

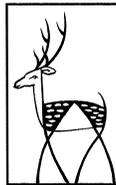
THE VOLUNTARY SECTOR, THE STATE AND THE LAW

The Voluntary Sector, The State and the Law

Edited by

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Foreword

Richard Best, OBE

Director, Joseph Rowntree Foundation

During the 1990s hopes and expectations for the voluntary sector grew. Disillusionment with the State's direct (often monopoly) provision of public and social services led to calls for greater pluralism and competitiveness to achieve better value for money, more flexibility and sensitivity. At the same time, the nation rejected the politics associated with the supremacy of market forces, electing a Labour government with a large majority. Interest in the voluntary sector as an acceptable alternative to both public and private sectors has chimed with the new government's quest for a "Third Way".

Is the sector equipped to take centre stage? Has it got the capacity and the qualities lacking in private and public sector providers?

Certainly, the UK's voluntary sector is big: it accounts for about one in 25 full-time paid jobs and nearly one tenth of all service employment. The total operating income of the broad voluntary sector is well over £30 billion *per annum* (and the broad definition excludes the Churches/faith communities/party political bodies).

Even if the sector is defined more narrowly and universities, "independent" schools, sports clubs and trade unions are taken out of the equation, it still accounts for more than one in 60 of all paid jobs and has a turnover of over £14 billion (in 1999 prices).¹

And, of course, measuring the scale of the sector in terms of paid staff and income/expenditure omits the key component of the volunteer. In 1995 the National Centre for Volunteering estimated the contribution of volunteering to the national economy at £41 billion *per annum* (although subsequent research at Loughborough University suggested a rather lower total²). By all accounts, the sector is operating on a substantial scale.

The problem in discerning trends for the voluntary sector is the diversity of its component parts. With nearly 200,000 charities, together with all the community based organisations, Friendly Societies (and Industrial and Provident Societies) the most striking feature is the small scale for most bodies. But there are big and powerful members of the sector too: the largest housing association

¹ J. Kendall and M. Knapp, *The Voluntary Sector in the UK* (Manchester, Manchester University Press, 1996).

² K. Gaskin and B. Dobson, *The Economic Equation of Volunteering* (Loughborough, Centre for Research in Social Policy, 1997).

owns more than 40,000 properties; the major care providers employ several thousand staff; major trusts like the Joseph Rowntree Foundation have hundreds of millions of pounds of assets.

The objectives of these bodies is astonishingly diverse. But all share the common characteristic of detachment from the control of the State (nationally or locally) and from the world of profit-making (and distribution). However much they depend upon statutory funds, ultimately they can turn their back on the institutions of the State and go their own way (even if this makes them penniless!). And although they may accumulate surpluses, these cannot be distributed for private gain and must be redeployed to meet not-for-profit objectives.

But is the sector's independence from government increasingly an illusion? And is the distinction between the voluntary and private provider—in terms of motivations as well as outcomes for service users—really a deceit?

A 1995 study from Manchester University analysed the income structures and funding experiences of a sample of 17 voluntary agencies, all providing care and support of different kinds, in the North of England over the preceding years. This showed how total income had increased sharply (by an average of 10 per cent above inflation each year) but how the bulk of the extra money came from statutory sources, particularly local authorities: 60 per cent of total income was from statutory funding.³

Perhaps unsurprisingly, the extra cash brings with it a sense of insecurity and unease for many organisations. Total income continues to be volatile and there is discomfort with the dependency upon time-limited project-funding (usually with the voluntary body's core funding remaining static). So funding increased during the 1990s for very many service-providing bodies but fears for the future, sometimes reflecting funding problems for the statutory bodies themselves, have grown.

Meanwhile, researchers from South Bank University and Sheffield Hallam University have noticed the heavy dependence of locally based voluntary organisations on their relations with local authorities.⁴

Nicholas Ridley, when responsible for local authorities as Secretary of State for the Environment, once famously described the model council as one which met annually to sign contracts for all services. He had in mind that private-sector bodies, in competition, would ideally provide all these services; but he recognised that sometimes voluntary bodies would successfully compete for the business.

There are still incentives from central government to persuade the local authorities to take a more pluralist approach to service provision, shifting to the role of funders/purchasers/enablers (and sometimes regulators). For example, 75 per cent of funding for residential care is ring-fenced for the “independent

³ L. Russell, D. Scott and P. Wilding, *Mixed Fortunes: The Funding of the Voluntary Sector* (Manchester, Manchester University Press, 1995).

⁴ P. Alcock, J. Harrow, R. Macmillan, J. Vincent and S. Pearson, *Making Funding Work* (York, York Publishing Services, 1999).

sector”; the provision of new social housing has shifted almost entirely to voluntary bodies. But in different forms, the relationship has become a contractual one—with the danger of “State capture”.

A 1997 report on the impact of a contract culture has shown that it has made recruitment of volunteers more difficult; it has formalised their roles, requiring increased supervision and training; and for many, but by no means for all, it has meant that existing volunteers feel their status and value have reduced. Increasingly, paid workers are driven by the contents of the contract not the views of their management committees.⁵

It is not only the constraints and culture of the public sector which have been impinging upon the independence and identity of voluntary bodies: the voluntary sector has also found it necessary to adopt the techniques and methods of the private sector.

On the fund-raising side, a competitive environment between major charities, intensified by TV telethons and some changes in giving patterns provoked by the National Lottery, has led them to employ expensive fund-raisers and adopt advertising methods and marketing ploys lifted from their commercial counterparts.

With business sometimes after the same contracts from statutory bodies, some of the distinctions between the two sectors have evaporated. A report by Diana Leat noted that voluntary organisations were sounding and acting more and more like for-profit businesses, which could lead to their distinctiveness and special fiscal privileges being questioned. She found there were no clear, unqualified differences in management.⁶

Is it possible for the voluntary sector to bring together its traditional attributes—altruism, independence of thought, the pioneering spirit—with the key qualities of both public and private sectors? The ethos of public service could live on within voluntary agencies, alongside new characteristics of efficiency and cost-effectiveness learnt from exposure to market forces during the 18 years of Conservative government. An attempt has been made by central government (principally the Home Office) working with the National Council for Voluntary Organisations in the wake of the Deakin Commission Report,⁷ to establish a national compact with the voluntary sector. This enshrines the basis for mutual respect and support, valuing the sector’s independence whilst expecting it to accept responsibilities in an accountable and open manner. And at the local government level, work is continuing on achieving a partnership between the statutory and voluntary bodies in each local area.⁸

⁵ L. Russell and D. Scott, *Very Active Citizens?* (Manchester, Manchester University Press, 1997).

⁶ *Challenging Management: A Study of Managers who have Moved from For-profit to Voluntary Organisations*, Centre for Voluntary and not-for-profit management (London, City University, VOLPROF, 1997).

⁷ *Meeting the Challenge of Change, Voluntary Action into the 21st Century: Report of the Commission on the Future of the Voluntary Sector* (London, NCVO, 1996).

⁸ See M. Taylor, *The Best of Both Worlds* (York, York Publishing Services, 1997); G. Craig, M. Taylor, C. Szanto and M. Wilkinson, *Developing Local Compacts* (York, YPS, 1999).

Not for the first time, the conclusion may be that the voluntary sector is at a crossroads. The danger of losing out in the provision of services to the private sector may have receded. And the chances of it entering a mutually beneficial accord with government seem better than in times past. But it has always contained the seeds of its own potential destruction—in its unwillingness to act cooperatively, its confusion about its role which flows from its diversity, and its inherent financial instability which can tempt it to abandon its independence—as well as its constant capacity to regenerate and capture the commitment and talent of a multiplicity of the highest quality people.

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Richard Best has been the Director of the Joseph Rowntree Foundation and its associated housing association, the Joseph Rowntree Housing Trust since 1988. The Foundation spends nearly £10m *per annum* on a programme of social policy research and development. Richard was Director of the National Federation of Housing Associations from 1973–88, and has acted as Secretary to the Duke of Edinburgh’s Inquiry into British Housing, an Advisor to the House of Commons Environment Committee and as trustee of various charities.

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Ann Lyon read history at the University of Newcastle-upon-Tyne and did post-graduate work in history and archaeology at the Universities of York and Durham before moving into law. She qualified as a Solicitor in 1991 and worked in private practice and local government before taking up a lectureship at De Montfort University, Leicester in 1993. Her main academic interests are in the public law sphere, particularly military law and the history of the British constitution.

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Stephen Swann has lectured in English property law at Oxford Brookes University and the University of Dundee. He developed his interest in the law reform needs of the voluntary sector while engaged at the Law Commission on its preparatory work for HM Treasury's 1996 consultation paper on reform of the Trustee Investments Act. Recently involved in collaborative research on British and German charity law, he is presently research fellow at the University of Osnabrück's Institute for International Private Law and Comparative Law. He also provides legal advice to the Fenland Lighter Project in a voluntary capacity.

Acknowledgements

This book arises out of a Newcastle Law School conference on The Voluntary Sector, The State and The Law which took place in March 1998. The conference was devised and organised by my colleague, John Alder, and my first and foremost debt of gratitude is to him for his invaluable help in organising and editing this book and for allowing me to see his project through to publication.

Secondly, I would like to thank the conference delegates for lively discussion, and the book contributors for developing with enthusiasm the conference's themes. They have collectively developed a very stimulating set of essays on the area.

Book preparation and conference organisation are no small tasks. I am grateful to Elayne Thorburn for her assistance in both, and to Joanne Pinnock and Suzanne Johnson who stepped in at the most pressured moments. I am also particularly grateful to Mia Murillo for discussing the issues of this book with me and for her many valuable suggestions; and to Richard Hart for his patience and his enthusiasm for the project.

Finally, an immeasurable debt of gratitude is owed to Anthony R Zito, whose moral support and practical assistance have been invaluable and greatly appreciated.

Alison Dunn

Newcastle upon Tyne, August 1999.

1

Introduction

ALISON DUNN

The origins of this collection of essays lay in a conference organised by John Alder and Newcastle Law School in March 1998. One aim of the conference was to draw together and analyse the themes underpinning the relationships between the voluntary sector, the state and the law. Common themes that one would expect to find in this area are those of independence and autonomy, regulation and accountability, and patronage through partnership. The papers delivered at the conference and produced in this book illustrate that the accommodation of these themes in the working relationships between the voluntary and public sectors has created tensions. This is particularly the case in recent decades, given the way in which the sectors have changed and developed, and the dichotomy between their complementary roles but diverse responsibilities and expectations.

The voluntary sector is extensive.¹ To say that it covers a wide range of organisations, issues and users is still to underestimate its nature, extent and heterogeneity, and the difficulties of defining its boundaries. From acts of neighbourliness within communities to organised programmes of global poor and disaster relief, with self-help and advocacy in between, it is of polymorphous character. On the other hand, the sector is united by its independence, innovation and spontaneity. As a pioneer of community collaboration and representation it represents a significant force within society.² The hallmark of the sector's innovation and capacity to respond is its autonomy. An independent voluntary sector is a distinct and important element of any democracy. It is a vehicle for direct public participation, with its autonomy enabling it not just to participate, but also to maintain a check upon the state.

¹ On the size of the sector as an economic and human resource see L. Hems and A. Passey, *The UK Voluntary Sector Almanac 1998–99* (London, NCVO, 1998).

² The European Commission, for example, has recognised that the contribution made by the voluntary sector is “immense”, and that voluntary organisations have “led the fight for the recognition of human rights and the dignity of the human person, and for the preservation of our cultural heritage and of the natural environment. Many promote a spirit of solidarity on behalf of the less favoured, the sick or people with disabilities, the poor and excluded, the aged and the young, and between those who have jobs and those who do not, between men and women, between generations, between the more prosperous regions and the poor or struggling regions”: *Promoting the Role of Voluntary Organisations and Foundations in Europe*, Com(97)241, para 7.1.

Voluntary organisations have been an important aspect of public life since Tudor times, when charities were first given state backing.³ Such patronage, advantageous at the time, has proved to have a double edge. While it enables organisations to pursue goals outside market pressures, it also carries the risk of dependence and political control. During the last two decades, state patronage has been a significant pressure upon the independence of the voluntary movement, not least because the boundaries between state and voluntary responsibilities have shifted. The emphasis of government has switched from the role of provider of services to enabler and regulator, with the voluntary sector through a series of contracts taking on more of the public sector's responsibilities, particularly in the delivery of welfare services.⁴ The relationship between government and voluntary organisations has been characterised as a "contract culture",⁵ in which legalistically defined rights and duties replace the traditional voluntary service ethos. This new relationship is still insecure. The notion of creating partnerships between the public sector and the voluntary sector⁶ has entered into common parlance, if not into the reality of their relationships.

Additional pressures upon the voluntary sector's independence stem from the fact that in the current economic climate, with its emphasis on financial efficiency and competition, the line between voluntary bodies and the private sector is becoming increasingly blurred. Many voluntary organisations have been forced by financial pressures to offer services, chase funding, engage in trading activities and perform a wide range of functions, such as lobbying as pressure groups and offering a framework for co-operative and mutual activities, which sometimes conflict and threaten their relationship with their users and funders. Efficiency, effectiveness and efficacy have become key reference points, almost replacing need, responsiveness and innovation as the standards of evaluating voluntarism.

In terms of regulation and accountability, voluntary bodies have traditionally been accountable primarily to their members. Their relationship with government has been largely informal and based upon trust, whilst their relationship with their users and beneficiaries has tended to be paternalistic. However, the way in which the sector and the pressures upon it are changing and developing raises legal questions about their governance, openness, accountability, conflicts of interest and regulation. As voluntary organisations increasingly straddle the divide between the private and the public, the issue of their accountability becomes more pressing. For example, the accounting requirements for charities have become more stringent in recent years under sections 41–49 of the Charities Act 1993, as have government controls for housing associations. So

³ See preamble to the Act of Charitable Uses 1601.

⁴ M. Taylor, *The Best of Both Worlds* (York, YPS, 1997).

⁵ J. Warburton and D. Morris, "Charities and the Contract Culture" (1991) 55 *Conv* 419.

⁶ See *Compact on Relations between Government and the Voluntary and Community Sector in England*, Cm 4100 (London, Stationery Office, 1998), *Building Real Partnership: Compact Between Government and The Voluntary and Community Sector in Northern Ireland*, Cm 4167 (London, Stationery Office, 1998), *The Scottish Compact*, Cm 4083 (London, Stationery Office, 1998).

too has the sector's range of stakeholders expanded and diversified, along with the expectations that they place upon individual organisations. From the perspective of the volunteer working within the sector these developments have also raised the stakes in respect of individual liability and legal regulation, and brought to the forefront the question of their status in employment law and any fiduciary duties that they may owe. The increased responsibilities of volunteers and the uncertain state of the law in their regard may well act as a deterrent against pursuing voluntary activity.⁷

The difficulty of reconciling accountability and regulation with independence and autonomy is a dilemma faced by both the state with its policies and the law with its regulatory framework. Reconciliation will be no easy task. The core problem is that a sector as multifaceted as the voluntary one is pulled in too many directions without respect being accorded to its distinct role. At one level, for example, a veneer of professionalism has permeated the sector, requiring quality standards, efficiency and financial audits, the meeting of targets and benchmarking.⁸ At another level, demands are placed upon organisations by their users to act as their voice in society and to draw attention to individual concerns in a manner which may not be cost-effective. This could be by quasi-official representation for example, or through lobbying. Yet again, pressure is placed upon voluntary organisations to partner local or central authorities, or to participate in joint ventures with private bodies, which may mean sacrificing the organisation's central purpose to other agendas and which also raises questions about the nature and purpose of charitable status. Further, individuals within voluntary organisations often fall between the two stools of lack of legal protection on the one hand, and regulation by legal standards which were not designed to apply to them, on the other.⁹ Quite often it is said that the voluntary sector is best defined by what it is not, but the tensions which interplay between the conflicting themes of accountability and independence mean that it is equally true to say that quite often the voluntary sector is forced to act out a role which is not its own.

The essays in this book draw out the tensions between the voluntary sector, the state and the law and highlight the many areas where the relationships between the principal actors are uneasy. They echo the point of view put forward by the Kemp Commission that, in order to be feasible, "the bargain

⁷ A recent Rowntree Study emphasised the absence of accountability to users: S. Kumar, *Accountability in the Contract State* (York, YPS, 1997). The Deakin Commission considered questions of accountability and independence and made broad proposals for reform, emphasising the need to preserve the independence and diversity of the voluntary movement: *Meeting the Challenge of Change, Voluntary Action into the 21st Century: Report of the Commission on the Future of the Voluntary Sector* (London, NCVO, 1996).

⁸ See, for example, the Quality Standard Agency's "White Paper" on Quality in the Voluntary Sector (London, NCVO, 1998), and the Charity Commission's *Hallmarks of a Well-run Charity*, Leaflet CC60 (London, TSO, 1999).

⁹ Consider in this regard the uncertain status of the voluntary "worker".

between the sector and government must be equitable and sustainable”.¹⁰ The book’s discussion applies across a broad range of voluntary organisations, including both charitable and non-charitable bodies. The broad areas which are considered include the governance of voluntary bodies; their accountability to government and to their users; legal structures; openness; regulation and privatisation; the standard of behaviour of volunteers; political control; volunteer vetting; and conflicts of interest.

The structure of the book divides into two parts. Part One concerns the regulation and accountability of the voluntary sector and sets forward an overview of how the sector is changing. Chapter 2 (Leigh) considers the regulatory boundaries between local authorities and the voluntary sector, including the legal constraints which may prevent effective partnerships. Chapter 3 (Lyon) discusses the regulation by judicial review of the activities of voluntary bodies when those bodies are carrying on the functions of the state. Another current interest is the status, regulation and monitoring of volunteers within the sector, and an examination is made in Chapter 4 (Moody) of the implications of Part V of the Police Act 1997 and the protection of service users through volunteer employment and vetting. Management board responsibility in the voluntary sector is the subject of Chapter 5 (Belcher), taking into account the effect of economic and social pressures and the general culture shift towards accountability. Chapter 6 (Gray) turns to the legal structures for voluntary organisations, concentrating on the legal form of the guarantee company and the framework provided by general company law for voluntary activity. Part One concludes with a consideration in Chapter 7 (Barker) of the regulatory framework for charities in Scotland, and how regulation and changing legislative frameworks can alter the nature of bodies within the voluntary sector, with Chapter 8 (Handy) using the housing arena as a case example of state capture.

Part Two focuses on the activities which voluntary bodies undertake and the particular legal problems which arise. Many of these activities and their associated conflicts result from the pressures which have forced the voluntary sector to change. Analysis is made in Chapter 9 (Morris) of the problems which arise from bodies engaging in a contracting role with local authorities, particularly in terms of how dependence upon public sector contracts for funding is partly responsible for the erosion of the independence of voluntary organisations. Political campaigning presents a further challenge, particularly in terms of maintaining the sector’s independence. Chapter 10 (Dunn) considers political activity of the voluntary sector in the European and UK contexts along with the obstacles that remain in the way of full political inclusion, whilst Chapter 11 (Swann) examines the cogency of the policy arguments which have been advanced for justifying the restrictions on charities in the political arena. The current economic climate has forced many charities to take up trading activities,

¹⁰ *Head and Heart: The Report of the Commission on the Future of the Voluntary Sector in Scotland* (Edinburgh, SCVO, 1997), 1.