Trust through governance

Institute of Chartered
Secretaries and Administrators

Saffron House
6–10 Kirby Street
London EC1N 8TS

020 7580 4741
info@icsa.org.uk
www.icsa.org.uk

scrutiny@parliament.uk

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FAO: Public Bill Scrutiny Committee
House of Commons

Dear Sir,

Charities (Protection and Social Investment) Bill

On behalf of ICSA I am pleased to submit evidence to the committee on the above Bill relating to charities.

ICSA: the governance institute is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With more than 120 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy and members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and corporate governance. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. A significant number of our members are involved in the charitable sector and all will be familiar with the different types of charitable structures available along with the legal and regulatory requirements facing each. Our members' wealth of expertise and experience, along with a detailed understanding of charity legislation and regulation, has informed the evidence submitted herewith.

Comments on specific clauses

Clause 1: Official warnings by the Commission
In principle, the ability of the Charity Commission to issue official warnings for a breach of trust or duty, misconduct or mismanagement sounds appropriate and proportionate. However, the proposed new power comes with very few safeguards and rights of appeal for trustees and charities.

For trustees, and their advisers, it may be easier to understand what constitutes a breach of duty or trust and to ensure that any action (or non-action) does not fall foul of such legal requirements. It may not be quite so easy to articulate, identify and take appropriate action to avoid any activity deemed to be mismanagement or misconduct (beyond that highlighted as non-compliance with a Commission order or direction). Trustees, and those who advise them, would therefore find it helpful if there was an agreed definition as to what constitutes 'mismanagement or misconduct'. It is appreciated that an exhaustive list would be unfeasible and unhelpful, but there is a case to be argued that any definitions or examples of 'mismanagement and misconduct' should be subject to public and sector consultation by the Charity Commission and appropriate guidance produced to aid charities.

The lack of a right of appeal also provides some concern for the sector. Where a charity may face public shaming with an official warning, there should be some element of being able to present a defence. The right to appeal to the Charity Tribunal should be available, as a last resort, to charities and trustees subject to an official warning. For the sake of using precious resources (the charity's and the Commission's) efficiently and effectively however, there should be other mechanisms in place to appeal an official warning that is proportionate and effective.

While a charity, or trustees, could apply for judicial review against a Commission official warning, the current process sees the Commission having to approve the expenditure of charitable resources on charity proceedings.

Should the Bill be amended to include charities and trustees with the right of appeal, it should follow that the contested official warning is not made public and any directions not implemented until after the final stage of any appeal process has been completed and a decision made.

Clause 2: Investigations and power to suspend
In light of the recent reaction to the Commission's draft CC3 guidance on the issue of good practice, it is welcome that a failure by a trustee or charity to follow the Commission's view of good practice will not automatically be deemed 'mismanagement or misconduct'.

The extension by 12 months to the suspension of a trustee appears to be justifiable in terms of the regulator having to wait for criminal investigations and actions to be concluded before taking regulatory action. Where possible, however, it would be advantageous for all involved if the regulator sought to complete its own investigations swiftly before reaching the proposed two-year limit.

Clause 3: Range of conduct to be considered when exercising powers
As with clause 1, the principle behind this new power could be sensible and proportionate. Without any detailed examples or definitions of inappropriate conduct, however, there is a danger that trustees and senior managers in a charity could be sanctioned for conduct that does not impact on their ability to govern or manage a charity effectively and in accordance with acceptable standards. There is very broad

wording in the Bill and much the of context relating to the use of this new power is contained in the explanatory notes

For managers employed by a charity, and with a career in the sector, it could be argued that a misdemeanour committed in their personal life could have a devastating impact on their professional life and their ability to earn a living in the future.

As the Commission would have to set out in its statement the reasons for the conduct being taken into account, it would be beneficial for it to hold a public consultation on the range of conduct to be considered and agreed as appropriate for the use of this power.

Clause 4: Power to remove charity trustees following an inquiry
The addition of a new power to remove trustees from the membership of an organisation is to be welcomed as it sits hand in glove with the power to remove trustees following a statutory inquiry.

Clause 5: Power to remove disqualified trustee
This clause appears to be eminently sensible and helps to close a loophole in current regulatory powers.

Clause 6: Power to direct specified action not to be taken
The proposed new power seems an appropriate addition to the regulator's canon of possible actions to protect charity assets and the reputation of the sector.

Clause 7: Power to direct winding up
It is noted that this power will only be used in rare circumstances by the Charity Commission. Even so, it would be helpful if there was formal guidance from the regulator as to when the power would be used and in what fashion. It may be advisable to have that guidance subject to public consultation before formally adopted.

Clause 8: Power to direct property to be applied to another charity
The proposed new power appears to be sensible given the situation it is aimed at resolving.

Clause 9: Conduct of charities – disposal of assets
This new clause is most welcomed by ICSA in its intended aim of protecting the independence of the sector, and of reinforcing the legal position that it is for trustees to determine the best use of resources for the fulfilment of charitable objects.

Clause 10: Automatic disqualification from being a trustee
ICSA recognises that there are anomalies within the current criteria for trustee disqualification and they should be addressed to protect the sector and the public's confidence in charities. The proposed clause does however cause some concerns, particularly in terms of the sector's ability to attract, recruit and retain appropriate people as charity trustees. As trustee positions are generally voluntary, this clause alongside others in the Bill, could act as a deterrent to those with honourable intentions as the potential risks to their professional and personal life could be disproportionate to the benefits.

For charities with few trustees, the lead-in time for removing and replacing disqualified trustees is challenging as there is rarely a waiting list for charity trusteeships, especially for smaller and less publicly well-known organisations.

Clause 11: Power to disqualify from being a trustee
As previously mentioned, these new powers – collectively – may have a potentially worsening effect on the ability for the sector to attract and retain appropriately skilled, experienced and enthusiastic trustees.

Clause 12: Records of disqualification
For governance experts and trustees undertaking due diligence on prospective and existing trustees, a publicly accessible register of trustees who have been disqualified or removed would be most advantageous.

It would be of real benefit if such records could be easily found on the Charity Commission's website.

Clause 13: Participation in corporate decisions while disqualified
This appears to be sensible.

Clause 14: Fundraising
It is understandable, given recent fundraising stories in the media, that the urge to add a clause regarding fundraising be inserted into the Bill. Requiring additional reporting within the annual reports of certain charities may or may not be advantageous. It will be for the sector to work on ways in which charities can make such disclosures meaningful rather than something that must be ticked off a list of compliance requirements.

Clause 15: Power to make social investments
ICSA has no specific comments to make on this clause.

Further comments
The recent barrage of negative press surrounding the charity sector in England and Wales has led to growing demands that the sector get its governance in order. It may be the view of government that the Charities (Protection and Social Investment) Bill is one way in which that can be achieved by strengthening the powers of the Charity Commission. It is our contention, however, that external sticks can only achieve so much and that there are other proportionate measures that could be used to instill good governance and lead improvement.

Typically, large charities, are comparable to public limited companies in their scale, complexity and economic impact. They tend to have fewer big stakeholders exerting influence and pressure on trustees. Furthermore, their duty to deliver public benefit places upon trustees a greater need to act in a manner commensurate with the ethos of the sector and the sentiments of their supporters. The presence of a suitably qualified and well supported governance professional is of particular importance in these current times of increased transparency and accountability in the way that trustees lead and direct their charities.

Small and medium sized charitable companies (gross income of £1m or total assets before liabilities that exceed £3.26 million, and the charity's gross income is more than £250,000) are already exempt from certain accounting and statutory audit requirements and we propose that the same criteria be used to exempt small and medium sized charities from the proposed requirement to appoint a governance professional.

Beneficiaries, donors, funders, employees, creditors, and other stakeholders that engage with charities need the assurance that proper procedures are followed and that corporate governance, regulation, charity and where applicable company law do not get overlooked or deliberately forgotten. ICSA believes that a requirement for a governance professional within charities of a certain size would be a major influence in keeping otherwise errant or ignorant trustees on the straight and narrow. Such a professional should also greatly increase the number and quality of statutory returns to regulators; acting as a partner to regulatory bodies in their pursuit of improved administration, reporting and decision-making.

ICSA appreciates the opportunity to present evidence to the committee on the Charities (Protection and Social Investment) Bill. Should further information or clarification be required, please do not hesitate to contact me.

Yours faithfully,

Louise Thomson FCIS
Head of Policy (Not-for-Profit)
020 7612 7040
lthomson@icsa.org.uk