

By email

14 May 2018

Dear Sir/Madam,

Charity Commission Consultation – Charities that are connected with non-charitable organisations: Maintaining your charity's separation and independence

On behalf of ICSA: The Governance Institute, I am pleased to respond to your consultation on charities connected to non-charitable organisations. ICSA: The Governance Institute is the international professional body for governance, with more than 125 years' experience and with members in all sectors. Our purpose is defined in our Royal Charter as 'leadership in the effective governance and efficient administration of commerce, industry and public affairs' and we work with regulators and policy-makers to champion high standards of governance, providing qualifications, training and guidance.

We are the professional membership and qualifying body supporting chartered secretaries and 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 governance issues. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide insights into effective practices across a range of organisations. Our members' wealth of expertise and experience, together with their detailed understanding of charity and company legislation and regulation, has informed our response to this consultation.

General comments

ICSA welcomes the development of this new guidance as it was an issue that generated considerable interest during the consultation for the revised Charity Governance Code. The guidance will be very helpful to those with an interest in and awareness of the issue and should be useful to prompt boards to consider and review such arrangements. The additional diagrams, checklists and tables provide added value, especially for those with an inclination to more visual information, and practical solutions for implementing good practice.

The governance issues surrounding such relationships are myriad and nuanced, according to the exact nature of the relationships involved. The diverse nature of the sector, and the legal forms used, further add to the complexity, especially where the charity involved is a company limited by guarantee with company law considerations, and/or regulated by a body other than the Charity Commission, such as academy trust schools. Due consideration might therefore be given to including in the guidance specific details or examples relating to the types of charities to which the guidance applies.

As a member of the steering group of the Charity Governance Code, we are pleased to see the specific references to the code and encouragement to adopt it. As there are many different codes of governance covering many sectors, it would be helpful for trustees to refer to the particular code for the sector by its new title 'the Charity Governance Code' (as opposed to the Governance Code used throughout the draft). It would also be helpful if specific Code recommendations relating to the subject matter are included, for instance 2.4.5, 3.4.5 and 3.5.1.



Responses to specific questions

Who is this guidance for?

How well does this section explain whether you need to read this guidance?

In addition to trustees, staff and advisers reading the document there is a real benefit in those involved in the connected organisation (directors and senior managers) also reading the document. This would provide each party with a similar level of understanding of, and respect for, the issues involved and the reasons why some actions might not be appropriate for a charity to undertake. Reading the full guidance could form one aspect of the due diligence performed by each entity before entering a relevant relationship.

Furthermore, it would be advisable to explicitly state that the guidance covers all charities, including those not regulated by the Charity Commission, such as academy trust schools, and signpost readers to the relevant resources available to them on the issue and related matters.

Get it right from the start

How well does this section provide an overall framework for trustees to manage their charity's relationship with a connected non-charitable organisation?

Within the section on making independent decisions there is an argument for addressing the particular issues of family-established and controlled charitable trusts, where the entire board is conflicted, but the conflict is permitted via a governing document. Such documents may have been drafted and approved at a time when it was more accepted that family and friends were the best people to oversee the funds donated by a particular family and honour the original intention of the gift. The guidance should suggest that trustees of such trusts regularly review their governing document, with the assistance of an independent governance and/or legal professional, and update it with a view to instilling the higher standards of good governance, transparency and accountability expected of a modern charity. Such 'closed shop' trustee arrangements appear anachronistic at a time when charity law and regulation has been strengthened in an environment of perceived decline in public trust and confidence. This is especially so in instances where the majority of trustees are also remunerated for positions within subsidiary companies owned by the charity.

The final version of the document should refer to the competing duties of charity trustees who also sit on a subsidiary company board, specifically the legal duty for company directors to act in the best interests of the organisation, taking into account the interests of all members and stakeholders. This is an issue where a parent charity tries to put in place effective controls over a subsidiary company to ensure it acts in a manner that supports the charitable objects of the parent. Such actions can be further complicated by trustees and senior managers of the parent charity being seen as de facto or shadow directors. References to these matters should be included within the final iteration of the guidance.

The section headed 'Personal benefits: avoid or authorise' should be amended to read 'avoid or authorise and review'. This will encourage trustees to reconsider the decision made in the light of modern standards of good governance, the ongoing nature of public trust and confidence in the sector, and most importantly whether the decision still reflects the best interests of fulfilling the charitable objects. Charities evolve and accepted behaviours and standards change. Trustees should be encouraged to review such decisions about personal benefits regularly and make changes where they no longer offer public benefit. As mentioned above, this should also include changes to the charity's governing document where it authorises personal benefits that no longer reflect the charity's best interests or would attract undue reputational risk.

For stronger and clearer guidance to be effective, there has to be a notion that such arrangements will be policed. As such, it might be useful for the final guidance to articulate the actions the Commission will undertake when registering charities and undertaking any themed investigations, along with listing any other potential repercussions that might arise, such as reputational risks.

Common issues for trustees

- i) How well does this section identify all the main issues that can arise?**
- ii) How well does this section help trustees consider and address these issues?**

It appears that the most common issues have been identified and addressed and the checklists for each section are particularly helpful for those engaged with the issue. With regard to the section on investing in non-charitable organisations, it might be worth referring to the potential and real issues of charity trustees and senior managers acting as shadow or de facto directors where they maintain too tight a grip on the decision making of the subsidiary company.

Another issue that might be worth including in the final guidance relates to the general conflict of loyalty that may be experienced by those trustees closely associated with the connected party. Such conflicts are not uncommon and can be particularly unconscious where there is a very close connection between the two parties, for instance where a company sets up a charitable foundation, a professional body has a separate benevolent charity, or the founder of a charitable family trust appoints only family and close friends to the board. Such conflicts can seriously undermine the independence of the charity and its decision making. While the Commission produces excellent guidance on managing conflicts of interest, it might be advantageous to include the matter within this document too.

If things go wrong

- i) How useful is this section?**
- ii) How useful are the examples of how things could go wrong?**

Information about what 'proactive remedial action' by the Commission might include would be helpful to reinforce to trustees that the Commission has a range of powers at its disposal to protect charity assets. While not every power will be used in every scenario, the full measures available to the Commission may focus the minds of those that have read the full version of the document and may share that information with other trustees and individuals in connected organisations.

The document does not provide a full list of circumstances which might give rise to the issues related to connected organisations, but states trustees are expected to apply the guidance. Recognising the difficulty in covering every possible scenario, the guide should nevertheless highlight the specific principles or approach the Commission will use when ascertaining if the guidance has been applied by trustees.

Applying to register a charity

Does this section explain the information which we need in a helpful way?

Yes, however it would be helpful to provide details of what the Commission is likely to do a) if it does not receive all the information requested, b) if it doesn't believe the proposal will be in the best interests of the charitable purposes and provide public benefit, and c) if any further review of the arrangements will be undertaken by the regulator at a later date to ensure the relationship is still appropriate.

Additional resources

- i) How helpful is the at a glance document?**
- ii) How helpful is the checklist for putting the guidance into practice?**

The 'at a glance' guide is a useful overview for those wishing to gain a quick 'rule of thumb' understanding of the main issues. For those trustees, managers and advisers already fully engaged in the situation and keen to ensure compliance and good governance practice is in place, the checklists and tables provide additional practical help. There is the potential for some trustees to fall between the gap created by the difference in the 'at a glance' guide and the full document however. This might be negated to some degree by embedding links to specific sections of the full guidance or other CC guidance in the shorter document.

Title of the guidance

How helpful are the examples in the explaining guidance?

In the main, the examples provided are useful and cover a range of situations. Noted above, however, are a few instances where further specific examples might be of benefit to the final version.

Overall, is the level of detail right?

As mentioned previously, there is insufficient detail given to some common situations: directors' duties, including related party transactions; different definitions of connected persons under company and charity law, company law and matters relating to shadow and de facto directors; exempt and excepted charities, family charitable trusts, and conflicts of loyalty. Further information might be included in the final version to cover these scenarios. The guidance might also include more emphasis on the need for trustees to regularly review the arrangements, and any accompanying authorisations in the governing document, to ensure the situation still reflects the best interests of the charity and goes towards fulfilling the charitable objects and providing public benefit.

Is the language sufficiently clear and easy to understand?

There is always a balance to be achieved between conveying the importance and gravity of the matter in hand while using language that is clear and easy to understand. There will always be some readers who will struggle with such guidance, but the Commission should avoid reducing complex matters down to overly simplistic messaging. The document appears to achieve the right balance for the subject.

Is the purpose of each section and resource document clear enough to enable you to easily navigate and access the information you need? If it is not clear, or there is too much, what could be omitted and why?

Yes, subject to the suggestion above to embed links into the 'at a glance' version of the guide.

Are there any gaps in the guidance? If so what are these?

There are a couple of concerns that we believe warrant further consideration for inclusion in the final version. These include details pertaining to: directors' duties, including related party transactions; different legal definitions of connected persons, company law and matters relating to shadow and de facto directors; exempt and excepted charities, family-controlled charitable trusts, and conflicts of loyalty.

Furthermore, the guidance could promote transparency in such arrangements with connected organisations by including references to any SORP disclosure requirements, and specific recommended practice detailed in the Charity Governance Code or fundraising practice.

Are there any unintended consequences of the advice in the guidance? Please describe these.

For those charities establishing subsidiary companies there is the potential for creating some confusion about the appropriate level of control and autonomy to be put in place. Trustees of a parent charity will be keen to ensure that the subsidiary company acts in a manner attuned to the values, strategy and objects of the parent. However, the subsidiary company directors will need to evidence fulfilling their legal duties under company law. This seemingly contradictory situation can be harder to resolve where the directors are also trustees or members of the charity's staff.

Inclusion of details about the legal duties of company directors and establishing appropriate subsidiary governance arrangements in the final guidance therefore needs to be balanced and proportionate. ICOSA would be more than happy to help with this, should the Commission decide to include the issue in the final version.

We hope that these comments are helpful and contribute to the Commission's deliberations on the guidance to charities relating to connected organisations. Should you wish to discuss them further or require any clarification, please feel free to contact me on lthomson@icsa.org.uk or on 0207 612 7040.

Yours faithfully,

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ICSA: The Governance Institute