

Institution: University of Liverpool		
Unit of Assessment: UoA18 – Law		
Title of case study: Supporting Charities in Challenging Times		
Period when the underpinning research was undertaken: 2001 – 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Debra Morris	Professor & Dean (SLSJ)	2010 – present
Warren Barr	Professor & HoD (Law)	1997 – present
Jennifer Sigafoos	Lecturer in Law	2013 – present
James Organ	Lecturer in Law	2015 – present
Jean Warburton	Professor	1982 – 2010
Period when the claimed impact occurred:		
All impacts claimed have occurred in this REF period 1st August 2013 – 31st July 2020.		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact <p>Charities in England and Wales must have a supportive legal framework and policy landscape to enable them to survive current funding reductions caused by economic austerity, negative impact of high-profile scandals (e.g. the Kids Company) and increased demands on their resources. Our work has driven legal change in five ways, all of which support charities' financial efficiency and effectiveness and, in some cases, their survival, First, through the widespread adoption of a bespoke charity structure. Secondly, through improving the legal process of charity mergers. Thirdly, through directly influencing the reform and operation of regulatory powers on charity trustee disqualification. Fourthly, by securing legislative change to enable social investments by charities. Finally, by directly shaping the content of a charity law reform Bill, which, when enacted, will remove burdensome technical legal barriers. Our research has also shaped supportive policy and practice in two, key ways. First, in improving charity governance through mainstreaming equality issues to avoid costly legal challenges. Secondly, in helping to mitigate the impact of legal aid cuts, both for charities providing legal advice and for those in need of that advice.</p>		
2. Underpinning research <p>The researchers are all members of the Charity Law and Policy Unit. The Unit is the UK's leading authority on legal and policy change relating to charities; it is the only Unit of its kind in the common law world with over 25 years of leading research projects and output, including an Impact Case Study for REF 2014. One way that the Unit ensures reach and impact is through an Independent Steering Committee, composed of senior charity practitioners and chaired by Sir Alastair Norris, Judge of the High Court of Justice. The charity sector is a significant part of the fabric of civil society, as there are 168,000 registered charities in England and Wales with an annual income of around GBP79 billion.</p> <p>Driving Legal Change</p> <p>The Unit's research on legal structures found that none of the existing legal structures for charities (e.g. charitable limited company) effectively recognised their non-profit status (e.g. issues of overregulation of charitable companies both by Companies House and by the Charity Commission). Our outputs (e.g. 2002) proposed both a new and bespoke charity structure, the Charitable Incorporated Organisation (CIO), which is cheaper to set up and administer and has a single regulator, and encouraged its wider adoption (3.1).</p>		

Mergers permit charities to pool resources and expertise and are often central to their continued survival. Our transformative work on **mergers** involved a case study of 13 charity mergers, followed by a conference with the 30 research participants, to identify the legal barriers and potential solutions to effective charity merger. The research (2001) uncovered major challenges (e.g. how to transfer property and assets to the newly formed organisation) and proposed new legal mechanisms to solve them (3.2).

The Charity Commission asked for new **regulatory powers** to improve governance in 2015, following a lowering of the public's trust and confidence in charities as result of numerous, high profile scandals. Drawing on our research, we recommended that the issue was not just about acquiring new powers but also about how such powers were used (3.3).

Social investments seek primarily to promote a charitable purpose alongside limited financial return. We found that the use of social investments by charity trustees has been hampered by legal investment rules focusing primarily on profit (3.4). Our extensive research base informed a detailed response and analysis in 2014 to a Law Commission consultation exercise in this area.

Finally, drawing on a number of areas of our published work on the legal barriers to effective operation of charities, in 2015 the Law Commission launched a wide-ranging **technical issues** in charity law reform package (covering, for example, mergers, structural issues, property issues). This reform package offers a real opportunity to remove some of the complexities and inconsistencies which can make charity law difficult both to apply and to regulate and to help charity trustees work effectively in modern day conditions. Drawing on our extensive research, e.g. recognising that charities come in all shapes and sizes and that legal solutions to any technical problems need to be tailored accordingly, we submitted a full, written analysis to the Commission consultation.

Shaping Supportive Policy and Practice

Our Leverhulme-funded project on equality (2013) found that the impact of the changes to the **Equality Framework** under the Equality Act 2010 were not well understood by charities (e.g. religious charities assumed that their practices were compliant, despite high-profile litigation around adoption services being offered to heterosexual couples only). As a result, charities could find themselves in breach of both equality law and charity law (3.5).

Research into the impact of swingeing **cuts to legal aid** funding found that there were unforeseen, serious consequences for charities. For example, our Equality and Human Rights Commission-funded work (2018) highlighted people's inability to solve legal problems without access to aid and the consequent emotional, social, financial and mental health impacts that they experience (3.6).

3. References to the research

- 3.1 Jean Warburton 'Trusts: Still Going Strong 400 Years After The Statute of Charitable Uses' in D Hayton (ed) *Extending the Boundaries of Trust and Similar Ring-Fenced Funds* (2002, Kluwer Law International) 163-179 (peer reviewed publication) – available on request
- 3.2 Jean Warburton and Warren Barr, 'Charity mergers – property problems' [2002] *The Conveyancer and Property Lawyer* 531-549 (peer reviewed publication) – available on request
- 3.3 Debra Morris, 'The Charity Commission for England and Wales: A Fine Example or Another Fine Mess?' (2016) 91 *Chicago-Kent Law Review* 965-105 (peer reviewed publication) - <https://livrepository.liverpool.ac.uk/3004179/>
- 3.4 Debra Morris, 'Commissioning of Services by Charities in the Third Decade of the Contract Culture: Lessons Learned (or Not Yet)' in J Picton & J Sigafos *Debates in Charity Law* (Hart (Bloomsbury) 2020) 231-256 (peer reviewed publication) <https://livrepository.liverpool.ac.uk/3107155/>

3.5 Jennifer Sigafoos, 'When Charities Be Allowed to Discriminate? The case of Single-Sex services and Transgender People' in J Picton & J Sigafoos *Debates in Charity Law* (Hart, (Bloomsbury) 2020) 103-128 (peer reviewed publication) – [REF 2]

3.6 Jennifer Sigafoos and James Organ, '[The Impact of LASPO on routes to justice](#)' [EHRC Research Report 118, September 2018 \(Report\)](#) - weblink with hard copy available on request

4. Details of the impact

Driving Legal Change

The impact of our research has driven legal change in five main ways:

First, our 'groundbreaking research' **[5.1]** created, established and encouraged the adoption of a **bespoke legal form** for charities, the **Charitable Incorporated Organisation** (see now Charities Act 2011, Part 11 ss.204–250). The impact of the creation of this legal form, since becoming operational in March 2013, is that it has been adopted as the 'vehicle of choice' **[5.1]** for new charitable organisations, given the numerous advantages it enjoys e.g. a single regulator and reduced costs as a result. Over 13,000 C.I.O.s were registered in the first five years post-introduction, and, by November 2019, the Charity Commission register of charities showed that this number had risen to in excess of 19,289 (updated figures are no longer available due to changes to the online register search engine). 'The impact of the Unit's research in creating the C.I.O. has been extended even further now that it is possible for existing charitable companies to convert to C.I.O.s' noted a leading charity practitioner **[5.2]**, following the additional reforms (in Charitable Incorporated Organisations (Conversion) Regulations 2017/1232)).

Secondly, our published work led directly to the current legislative framework for **charity merger** (see now Charities Act 2011, Part 16 ss.305–311), and the subsequent application of this legislative change has had demonstrable impact from 1 August 2013 onwards. Indeed, 'mergers have proved vital as a means of protecting charitable activity' **[5.1]** as challenging times have forced charities to merge, either to simply survive or to maximise efficiency. Mergers have helped organisations 'weather the storms of austerity' **[5.4]** and will now support charities in meeting the challenges of COVID-19, with the National Council for Voluntary Organisations, for example, advising charities to [consider merger](#) as one possible response to the pandemic. A good example of the effectiveness of mergers is provided by New Philanthropy Capital's [analysis](#) of a merger of the St Mungo's and Broadway housing charities in 2018, which was completed using our reformed legal process. This demonstrated an increase of 26% in contract income, meaning that the charity could reach 37% more rough sleepers. Nevertheless, building on the experience of implementing the merger process, we made submissions to the Law Commission arguing that the process could be further improved through addressing **technical issues** in charity law. Our proposals played a significant role in persuading the Law Commission to draft a Bill which would include provisions to resolve these outstanding issues with the merger process **[5.5.2, Bill, Part 5, cl.35-37]** e.g. to clarify whether leases subject to an absolute covenant on assignment are excluded from automatic vesting of property in the new, merged charity **[5.5.2, Bill, Part 5, cl.36(b)]**. The Law Commissioner for Property, Family & Trusts Law has acknowledged that the Law Commission's recommendations on charity mergers 'were improved by the input that we received from the CL&PU' **[5.3]**.

Thirdly, Morris's research enhanced the Charity Commission's use of its **regulatory powers** concerning charity trustee disqualification, leading to the relevant policy being rewritten **[5.6]** and some of the wording of the Charities (Protection and Social Investment) Act 2016 being changed from what was proposed in the Bill **[5.7]**. This occurred when Morris, appearing before the Joint Committee of Parliament on the Draft Protection of Charities Bill, raised concerns on the Charity Commission's use of powers to disqualify charity trustees (contained in s.10 of what became Charities (Protection and Social Investment) Act 2016) **[5.7.1]**. Now, when considering disqualification for offences committed overseas, the revised policy requires the Commission to consider whether the standards of evidence and justice would be likely to be accepted in a UK

or European court [5.6, p 12]. In the Act itself, the ability to disqualify a person from being a trustee if they have merely received a caution overseas was not included, addressing concerns raised by Morris [5.7.2, para 239, 5.7.3, para 57]. The Charity Commission reported that it has used its new powers on over 130 occasions ([Charity Commission, 'Dealing with Wrongdoing and Harm 2017-2018'](#)) and the actions have varied from issuing official warnings and directions to disqualifying and suspending individuals from trusteeship.

Fourthly, we enabled changes to the law on **social investments**, when we pressed for a distinct power of social investment to allay trustee fears. The Law Commission, following a meeting with us, prioritised work on social investment as part of the review of the Charities Act 2006. In 2014, our arguments were cited 13 times in the Law Commission's consultation analysis regarding social investments [5.8], and directly fed into both the creation of a new power in the Charities (Protection and Social Investment) Act 2016 (s.15) and into its use in practice. We directly influenced the content of the statutory power. For example, the Law Commission had provisionally proposed creating a statutory checklist of factors for trustees to consider when making a social investment. As noted by the Law Commissioner for Property, Family & Trusts Law 'Taking their concerns...into account, we changed our recommendation and preferred the approach of putting clear duties on trustees without a statutory checklist. That is the reform that has been implemented' [5.3]. Similarly, following our suggestion that guidance on the use of the power should include reference to tax considerations, the Law Commission noted 'We agree that this should be addressed in Charity Commission guidance and we make a recommendation to this effect' [5.8, para 3.182]. The [guidance](#) now includes this reference. The new power has, according to a retired Law Justice of Appeal, 'seen more charities make use of [social] investments' [5.1]. To put this in context, in 2018, the value of the UK social investment market grew by one third to a value of GBP3.5 billion ([data published by Big Society Capital, November 2019](#)) and the accounts of 34 of the top 300 charitable foundations demonstrated that they had embraced social investments, worth GBP146 million alone ([Foundation Giving Trends 2019](#)).

Finally, our research had two major impacts on the broad-ranging Law Commission **Technical Issues** work. First, we set up a series of networking events to allow over 90 key stakeholders (including e.g. members of the Charity Law Association) to feed their ideas into the process, including a one day symposium ([15th May 2015](#)). This enabled participants to form coherent views on the utility of the proposed changes, informed by our expert commentary based on our research findings (e.g. on issues such as the constitution of charities, charity property and permanent endowment). This, in the words of the Law Commissioner for Property, Family & Trusts, 'insured that our consultation process was thorough and effective, that we received comprehensive feedback from an informed audience, and ultimately that our recommendations for reform were considered, tested, challenged, and adapted, so that they can deliver important and lasting change' [5.3]. Second, our arguments were cited 58 times in the Law Commission's consultation analysis [5.5.1] and relied upon in relation to five substantive issues in the Law Commission's final report (e.g. that any proposed solutions needed to be tailored to the spectrum of organisations, as one size may not fit all [5.5.2, para 5.80]. Our work was considered 'instrumental' by the Law Commissioner for Property, Family & Trusts, as it has 'assisted our policy development so that our recommendations are right and have the most positive impact for the sector' [5.3]. Given that the Bill will 'remove unnecessary bureaucracy [and] will allow charities to dedicate their full resources to the public good, ensuring the efficient use of charitable funds alongside proper safeguards for the public' [5.3].

Shaping Supportive Policy and Practice

The impact of our research has shaped and supported policy and practice in the charity sector in two key ways:

First, our work on the **Equality framework** has been mainstreamed into the governance of charities, providing, in the words of an experienced charity leader of both individual and umbrella organisations, a 'lifeline in helping to equip leaders... to do [their] jobs better...[in] articulating what the legislative frameworks demand of organisations, this has empowered [organisations] to challenge existing practices and work towards full compliance' [5.4]. In particular, our findings

are reflected in the voluntary [Governance Code](#), which consists of 7 core principles, particularly principle 6, which stresses the importance of following equality principles for effective charity governance. This voluntary code has been adopted by almost half of large charities ([Civil Society, 11th March 2019](#)). This could save charities from 'expensive and potentially damaging Tribunal cases' [5.2] – e.g. a [2018 finding](#) of disability discrimination against Citizen's Advice Haringey cost it almost GBP24,000 in compensation.

Secondly, our research findings on the impacts of **legal aid cuts** have been instrumental in the Equality and Human Rights Commission's recommendations in its response [5.9] to the 2018 review of Legal Aid, Sentencing and Punishment of Offenders Act 2012, as the EHRC commissioned the research and relied heavily on its findings. The 'Liverpool Research', as it is referred to in the response, is cited ten times by the EHRC and feeds through, e.g. into recommendation (iv) on better provision of information about what legal aid funding remains, and (viii) on changes to the mandatory telephone gateway. Several of the EHRC recommendations that relied on our research (e.g. [5.9, recommendation (iii)], calling for the restoration of funding for early legal advice) were then adopted by the Government [5.10, pp 6-7]. Locally, our research findings have led in 2018 to Liverpool City Council incorporating Access to Justice, particularly access to free legal advice, as an integral part of its [Fair City Policy](#) and anti-poverty strategy. As a result, in 2019, the improvement of collaboration in and access to a free legal advice network has been prioritised within the Mayoral Hardship Fund, and with funding from that source, we are working in partnership to deliver this.

5. Sources to corroborate the impact

- 5.1 Testimonial, Lord Justice of Appeal (retired): impact on C.I.O., mergers, social investment
- 5.2 Testimonial, Charity Lawyer, Principal Associate, Shoosmiths: impact on C.I.O., equality framework
- 5.3 Testimonial, Law Commissioner for Property, Family and Trust Law, Law Reform Commission: impact on mergers, social investment, technical issues
- 5.4 Testimonial, CEO, Age UK West Sussex: impact on mergers, equality framework
- 5.5 Evidence File on Impact of our Research on Law Commission's Technical Issues in Charity Law Project
- 5.6 [Charity Commission, Explanatory Statement – The discretionary disqualification power: power to disqualify from being a trustee](#), 2016, p 12
- 5.7 Evidence File on Impact of our Research on Regulatory Powers Aspects of the Charities (Protection and Social Investment) Act 2016
- 5.8 [Law Commission, Social Investment by Charities, Analysis of Responses](#), 2014, with references to our research: paras 3.25, 3.35, 3.80, 3.122, 3.141, 3.152, 3.159, 3.167, 3.171, 3.182, 3.212, 3.235, 4.12
- 5.9 [Response of the Equality and Human Rights Commission to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), 2018, with references to our research: paras 9, 27, 31, 35-38, 45, 57
- 5.10 [Ministry of Justice, Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems](#), CP 40, 2019, pp 6-7