Trust through governance

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Mr James Linney
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Dear Mr Linney,

Law Commission: Technical issues in charity law

On behalf of ICSA I am pleased to respond to the Law Commission's paper on technical issues in charity law.

ICSA is the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. 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 our response to this consultation.

General comments

The Law Commission is to be commended for producing a document that manages to distil the particular inconsistencies in charity law and regulation affecting many charities and to do so with an appropriate degree of contextual information. The aims of the document are clear and the majority of its recommendations support the desire to make charity law and regulation easier to understand and implement effectively.

Responses to specific questions

In addition to responding directly to the questions the consultation document poses, ICSA has also provided additional general comments on each specific section. These comments have been drawn from working groups of members involved in the sector affected by the specific issues highlighted. We therefore hope the comments are useful to you in your further deliberations.

Changing purposes, amending governing documents and applying property cy-près

- General comments: Royal Charters and statutory charities

The feedback from ICSA members in Royal Charter charities is respectful of the prestige and status of being a Royal Charter body and the caché it brings. There was a high regard for ensuring that the charity is directed and managed in a manner that supports and protects that status. Members' experience of the Privy Council however, is mixed, with some offering nothing but praise and others highlighting inconsistencies and unexplained delays.

There is some concern that the experience in working with the Privy Council, especially when dealing with governing document amendments, can be patchy. The ability of the Privy Council's advisers to provide expert guidance and experience to charities should be paramount as it will be invaluable to Royal Charter charities, their trustees and advisers. At times, the experience of some Royal Charter charities is that the decision-making by the Council's advisers can be arbitrary and lacking in consistency.

There is a view expressed by some charities' that the Privy Council is nothing more than a 'post box' where requests are simply forwarded to the appropriate organisation or public body. The time it takes for minor amendments to be approved appear to be disproportionate to the complexity of a response. This is particularly so where those amendments reflect good practice in other organisations – such as changes to bye-laws to bring the body into line with sector norms. In some instances, there is a perception that the Privy Council is reluctant to see some provisions moved to bye-laws and regulations, thereby impeding the ability of charity trustees to improve their governance arrangements in the best interests of the charity. To the extent that the Privy Council (and its advisers) retain a right of comment on changes proposed by Royal Charter/statutory charities, it would be helpful for them to publicise and adhere to a service standard regarding the speed of their responses – as noted below under 17.22.

17.1 We provisionally propose that, subject to paragraphs 17.2 and 17.3 below, Royal Charter and bye-laws of Royal Charter charities should be deemed by statute to include a power for any provision of the Royal Charter or bye-laws to be amended, subject to any amendment being approved by the Privy Council. Do consultees agree?

We welcome the general proposal to provide all charities, regardless of their structure, with a statutory power to amend governing documents as a way of simplifying the law and empowering trustees to act in the best interests of the charity. For consistency and clarity, it might be advantageous to legislate that the statutory power applies to the Royal Charter rather than both the Charter and bye-laws. Ensuring such powers can be generally found in one place will help promote understanding and awareness of the process to be used to change the Charter, where it does not already contain any express provision for making amendments. Such amendments should be clearly articulated and reflect those agreed under 17.16

17.2 We provisionally propose that the power of amendment should be exercisable:

1) by a resolution of at least two-thirds of the trustees who vote on the resolution; and

2) if the charity has a separate body of members, by a further resolution of at least two-thirds of the members who vote on the resolution at a general meeting.

Do consultees agree?

Subject to 17.3 below, ICSA agrees with the proposals as it will represent a level of consistency within charity law with regard to the processes required to change a governing document provision.

17.3 We provisionally propose that the power of amendment should not apply to a charity's Royal Charter or bye-laws if those documents already make express provision for their amendment. Do consultees agree?

We endorse this proposal as it may be the case that existing powers within Royal Charters require a lower threshold for making such amendments. Thus the power to retain charity specific clauses should be respected, as it will not always be known as to why a particular power was framed in such a way. Those reasons might have been intrinsic to the values and representation of the charity and therefore still relevant.

17.4 We invite the views of consultees as to whether Royal Charter charities would find it helpful for the Privy Council and Charity Commission to issue guidance concerning the types of provision that they consider to be appropriate for the Royal Charter, bye-laws and regulations, to form a basis for Royal Charter charities to seek amendments to their governing documents.

Guidance detailing which provisions should sit within each document (Royal Charter, bye-laws and regulations) would be helpful, but might not necessarily resolve the problems identified. One step might be to apply the statutory power of amendment to the Royal Charter rather than the bye-laws.

Any such guidance will be of most relevance to those organisations seeking to become a Royal Charter charity, or those existing charities seeking to amend their Royal Charter or bye-laws. Any guidance, therefore, should not impose a retrospective requirement to comply on those existing Royal Charter charities whose trustees are content with their governing structures. As such, the numbers involved might not warrant the guidance being a high priority, especially given the funding constraints facing the Charity Commission. The varied nature of Royal Charter charities adds further to the complexity the guidance must cover.

Finally, any guidance should also reference the different charity regulation regimes affecting those charities operating in Scotland and Northern Ireland.

17.5 We provisionally propose that charities established or governed by statute or Royal Charter should have a statutory power to make minor amendments to their governing documents. Do consultees agree?

This proposal would be commensurate with the powers already available to other types of charities, or subject to further proposals in the consultation. We therefore welcome the intention to give all types of charities similar powers to make minor amendments, subject to 17.6 below.

17.6 We invite the views of consultees as to the types of amendment that should fall within, and outside, the amendment power?

There are concerns that need to be addressed regarding the definition of 'minor amendments'. Such definitions should be consistent across all types of charities and applied accordingly. It is suggested that rather than list minor amendments in statute, the approach should be to define major amendments (as in para. 4.52) and regard amendments not listed as minor and therefore subject to the statutory power detailed.

Further guidance will be necessary for trustees to fully understand which types of amendment must follow the statutory power if we are to avoid the current confusion within s280 of the Charities Act 2011.

17.7 We invite the views of consultees as to whether the Secretary of State should have power to alter any list of permitted amendments by secondary legislation.

Any proposed powers should be congruent with those already available to the Secretary of State, with the appropriate level of scrutiny and oversight built into the system.

17.8 We provisionally propose that the power to make minor amendments to statutory and Royal Charter charities' governing documents should be exercisable by the trustees of the charity rather than by the Charity Commission. Do consultees agree?

This proposal would appear to be consistent with those available to other types of charities. Where there is still a need for the charity to apply for a scheme, it is suggested that the approval should come from the Privy Council after they have consulted with the Charity Commission, thereby doing away with the need for the charity to liaise with both the Privy Council and the Charity Commission.

17.9 We provisionally propose that the power should be exercisable by a resolution of trustees and, if the charity has a separate body of members, by a further resolution of at least two-thirds of the members who vote on the resolution at a general meeting. Do consultees agree?

This proposal is consistent with other proposals within the document and appears to make sense in terms of reducing bureaucracy and removing complexity from the process for charity trustees, while improving transparency and accountability.

17.10 We provisionally propose that the power should apply to provisions in a charity's governing document, whether those provisions are contained in statute, regulations made pursuant to a statute, a Royal Charter, or bye-laws or regulations made pursuant to a Royal Charter. Do consultees agree?

The proposal would be helpful to trustees.

17.11 We provisionally propose that amendments should take effect once the necessary resolutions have been passed. Do consultees agree?

It is unclear as to whether the proposal means that a resolution is passed after the charity has received an 'advisers have no further comments' communication from the Privy Council, or before that has been obtained. Currently Royal Charter charities will pass a resolution by trustees (and members) then seek the approval of the Privy Council before it is ratified. Further clarification as to the process proposed would help in deciding whether it achieves the stated aims of the consultation.

17.12 We invite the views of consultees as to whether charities that exercise the power should be required to notify the Privy Council or lay the amendments in Parliament (as the case may be).

It would be in the best interests of the charity if the Privy Council was notified of amendments made as it will provide an additional source of information on the governance and constitutional powers of each Royal Charter charity. This may be useful in circumstances where there is a disagreement within a charity regarding the powers, duties and responsibilities of trustees when seeking to make changes to the way the charity is directed.

Appropriate guidance on the form of notification of what types of minor amendments would be helpful.

17.13 We invite the views of consultees as to whether the power of amendment (see 17.5 above) should operate a) alongside, or b) instead of, guidance from the privy Council concerning the reallocation of provisions in governing documents (see 17.4 above).

ICSA suggests that both approaches would be beneficial, so long as there is consistency in the supporting documentation and implementation of the powers, and their oversight. Any guidance should also include references to the various charity legislative and regulatory requirements placed upon charities operating in Scotland and Northern Ireland.

17.14 We invite the views of consultees as to whether, and if so how, the involvement of the Charity Commission in making amendments to statutory and Royal Charter charities' governing documents should be increased or reduced.

As stated above, liaison with the Charity Commission should be part of the responsibility of the Privy Council, as with all relevant interested bodies, when a Royal Charter charity seeks to make amendments to its governing document. Appropriate, and detailed guidance on the use of the statutory powers and the types of amendments that can be made under each provision would be beneficial in reducing the need for Charity Commission oversight and input.

17.15 We provisionally propose that all section 73 schemes should be subject to the negative procedure, regardless of whether the governing document is contained in a private Act or a public general Act. Do consultees agree?

The argument for this proposal appear to be sensible.

17.16 We provisionally propose that the Privy Council Office amend its guidance to make clear that amendments to bye-laws only require approval when that is expressly required by the Royal Charter itself. Do consultees agree?

We agree with the proposal as it will reduce confusion and bureaucracy for trustees.

17.17 We invite the views of consultees as to whether it would be helpful for the Office for Civil Society and the Charity Commission to issue joint guidance in respect of the amendment of statutory charities' governing documents, and for the Privy Council and Charity Commission to issue joint guidance in respect of the amendment of Royal Charter charities' governing documents.

Joint guidance is always helpful to charity trustees as it provides a single point of information from the relevant parties, thereby reducing the opportunity for inconsistency or misunderstanding. Furthermore, any such guidance should be consistent with the guidance detailed in para. 17.4. Such documents could be developed together and presented as a suite of inter-related information to maximise awareness and adoption.

17.18 We invite the views of consultees as to whether any further amendments could be made to the existing procedures for amending the governing documents of statutory and Royal Charter charities.

We have no further comments regarding the procedure for changing governing documents in itself. We do suggest, however that the Privy Council should establish and publish details regarding the service they provide. ICSA has received mixed comments as to the experience of dealing with the Privy Council (see general comments above). As such, set service level standards would enable charities to better understand the timeframe for all types of dealings with the Privy Council Office, along with details as to what might impact on those standards.

17.19 We provisionally propose that the new power of amendment should not apply to the governing documents of Parochial Church Councils. Do consultees agree?

ICSA has no comments.

17.20 We invite the views of consultees as to:

1) **whether the new amendment power should apply to higher education institutions without modification;**
2) **whether the new amendment power should apply to higher education institutions in accordance with regulations made by the Secretary of State and Welsh Ministers setting out the provisions that can be amended without Privy Council oversight;**
3) **whether, and if so how, the 2006 list for universities should be revised;**
4) **whether, and if so how, that approach should be extended to higher education corporations;**
5) **whether, and if so how, the amendment procedure for higher education corporations under the Education Reform Act 1988 could be improved; and**
6) **whether, and if so how, the amendment procedures for the universities and colleges set out in figure 7 could be improved.**

ICSA has no comments.

17.21 We invite the views of consultees as to whether there are any other categories of charities established by statute or Royal Charter for which special provision should be made when creating any new amendment power.

ICSA has no comments.

17.22 We invite consultees to share with us their experiences of amending statutory or Royal Charter charities' governing documents, in particular the work, time and expense that have been involved.

As previously mentioned, there appears to be inconsistency in the service of the Privy Council experienced by Royal Charter charities. Agreed and articulated service levels would provide a standard of expectation for those working with the Privy Council and improve the level of understanding of its role amongst charity trustees and their advisers.

- General comments: Other charities - changing purposes and cy-près schemes

The document provides a clear and understandable précis of the issues facing charities trying to change their governing documents. The inconsistencies between unincorporated and incorporated charities seem incongruous in the light of recent changes to charity law. Quite rightly, the consultation suggests that trustees have specific fiduciary duties and that the structure of the charity should not infer that one group of trustees should be subject to any greater or lesser scrutiny than another (as opposed to the separate, codified duties of company directors). As such, proposals to level the playing field between unincorporated and incorporated charities (alongside proposals affecting Royal Charter and statutory charities) when amending governing documents, appear to be sensible. The opportunity to reduce confusion and empower trustees, within appropriate parameters, will be welcomed by trustees and those advising them, as a means of enabling and fostering a better understanding of their duties and the framework within which charities must operate.

Care should be taken however to differentiate between the reasons for desired changes to be made and the types of changes. For example, changes to governing documents that affect the administrative arrangements, without impacting on the powers of members, are less likely to attract, or require, external scrutiny. Conversely, changes to the charitable purposes of a charity ought to attract appropriate scrutiny to ensure that charitable funds are being used in a manner expedient to the achievement of those stated objects.

Responses to specific questions

17.23 We invite the views of consultees as to whether, and if so how, the powers to amend charities' purposes (and other provisions in their governing documents) should be aligned between incorporated and unincorporated charities established in the future.

On balance, there should be a uniform approach to governing document amendments and a consistent level of scrutiny attached to any changes affecting the organisation's charitable purposes. Proposals respecting existing entrenchments within governing documents are laudable as there may well be very good reasons as to why they have been included. We do not believe, however that this should prevent existing charities from benefiting from proposals to introduce a consistent approach for both incorporated

and unincorporated charities. A proposal that removes inconsistency within existing charities only to introduce a different approach for new charities appears less than ideal.

Governing documents should be reviewed and amended regularly as part of good governance practices to ensure that the powers therein continue to support the work of the charity rather than restrict. At those reviews, trustees are likely to think long and hard about any entrenchments, and other powers, to decide whether updated legislation provides welcome flexibility in the administration or whether specific restrictions should remain.

If a dual regime came into effect, some trustees might be tempted to establish a new charity with its new freedoms for amendment and transfer assets from an existing charity. While this may make sense for an unincorporated charity moving to incorporated form, for example, it would represent an unnecessary burden for those charities keen to benefit from the additional freedoms created without changing their organisational status.

17.24 We provisionally propose that the power of unincorporated charities to amend their purposes under section 275 of the Charities Act 2011 should be extended to charities with a larger income. Do consultees agree?

We agree with the proposal to widen the criteria within which charities can use s275 powers to amend their charitable purposes.

17.25 We invite the views of consultees as to the appropriate income threshold.

An incremental approach to increasing the availability of s275 powers would be sensible to ensure their use is appropriate and effective within the sector. As a first step in that incremental approach, raising the income threshold to £25,000 is welcome.

17.26 We provisionally propose that the power of unincorporated charities to amend their purposes under section 275 should be extended to charities that hold designated land. Do consultees agree?

The inclusion of designated land within that widened criteria requires a little more caution, especially if Part 7 of the 2011 Charities Act is repealed. As designated land can play an integral part in the activities of a charity, a change in purposes could mean that such property is no longer deemed necessary to fulfilling the new purposes. Any blanket extension to s275 to cover all designated land could theoretically be used inappropriately by trustees wishing to divest themselves of the land. Perhaps a staggered approach which took into account the value of the designated land could be adopted in the first instance. While this may present an additional level of bureaucracy as trustees will require professional advice, that advice could come from those sources deemed appropriate in the proposals dealing with land.

Changes to both income and land value thresholds could always be amended by secondary legislation, if the Minister is given such powers, once the success of the measures have been reviewed.

17.27 We invite the views of consultees as to whether trustees should continue to be required to notify the Charity Commission of a section 275 resolution and whether the Charity Commission should retain its power to object to the resolution.

Small charities are unlikely to have the same access to advice and professional expertise as larger charities; that said it is not always the case that large charities get it right. As the public provides money to specific charities for their stated causes, it only seems appropriate that the Commission continues to play an oversight role when purposes are amended.

Such scrutiny provides some assurance to the public and helps to maintain their trust and confidence in the sector. While such scrutiny may not be as politically imperative as tackling fraud and abuse, the general public and individual donors might be dismayed to hear that charitable funds have not been spent on furthering the purposes promoted, but used in what might be a very different manner.

17.28 We invite the views of consultees as to whether the power of unincorporated charities to amend their purposes under section 275 should be subject to a requirement that the members of the charity (if any) agree to the trustees' resolution.

There is a fine balance to be struck between appropriate scrutiny and the need to make much needed amendments swiftly to ensure that a charity continues to work effectively and efficiently. Agreed charitable purposes, and public benefit, are what makes an organisation a charity, it is therefore probably not altogether unreasonable that some membership involvement is required when trustees want to amend their charitable purposes. This will cause additional administrative costs and impact timings on changes, but done constructively and in partnership with members could mean that any changes have an increased legitimacy within the charity's stakeholders.

Including members' concerns within any proposals to make such amendments is likely to engender a more productive outcome than the current system whereby members can make representations to the Charity Commission after the resolution. This is a more adversarial approach which can have a negative impact on the reputation and work of the charity.

17.29 We invite the views of consultees as to whether trustees should be given the power to make cy-près schemes in light of the availability of the section 275 power and loss of Charity Commission oversight that would be involved.

The proposal to expand s275 powers to more charities, within a stepped threshold approach, is more agreeable than providing trustees with the power to make cy-près schemes.

17.30 We invite the views of consultees to share with us their experiences of changing charities' purposes under section 275 of the Charities Act 2011 and under cy-près schemes, in particular the work, time and expense that have been involved.

ICSA has no additional comments.

Other charities: amending governing documents

- General comments: amending the governing documents of other charities

The consultation provides a good explanation as to the general issues with charities face when using s280 of the Charities Act 2011. It is therefore clear that further effort is required to clarify the circumstances as to when those powers can and cannot be used by the trustees of an unincorporated charity.

Furthermore, proposals to add consistency between the powers available to incorporated and unincorporated charities to change administrative clauses within their governing document should be consistent. Administrative changes are less likely to cause an adverse reaction from members (unless it diminishes their rights), and therefore it seems unduly burdensome for unincorporated charities to gain approval for administrative changes by members.

Responses to specific questions

17.31 We invite the views of consultees as to whether the power to make administrative amendments to unincorporated charities' governing documents under section 280 of the Charities Act 2011 is helpful and whether its scope is sufficiently clear.

There is evidently a lack of clarity within the understanding of the phrasing in s280 of the Charities Act 2011 that needs to be addressed. While it is accepted that informed opinion will not always agree on the meaning of a form of words in legislation, trustees of smaller charities will rely to a greater extent on the guidance of the Charity Commission. Any cause of confusion should therefore be remedied so that Commission guidance can continue to be reliable.

17.32 We invite the views of consultees as to the types of provision that should be included within, or excluded from, the section 280 amendment power.

The proposals set out within the document appear to be sensible and we have no further suggestions.

17.33 We invite consultees to share with us their experiences of amending administrative provisions under section 280 of the Charities Act 2011, in particular the work, time and expense that have been involved.

For unincorporated charities with few resources, reliant on trustees to implement decisions, the process for amending governing documents can be particularly difficult and will take considerably longer than for other well-resourced and supported charities. For instance, a small village hall could see any amendments taking over two years, given the lack of professional advice available to them and the infrequency of meetings.

- General comments: Cy-près schemes and the proceeds of fundraising appeals

The issues surrounding failed and surplus fundraising appeals are familiar within the sector, and much has been done to resolve the situation by the use of the appropriate wording within fundraising literature. That Charity Commission guidance however, does not prevent such scenarios cropping up regularly. A system that can therefore remedy the situation, with reasonable levels of oversight, would be welcome to those charity trustees that have fallen foul of failed appeals and poorly written appeal literature.

Responses to specific questions

17.34 We invite the views of consultees as to whether the requirement for a general charitable intention, as a precondition for a cy-près scheme in respect of the process of a failed appeal, should be removed:

1) generally; or

2) in respect of small funds or small donations and, if so, what size of fund or donation.

While there is a balance to be made between the autonomy of the donor and the need for a charity to use resources effectively, it appears that removing the intention generally would be of more benefit to charities while not unduly adversely affecting the donor. For those donors that wish for their donation to be used in a specific way, there should still be that opportunity.

17.35 We invite the views of consultees as to whether the procedures governing the distribution of the proceeds of failed appeals under sections 63 to 66 of the Charities Act 2011 could be improved, and in particular whether:

1) the advertisement and inquiry procedure could be simplified; and

2) the disclaimer and declaration procedures remain of use.

Better promotion of the guidance and support available to trustees considering a specific appeal should be the first line of improving understanding and reducing the incidence of failed appeals and the need for cy-près. Secondly, the requirements for adverts and inquiry should be simplified in order to ensure charitable funds are not unduly spent on a procedural matter that does not provide sufficient positive results for the expense. Thirdly, donors should be able to give without too much difficulty, but with sufficient opportunity and information to ensure that any donation is given in a respectful and non-pressured situation.

It is unlikely that most donors are aware of the disclaiming and declaration procedures. As such, that mechanism may be redundant. However, there should always be some procedure for donors to make a donation for a specific purpose and for that desire to be respected by the charity concerned.

17.36 We invite the view of consultees as to whether trustees should be given the power – in place of the Charity Commission - to apply small funds or small donations (from a failed appeal or a surplus case) cy-près, and the size of fund or donation for which the power should be available.

The ability of trustees to apply small sums from failed appeals cy-près appears to be sensible in the circumstances. The front line of defence however, should be better promotion to, and understanding by, trustees of the issues surrounding specific charitable appeals and the need to ensure that appropriate wording is used in appeal literature.

17.37 We invite the views of consultees as to whether trustees should be given any broader power – in the place of the Commission - to apply funds (from a failed appeal or a surplus case) cy-pres.

The proposals detailed above should be sufficient.

17.38 We invite consultees to share with us their experience of administering the proceeds of failed fundraising appeals, including the procedures under sections 63 to 66 of the Charities Act 2011, in particular the work, time and expense that have been involved.

ICSA has no further comments.

Regulating charity land transactions and the use of permanent endowment

- General comments: acquisitions, disposals and mortgages of charity land

The way land is used in modern charity practice has developed in a way unforeseen when the legal framework governing dispositions was first conceived. The increase in the use of charity shops presents an interesting perspective to the discussion. As many charities will have a high street retail presence in the form of multiple leases lasting more than seven years, there is a pressing need to update the law in order to reflect the contemporary practices of charities.

Furthermore, it has been posited that for trustees to follow the letter of the law, they will need to engage professional advice twice when disposing of land – at the start of any discussions on the proposals and later when the action is being implemented. This is not always the approach taken by charities.

Responses to specific questions

17.39 We provisionally propose that the provisions of Part 7 of the Charities Act 2011 relating to dispositions to connected persons be repealed. Do consultees agree?

Depending on the situation, there can be three different definitions of 'connected person' in play that charity trustees must be aware and respectful of (charity law, company law, and land dispositions). It therefore makes sense to ensure some consistency within charity legislation, as trustees will not always be aware of the nuances in each situation.

17.40 If, contrary to our proposal in paragraph 17.39 above, the provisions concerning connected persons are retained, we provisionally propose that the definition of "connected persons" should exclude:

1) a charity's wholly-owned subsidiary company; and

2) a trustee for a charity who is not also a "charity trustee", as defined by the Charities Act 2011.

Do consultees agree?

If the definition cannot be changed, the above recommendations appear to be appropriate as an intermediate step.

17.41 We provisionally propose that:

1) the general prohibition on trustees disposing of charity land should be removed; and

2) in its place should be a duty on trustees, before disposing of charity land, to obtain and consider advice in respect of the disposition from a person who they reasonably believe has the ability and experience to provide them with advice in respect of the disposal; but

3) the duty to obtain advice should not apply if the trustees reasonably believe that it is unnecessary to do so.

Do consultees agree?

While the proposal aims to reduce administrative bureaucracy, the duty to obtain advice, unless deemed unnecessary is potentially worthless. Without any mechanism to 'police' that trustee duty, it is arguable that the duty is unlikely to be adhered to in many instances. Thus any attempt to improve the incidence of breaches in duty with regard to land transactions is subject to continue, but by other means.

17.42 We provisionally propose that the requirements in section 121 of the Charities Act 2011 concerning advertising proposed disposals of designated land and considering any responses received should be abolished. Do consultees agree?

Trustees must make decisions in the best interests of achieving charitable purposes, those decisions might or might not be better informed with the input of others, including advisers and stakeholders. While such feedback may be sought, it is not always followed, and does not necessarily have to be.

Conversely, such information can help trustees to make a much better decision and avoid any reputational or financial risk. While there may be some merit in the proposal to remove the requirement for designated land disposals to be advertised, there should be some continued obligation on trustees to consult on the proposals with their stakeholders. It is undoubted that such a requirement places additional administrative costs on the charity, but it also provides an opportunity to engage with stakeholders and to 'take them' with the trustees. A lack of stakeholder engagement on such a manner could foster an adverse reaction which will have a bigger impact on the charity, and could cause the trustees additional administrative challenges.

That said, it does seem a little indiscriminate that an obligation to consult on the disposal of land would continue to exist but not apply to any other high value assets of the charity.

17.43 We invite the views of consultees as to whether the advice requirements that we propose governing dispositions by non-exempt charities should be extended to dispositions by exempt charities.

This proposal appears to be sensible in terms of ensuring consistency across the different types of charities.

17.44 We invite the views of consultees as to whether the new advice requirements that apply to disposals of charity land should also apply to the acquisition of land by charities.

We agree that there should be consistency between the duties on charity trustees when purchasing or disposing of charity land as the risks can be equally harmful to the charity's ability to fulfil its charitable purposes.

17.45 We provisionally propose that if the Part 7 requirements are not amended, or are replaced with other requirements non-compliance with which will render the transaction void, then a purchaser should be protected by a certificate, deemed conclusively to be correct, in the contract that the statutory requirements have been complied with. Do consultees agree?

Assuming the purchaser has acted in good faith, there should be some assurance that the disposition is not void. Conversely, where trustees have acted in a manner that breaches their duties and a transaction rendered void, there should be appropriate sanctions in place to ensure compliance.

17.46 We provisionally propose that the advice requirements under the new regime should apply even if the transaction must be authorised by the Secretary of State under the Universities and College Estates Act 1925. Do consultees agree?

ICSA has no further comments.

17.47 We invite the views of consultees as to whether the Universities and College Estates Act 1925 should be repealed and the institutions to which it applies given the general powers of an owner similarly to trustees under the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000.

ICSA has no further comments.

17.48 We invite consultees to share with us their experiences, including any delays and costs incurred, in seeking to comply with Part 7 of the Charities Act 2011 when disposing of or granting mortgages over charity land.

ICSA has no further comments.

- General comments: permanent endowment

Permanent endowment can either be a valuable asset to the work of a charity or can represent an undue administrative burden that adds little in the way the charity fulfils its charitable purposes. It is therefore appropriate that the consultation reviews the current legislation regarding permanent endowments.

Responses to specific questions

17.49 We provisionally propose that the parallel regime for "special trusts" in sections 288 and 289 of the Charities Act 2011 be repealed. Do consultees agree?

The argument posited for the proposal to repeal the regime regarding 'special trusts' is persuasive given the powers are mirrored in s281 and 282 of the Charities Act 2011.

17.50 We provisionally propose that sections 281 and 282 of the Charities Act 2011 be amended to make it clear that they apply to permanent endowment held by an incorporated charity. Do consultees agree?

As the point of the review is to further empower trustees to fulfil their duties and make it easier for charities to fulfil their charitable purposes, it would be appropriate for the proposal to make it clear that section 281 and 282 apply to permanent endowment held by an incorporated charity.

17.51 We invite the views of consultees as to whether the financial thresholds in sections 281 and 282 should be increased, to what level, and why.

Any change on the financial thresholds should be approached with a little caution. The opportunity to release up to £100,000 of permanent endowment could represent a sizeable amount of a charity's permanent endowment, while to others it may be less significant. It might therefore be appropriate for a financial threshold to represent a percentage of the charity's permanent endowment and/or annual income.

17.52 We invite the views of consultees as to whether the time limit in section 284 of the Charities Act 2011 for the Charity Commission to consider a resolution passed under section 282 should be reduced to 60 days.

The proposal appears to be eminently sensible to ensure consistency across the legislation.

17.53 We invite the views of consultees as to whether the current regime in sections 281 and 282 of the Charities Act 2011 is otherwise satisfactory.

We have no other comments to make on these sections of the Charities Act 2011.

17.54 We invite consultees to share with us their experience of releasing the restrictions on the expenditure of permanent endowment, including the procedures under sections 281 and 282 and sections 288 and 289 of the Charities Act 2011, in particular the time and costs involved.

ICSA has no further comments.

17.55 We invite the views of consultees as to whether a new regime should be devised that permits charities to use permanent endowment more flexibly whilst seeking to maintain its real value in the long term. We also invite consultees to comment on how such a scheme might operate.

ICSA has no further comments.

17.56 We invite the views of consultees as to whether, and if so how, such a new regime would be likely to increase or decrease the costs incurred by charities in administering permanent endowment.

ICSA has no further comments.

<u>Payments to charity trustees and other non-beneficiaries</u>

Payments to charity trustees continues to be a small incidence within the wider sector and as such any proposals should not unduly promote the propensity and trend towards trustee remuneration. The proposals presented, however do appear to deal with incongruities within the legislative drafting process.

- General comments: remuneration for the supply of goods and the power to award equitable allowances

The issue of trustees supplying goods to their charity seems to be an anomaly of the drafting procedure. There appears to be no clear reason as to why goods supplied, but not in connection to the supply of services, should not be possible under statutory powers (subject to a permissive governing document). The proposal to rectify this situation therefore appears to be eminently sensible.

Responses to specific questions

17.57 We provisionally propose the introduction of a new statutory mechanism for the authorisation of remuneration of trustees for the supply of goods that mirrors section 185 of the Charities Act 2011. Do consultees agree?

This would be a sensible course of action as there does not appear to be any strong arguments as to why such a measure was not originally included in the 2006 Act.

17.58 We invite consultees to share with us their experiences of considering whether to authorise, and subsequently authorising, the remuneration of trustees for the supply of services and for the supply of goods to a charity, in particular the work, time and expense that have been involved.

ICSA has no further comment.

17.59 We provisionally propose that the Charity Commission should have a statutory power to relieve a trustee, in whole or in part, from liability to account for a profit (of any size) made in breach of a fiduciary duty. Do consultees agree?

While the proposal seems sensible, it would be helpful to ascertain the degree to which charity trustees approach the courts for authorisation for an equitable allowance. An understanding of the demand for such relief would provide a better idea as to the additional work the proposed power would present the Charity Commission and whether additional funding would be required to perform this function. As there is no proposed financial range within which the Commission could exercise such a power, the work of the Commission will be added to as internal operational guidance along with formal information for charity trustees will be required. It is also likely that considerable internal discussion will take place as to appropriate levels of relief, and those decisions may be subject to further challenge.

On balance, it is therefore unclear as to whether the proposal would be of sufficient benefit to the Commission and charity trustees.

17.60 We invite the views of consultees as to whether the criteria that apply to the exercise of the power:

1) should be the same as the criteria applied by the court when considering whether to award an equitable allowance; or

2) should be the same as the criteria that apply to the exercise of the power in section 191 of the Charities Act 2011, namely whether the trustee has acted honestly and reasonably and ought fairly to be relieved from liability.

ICSA has no further comment.

17.61 We invite consultees to share with us their experiences of seeking to authorise an equitable allowance for a trustee, in particular the work, time and expense that have been involved.

ICSA has no further comment.

- General comments: ex gratia payments out of charity funds

The issue of ex gratia payments appears to present a number of administrative and governance issues depending on the size of the charity and the number of bequests left to the charity in question. For a large charity with a significant proportion of income generated from legacies, it may be the case that decisions to award an equitable allowance are already delegated to staff at sums greater than that decided by the Charity Commission. Furthermore, with a legacy bequeathed to a range of charities there can be added frustration as each charity will take a different approach to awarding an ex gratia payment. This may be especially so where the percentage of ex gratia payment is higher in one charity than others where several are meant to benefit from the gift.

In general, the approach taken to authorise ex gratia payments appears to be unduly burdensome for the charities involved. The time it can take from receiving a request to the dispensation of an ex gratia payment can be unduly lengthy, which can add to the frustration of the individual(s) requesting an ex gratia payment. While charities should be cautious in their approach to ex gratia payment requests, there is a balance to be achieved between protecting charity assets and reputation.

Responses to specific questions

17.62 We provisionally propose that a new statutory power to be introduced allowing trustees to make small ex gratia payments without having to obtain the prior authorisation of the Charity Commission, the Attorney General or the court. Do consultees agree?

Given that there already appears to be a similar system working informally, it would be sensible to place the practice on a statutory footing to ensure consistency of understanding and application.

17.63 We invite the views of consultees as to the appropriate financial threshold for the exercise of such a new statutory power.

It could be argued that an increase to the threshold of up to £5000 would make the system more practicable for those charities that regularly deal with legacies and the incidence of ex gratia payment requests, but might still be too low. Such a sum however, might represent a sizeable proportion of a smaller charity's income and therefore might be deemed an unreasonable upper threshold.

An alternative approach might be to set the threshold as a percentage of the overall income generated by the charity in a given financial year. Such an approach, however is not without added complexity.

17.64 We provisionally propose that the Minister be given a power to vary the financial threshold by secondary legislation. Do consultees agree?

Regardless of how the threshold is set, Ministerial power to amend thresholds via secondary legislation would be sensible, subject to suitable consultation.

17.65 We provisionally propose that such a statutory power should be capable of being excluded or limited by a charity's governing document. Do consultees agree?

The proposal to ensure any statutory power does not over-rule any clauses in a charity's governing document is consistent with other aspects of charity governance and is supported by ICSA.

17.66 We invite the views of consultees:

1) **as to whether the trustees of a charity should be capable of delegating the taking of a decision to make an ex gratia payment (whether under any new statutory regime for the making of payments without Charity Commission authorisation, or under section 106 of the Charities Act 2011) to another officer of the charity;**
2) **as to whom the taking of the decision should be delegated; and**
3) **as to whether such a power should be limited to payments of a certain value and, if so, what that value should be.**

As some larger charities already delegate the decision to members of staff, there may be an argument to formally extend the power. If such a power is introduced, it might be more practicable to delegate the power to a responsible officer, who may or may not be a trustee, the chief executive or another member of the charity's staff.

Conversely, for the majority of smaller charities such a power may be quite beyond their organisational set up. For those charities that do not employ staff any power would be unnecessary as it is envisaged that the trustee board would still want to take the decision collectively.

If such a power is introduced, there should be clear guidance for trustees as to how best to maintain appropriate oversight for the use of any delegated powers to a nominated responsible officer. Details of the use of the power, and the procedures in place for its use, should be publicly available to provide additional transparency and accountability.

17.67 We provisionally propose that the Attorney General, the court and the Charity Commission should have the power to authorise ex gratia payments by statutory charities. Do consultees agree?

As detailed throughout the document, it would seem the inconsistency in the way administrative matters are implemented within different types of charities are no longer fit for purpose. We therefore agree with the proposal.

17.68 We provisionally propose that the new statutory power for charity trustees to make small ex gratia payments (under paragraph 17.62 above) should be available to the trustees of statutory charities. Do consultees agree?

The approach appears commensurate with the aims of the consultation.

17.69 We invite consultees to share with us their experiences of considering whether to make, and seeking authorisation to make, ex gratia payments, in particular the work, time and expense that have been involved.

ICSA has no further comment.

Incorporation, merger and insolvency

- General comments: charity incorporations and mergers

For trustees of unincorporated charities the associated risks can appear to be overwhelming and the case for incorporation conclusive. Once a decision to incorporate has been made, trustees can then be further confused by the process of establishing a new charity, dissolving the existing one and transferring the assets. For those unfamiliar with charity law, the process appears to be unnecessarily bureaucratic and long-winded – especially where the governing document is not permissive in making administrative changes without Charity Commission approval.

Changes to charity law that makes it easier for charities to merge and/or incorporate should therefore be welcomed by many trustees and their advisers.

Responses to specific questions

17.70 We invite the views of consultees as to whether, and if so how, the power for unincorporated charities to transfer their assets to another charity under section 268 of the Charities Act 2011 should be expanded.

As s268 powers are similar to those available to unincorporated charities elsewhere in the Charities Act 2011, there is some weight to the argument that s268 powers should be expanded to accurately mirror the appropriate thresholds in place for similar powers.

17.71 We provisionally propose that the condition for the exercise of the power under section 268 of the Charities Act 2011 requiring similarity of purpose between the transferor and transferee charity should be the same in respect of both unrestricted funds and permanent endowment. Do consultees agree?

ICSA agrees with the proposal.

17.72 We invite consultees to share with us their experiences of using the section 268 power, including in respect of permanent endowment, in particular the work, time and costs that have been involved.

ICSA has no additional comments.

17.73 We invite consultees to share with us their experiences of using vesting declarations under section 310 of the Charities Act 2011, including any difficulties that they have encountered and whether they consider the power to be satisfactory.

ICSA has no further comment.

17.74 We provisionally propose that the exception in section 310(3)(b), in respect of leases containing covenants against assignment, be removed. Do consultees agree?

Before a substantial decision could be made as to s310 exceptions, it would be useful to understand more fully the perspective of landlords. It is not beyond imagination that some leases include absolute or qualified covenants for good reason. Removing the clauses that protect landlords could therefore be

detrimental to them and may in turn adversely impact on the reputation of the individual charity and the sector.

Those representing charities involved in a merger or incorporation are likely to be in dialogue with those they have contractual arrangements with as a matter of good governance, so any issues relating to absolute or qualified covenants might be more easily resolved by that means. The use of statutory powers to use vesting declarations to transfer property which include absolute and/or qualified covenants, without the ongoing dialogue with the landlord could therefore be seen as a strident step that does not facilitate the best relationship between the charity and the landlord.

It is arguable that the anomalies between s310, s239 and s244 should be smoothed, one way or the other, to promote better understanding and consistency in implementation.

17.75 We invite the views of consultees as to whether the section 310 power and its exceptions are otherwise satisfactory.

ICSA has no further comments to add.

17.76 If, contrary to our provisional proposal in paragraph 17.74 above, consultees do not agree that section 310 vesting declarations should apply to leases containing qualified covenants against assignment, we invite the views of consultees as to whether section 310 vesting declarations should apply to leases containing absolute covenants against assignment.

Please see previous comments in this section.

17.77 We provisionally propose that vesting declarations under section 310 should apply to a charity's permanent endowment in the same way that they apply to a charity's unrestricted funds. Do consultees agree?

As the vesting declaration does nothing to change the nature of permanent endowment when transferred to a new or existing charity, there appears to be no overwhelming reason to restrict their inclusion.

17.78 We provisionally propose that, when a charity has merged and the merger is registered, for the purposes of ascertaining whether a gift has been made to that charity under section 311(2) of the Charities Act 2011, the charity should be deemed to have continued to exist despite merger. Do consultees agree?

The proposal would appear to be a sensible way of dealing with future legacies without the need to retain shell charities, and the attendant ongoing administrative costs this incurs.

17.79 We invite consultees to share with us their experiences of retaining shell charities as a result of the potential limitations on the scope of section 311, as well as the work, time and costs involved in retaining such shell charities.

ICSA has no further comment.

- General comments: charitable trusts in insolvency

For trustees of unincorporated charities the associated risks to their personal property can be negligible or misunderstood. Likewise, there may be considerable ignorance as to the use of assets in insolvency situations. Greater clarity and moves to better promote understanding would therefore be desirable for all trustees, but especially those of unincorporated charities.

Response to specific questions

17.80 We provisionally propose that the guidance of the Charity Commission in CC12 should be revised so as to make it clear that the availability of trust property, including trust property that falls within the statutory definition of permanent endowment or special trust (or both), to meet the liabilities of an insolvent trustee is no different whether the trustee is an individual or a charitable company. Do consultees agree?

Consistency of message and clarity in Charity Commission guidance would enable trustees to better understand their position in what will undoubtedly be a stressful situation.

17.81 We provisionally propose that the guidance of the Charity Commission in CC12 should be revised to reflect more fully and accurately the law governing the exercise of trustees' rights of indemnity from trust property for the benefit of the creditors of the trustee, in particular in respect of permanent endowment and special trusts. Do consultees agree?

As stated above, consistency of message and clarity in Charity Commission guidance would be highly desirable to enable trustees to better understand their position in such situations.

17.82 We invite the views of consultees as to whether the law relating to the availability of permanent endowment and special trusts to the creditors of an insolvent trustee is satisfactory, if not, how could it be improved.

ICSA has no further comments.

<u>Charity Commission powers</u>

- General comments: charity names

At a time when the Commission is required to do more with limited funds, it seems appropriate that new powers to enable them to do their job without undue administrative burdens would be welcome. The situation regarding charity names appears to be particularly unhelpful and measures to remedy the situation are sensible.

Responses to specific questions

17.83 We provisionally propose that section 42(2)(a) of the Charities Act 2011 be amended to remove the reference to the charity being registered. Do consultees agree?

Yes, the proposal appears to be eminently sensible.

17.84 We invite the views of consultees as to whether the Charity Commission's power under section 42 of the Charities Act 2011 to issue a direction requiring a charity to change its name should be extended to all exempt charities.

Consistency in the application of s42 powers for exempt and registered charities would be welcome.

17.85 We provisionally propose that the Charity Commission be given a power to refuse an application by an institution for registration as a charity, and to refuse the registration of a change of name, if any of the criteria in section 42(2) of the Charities Act 2011 apply in respect of the name of the institution. Do consultees agree?

These powers appear to be commensurate with those available to Companies House and would be a useful addition to the Commission.

17.86 We provisionally propose that the Charity Commission be given a power to stay an application by an institution for registration as a charity, and to stay the registration of a change of name, pending an inquiry into the compliance of the name of the institution with the criteria in section 42(2) of the Charities Act 2011. Do consultees agree?

The proposal may prove advantageous to the Commission in dealing with such matters.

- General comments: determining the identity of a charity's trustees

As with other procedural matters raised within this consultation, it appears that the situation highlighted has been introduced as an anomaly of the legislative drafting process. If the Charity Commission was to have the power to determine members and trustees it would speed up the resolution of certain charitable conflicts, for the benefit of all involved, especially the charity's beneficiaries.

Responses to specific questions

17.87 We provisionally propose that the Charity Commission be given the power to determine the trustees of a charity, either (1) on the application of the charity or any person claiming to be a trustee of the charity, or (2) following the institution of an inquiry into the charity under section 46 of the Charities act 2011. Do consultees agree?

We agree that the proposal would be helpful to charities facing uncertainty as to the identity of trustees. It is likely that if the charity, or the Commission, requires such an exercise of this power there are other administrative matters that require resolving within the charity and a trustee body that has the benefit of s46 backing is more able to act swiftly in resolving those concerns.

<u>The Charity Tribunal and the courts</u>

- General comments: the Charity Tribunal and the courts

The introduction of the Charity Tribunal in the Charities Act 2006 was generally warmly received, however it has yet to fulfil its stated aims. Measures to improve the work and accessibility of the Tribunal are likely to again be warmly received by the sector.

Responses to specific questions

17.88 We provisionally propose that, when applications within (or in contemplation of) proceedings against the Charity Commission fall within the definition of "charity proceedings" under section 115 of the Charities Act 2011, the charity should be permitted to obtain authorisation to pursue that application either from the court or the Charity Commission. Do consultees agree?

The opportunity for charity trustees to apply to either the Commission or court for authorisation for charity proceedings is to be welcomed as providing a choice to those charity's that may have an issue with a Commission decision or action. Given the costs likely to be incurred by approaching the court instead of the Commission, it is questionable as to the number of charity's that will approach the court, but the choice is important and should be available.

17.89 We invite the views of consultees as to the differing costs of seeking authorisation to pursue charity proceedings under section 115 of the Charities Act 2011 from (a) the Charity Commission and (b) the court.

ICSA has no further comment.

17.90 We invite the views of consultees as to whether charities should be required to obtain authorisation from the Charity Tribunal or the Charity Commission before commencing proceedings in the Tribunal.

It may be the case that charities would benefit from such authorisation before commencing proceedings with the Charity Tribunal

17.91 We invite the views of consultees as to the likely costs of having to obtain authorisation from the Charity Tribunal before pursuing proceedings in the Tribunal.

ICSA has no further comment.

17.92 We provisionally propose that the Charity Tribunal should be given the power to make Beddoe orders in respect of proceedings before it. Do consultees agree?

Such a move is likely to provide additional assurance to trustees without the need for incurring additional costs by approaching the court.

17.93 We invite the views of consultees as to whether the Attorney General should always be a party to applications for a Beddoe order.

There is some advantage in ensuring that the Attorney General is always party to an application for a Beddoe order, if only for a comprehensive index for such applications.

17.94 We invite the views of consultees as to the differing costs of seeking Beddoe protection from (a) the Charity Commission, (b) the court, and (c) the Charity Tribunal.

ICSA has no further comment.

17.95 We invite the views of consultees as to whether, in light of the associated difficulties:

1) the Charity Tribunal should have the power to suspend the effect of a Charity Commission decision pending challenge (or to award an interim injunction to prevent named persons from taking action in reliance on it); and

2) all decisions of the Charity Commission should take effect only after a certain period of time.

Where a charity seeks Charity Tribunal intervention to challenge a Charity Commission decision, it would appear sensible to suspend that direction until after the Tribunal's findings. This will hopefully save a charity resource and time in not having to implement a decision which is later overturned by the Tribunal.

As such, a set period of time in which trustees can register a challenge with the Tribunal but does not have to implement the decision would be favourable. In those circumstances where the charity, or its trustees, decide to implement the decision it would not be necessary for such a period and therefore should not be inhibited from acting accordingly if delay is likely to adversely impact on the charity or its beneficiaries.

17.96 We invite the views of consultees as to whether the Attorney General's consent should continue to be required before the Charity Commission can make a reference to the Charity Tribunal.

ICSA has no comment to make on the proposal.

17.97 We invite the views of consultees as to whether the Charity Tribunal should have the power to award remedies in reference proceedings and, if so, which.

ICSA has no further comment.

ICSA appreciates the opportunity to comment on the Law Commission's document on the technical issues in charity law. Should further information or clarification be required, please do not hesitate to contact me.

Yours sincerely,

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