an important consideration for the activities of students' unions in particular.

⁴⁶ Re Koeppler's Will Trusts [1986] Ch 423

⁴⁷ <https://www.nusconnect.org.uk/resources/guidance-on-political-activity-in-relation-to-students-unions>



3.3.4 Alternatively or in addition, the Commission could look to embed or merge other existing guidance to ensure that a consistent message is being communicated, and so not as to overburden students' unions with multiple documents conveying the same message.

3.4 [Overview of casework](#)

3.4.1 Over the last two financial years, six registered students' union charities have been involved in seven cases regarding external speakers. Two of those case are live, and include one which is a follow up case.

3.4.2 Compliance cases were initiated either due to complaints from members of the public or media reporting or as part of regulatory follow-up to assess trustees' compliance with actions the Commission had required them to take in earlier cases. All cases were assessed against the applicable Commission's Risk Framework then in place.

3.4.3 Action in these cases was considered in order to:

- ensure that charity trustees carry out their duties and responsibilities as required by law;
- assure the public that the charities were operating wholly in pursuit of their charitable purposes;
- promote high standards of governance and accountability by charities.

3.4.4 However all action in these cases was by correspondence only, and no formal statutory powers were used in any instance. The Commission has provided an outline of its engagement in those cases, in Appendix A and B. Other than the case relating to SOAS students' union, of which the Committee is already aware, those cases have been anonymised.

3.4.5 It is important to note that, for all these closed cases, no events were cancelled as a result of the Commission's engagement, nor has the Commission ever required any events to be cancelled.

3.4.6 However, as a result of these individual cases, for each charity we identified what we considered to be shortfalls in risk assessment and management policies and/or procedures in relation to events and speakers. This is consistent with how the Commission treats other charities engaging in similar events e.g. charities promoting the advancement of religion. In these instances, the Commission provided relevant regulatory advice and guidance to support the trustees in rectifying weaknesses or failures and closed the cases where it was satisfied with the actions that the trustees took to comply with this.