



The Governance  
Institute

By email:

26 September 2018

Dear Sir/Madam,

### **Consultation on the Draft Charity Code of Ethics**

On behalf of ICSA: The Governance Institute, I am pleased to respond to your consultation on the draft of the Charity Code of Ethics.

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 125 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 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**

Recent high profile stories have brought renewed focus to the issue of the behaviour of those who lead and those who work in and for charities. This has been damaging for the sector, even though the individuals involved and the organisations they represent account for a tiny minority of those engaged in charitable work. The recent 'Trust in Charities' report, published by the Charity Commission, illustrated the negative impact which questionable behaviour has on the trust and confidence of the public and consequently on donation habits. It is crucial that the sector works to ensure that the highest levels of conduct and behaviour are demonstrated and that charities live up to the elevated standard of expectations to which they are held.

While ICSA welcomes attempts to improve the ethical standards of charities and the behaviour of people involved in them, and finds the intention of the document to enable all charities 'to be a safe place for anyone who comes into contact with them' to be laudable, we are not convinced that a separate Code of Ethics is the most effective method of achieving this.

In a number of instances, the code addresses issues which are in fact legal duties. Ensuring the safety of any individual who engages with the charity, for example, may in part relate to the behaviour of others, but is also covered by legislation with which trustees must comply.



Conflating ethical considerations with a range of applicable laws and regulation reduces the focus of the code and involves unnecessary duplication.

We have heard repeatedly that charities, and trustees in particular, are struggling with a surfeit of codes and guidance which is offered to them in a disparate manner. The point scarcely needs to be made that the majority of charities are small undertakings, with 80% of organisations operating without paid staff. Introducing another document to which trustees and those who lead charities ought to have regard risks increasing the burden placed on them. The production of a further code which has sector or regulatory backing but no legal standing may also prove confusing for trustees, particularly where they may already have guidelines relating to conduct and standards which are specific to them.

This problem is exacerbated by the sense among our members that the Code of Ethics in a number of respects duplicates material and areas of responsibility covered by the Charity Governance Code, which itself is undergoing a process of being embedded in the sector. We acknowledge that there is something of an assumption that the Charity Governance Code is 'for trustees' and that a document such as the Code of Ethics is intended to be applied at all levels of a charity, but feel that this is an artificial division as good governance is implemented throughout an organisation. While people at all levels of a charity have a responsibility for demonstrating the highest standards of conduct, setting, embedding and overseeing the organisation's values, ethos and culture is a task for the trustees.

In a number of instances throughout the draft, the Code of Ethics strays into areas which may simply be thought of as good governance practice rather than as ethical considerations. Such duplication seems unhelpful, particularly where it relates to compliance matters.

We recommend that thought is given to how the relevant aspects of the proposed Code of Ethics can be incorporated into the Charity Governance Code, so that one document can be a single point of reference for those who lead charities. Recent allegations have given the sector occasion to consider areas of charity governance which need to be strengthened, and the Charity Governance Code offers in our opinion the strongest framework for ensuring that standards are constantly improved. In terms of format, the Charity Governance Code also provides more in the way of recommended practice and examples of how to implement its principles than the Ethics Code is able to – or at least does currently.

If, however, the intention remains to create a Code of Ethics as a standalone document, we would offer the following suggestions.

### **Structure**

At present, the Code of Ethics is structured according to its identified principles. Given that the code covers legal obligations, regulatory requirements and examples of good practice, there may be some value in having the format reflect the priority which a charity must give to each. Legal duties must clearly head the list. Furthermore, it might produce a more focused code if it signposted to existing documents elsewhere which address material currently contained in the draft – legislation, Charity Commission guidance, the Charity Governance Code, etc. – allowing the current code to concentrate on its central concern of how charities balance competing, non-statutory demands.

For ease of reference in our submission, we have provided comments on the code as it is currently structured.

### **Definitions and scope**

The document may benefit from an attempt to define what is meant by 'ethical behaviour'. To a degree this is a subjective issue and one charity may hold a different view of what is ethical from another. This may be apparent, for example, in the standards individual charities apply in terms

of the sort of activities they undertake, partnerships into which they enter or individuals and organisations with which they are prepared to work. Each of these require a charity to determine what it wants to achieve and how it intends to go about achieving that. These are difficult decisions but can go to the core of an organisation's moral position.

It seems like an omission that there is no explicit requirement in the Code of Ethics for a charity to establish, publish and promote what its values are. The closest reference is to point out that the code is not intended to replace a charity's own definition of values, indicating an assumption that these have been determined. Such a requirement would seem a logical first step to ensuring that behaviour meets those values. The Charity Governance Code, on the other hand, recommends that a charity's board agrees the organisation's values (Key Outcome 2.2). This then enables the board to require that anyone representing the charity reflects its values positively and ensure that the 'charity's values are reflected in all of its work, and that the ethos and culture of the organisation underpin the delivery of all activities'.

We understand that the Code of Ethics is not intended to be prescriptive and that the size, complexity and activities of charities vary enormously. However, the document is somewhat sparse in terms of providing recommended practice. It is very possible to envisage charities turning to other documents, such as the Charity Governance Code, for more detailed guidelines for improving ethical culture and behaviour. While it is intended that the two codes are complementary, this does undermine the Code of Ethics somewhat. At present the Code runs the risk of falling between two stools: in trying to avoid being too prescriptive, it may risk providing insufficient detail, requiring readers to obtain this elsewhere.

Some of our members are of the view that the size and diversity of the sector may render a single, agreed set of ethical guidelines unfeasible. The subjectivity of the notion presents a significant problem, as does the need to apply across organisations which vary enormously in their scale and activities and ensuring that the principles and recommended practice for meeting them remain proportionate to capability.

If the code is left in its present format, one further, minor, suggestion would be to amend the order in which the document's terms are defined. While there is no indication that any importance is ascribed to the order, it would be preferable to see a charity's purpose and beneficiaries at the top of the list.

### **The principles**

We offer some comments on the principles as they are presented below. We would note at this juncture, however, three points. First, with the exception of the 'right to be safe', the principles set out are covered in some (often greater) detail in the Charity Governance Code. Secondly, we would argue that principles of behavioural standards are set out in an established fashion in the Nolan Principles on Standards in Public Life and these might be more recognisable and thus more useful as a rallying call for improved behaviours amongst charity workers. Thirdly, we would suggest that if the Code of Ethics stands as an individual document, at the very least a fifth category ought to be added to the principles presented, namely 'Inclusion and Diversity'. While this issue is touched upon in a number of places in the document, its omission as a principle is a missed opportunity. This is even more stark given that promoting and improving both inclusion and diversity are identified in the introduction as objectives charities should pursue. In some areas where it is addressed, its treatment can feel a little 'tacked on', such as in the first bullet point under the principle 'Beneficiaries first'. Establishing diversity and inclusion as a pillar of the Code in its own right would greatly enhance the impact of the Code as a whole and would accord the issue the importance it deserves.

#### **i) Beneficiaries first**

We agree that beneficiaries should be front and centre of what a charity does, though we would also add the observation that a beneficiary need not be a person. The context in which the Code of Ethics has been drafted lends a certain focus to interactions and outcomes which operate at a

human level, but there ought to be a recognition that this will be of less relevance for some charities, depending on their charitable purpose.

The Charity Governance Code addresses the importance of charities acting in the best interests of their beneficiaries and it could be argued that it does so in a more comprehensive and rounded manner, by recommending that charities: demonstrate how their charitable purposes are being achieved; assess their impact; ensure they remain relevant and valid; and consider the possibility of a merger where their viability is uncertain or where this would have a beneficial impact on the charitable purposes. A preparedness to admit when a charity is no longer necessary or is not the most effective motor for the change it wants to see is an aspect of ethical behaviour which can be overlooked.

With regard to the second bullet point, this recommendation may need to be revisited. Situations can arise where 'doing the right thing' means that a charity may have to curtail the provision of services to its beneficiaries in order to remain true to its values and preserve its reputation. One thinks, for example, of the dilemma some charities found themselves facing when considering whether to accept or return money raised by the Presidents Club. Protecting values and reputation may benefit the charity and its objects in the long term, even at the immediate cost of individual beneficiaries. This quandary is not fully explored in this bullet point. Linking ethical and moral behaviour to achieving impact, reputational concerns and sustainability of a charity, however, may exceed the scope of the principle as it is currently framed, with beneficiaries as the focus. It may indeed fall within the ambit of 'institutional integrity' which is referred to in the following principle, but which is left undefined.

It is encouraging to see that effective engagement with beneficiaries is promoted in the code. Though it may take it beyond the scope of this beneficiaries-focused principle, it might be worthwhile considering the value of extending this to cover engagement with wider stakeholder groups. For example, a charity that proceeds in a manner that many donors find unpalatable is likely to see a reduction in their income with the concomitant impact on sustainability which that brings.

## ii) Integrity

This is another area which we feel is dealt with more comprehensively in the Charity Governance Code, with the whole of Principle 3 addressing this issue.

If the two Codes were indeed to complement one another, some of the provisions dealing with, for example, policies to ensure accountability for funds might be better left to the Charity Governance Code. In their stead, the Code of Ethics could rather make recommendations such as ensuring that the choice of people and organisations with whom a charity works, or contents of agreements in place with them, reflects the values which it seeks to uphold. This is touched upon in the second bullet point and possibly the fourth, but could be made more explicit. This could dovetail with the suggestion we made in the previous section with regard to weighing long term reputational considerations with business decisions.

A number of the suggested recommended practice might more properly be viewed as good governance. It would seem appropriate for a code of ethics to focus on all of a charity's activities being underpinned by its set of values, rather than to make procedural recommendations which are covered more completely in a governance code.

Given the context, it is assumed that the 'sustainable practices' referred to in the final bullet point relate to environmental sustainability. This could be made clear, as the financial sustainability of an organisation is also a valid consideration, though not one suited to this section. There is no legal duty on charities to act in an ecologically or environmentally sensitive manner. Any imperative to do so is likely to stem from reputational considerations or from individual charities' determined values, which may vary from one organisation to another.

### iii) Openness

We agree with the sentiment expressed in the recommendation that charities operate a presumption of openness and appropriate transparency. This mirrors Principle 7 of the Charity Governance Code: that a charity 'is open in its work, unless there is good reason for it not to be'. Indeed, much of the thrust of the 'Openness' principle in the present code is already contained in Principle 7 of the Governance Code, which goes into much greater detail as to how organisations might achieve greater levels of transparency and accountability.

There may be some benefit from amending the title of this principle to cover openness and accountability. Some of the recommended practice, in particular the third bullet point, no doubt promote accountability but, depending on the circumstances, may not be appropriate to be disclosed openly. This principle is another area in which it is important to bear in mind what an individual charity can realistically achieve. Even where an organisation wishes to be as open and accountable as possible, it may find itself constrained by resources or other limitations.

The suggestions for documents to be made available are sensible as far as they go. However, charities should also be encouraged to provide information such as their mission, strategic objectives and the organisation's values. Where it would not be unduly burdensome, this might be accompanied by an indication of how their actions and activities live up to these statements. If seeking to promote ethical behaviour, it is essential that stakeholders are able to see what a charity purports to stand for and evaluate how far it is successful in doing so. This can also be a useful exercise for the organisation itself.

The suggestion that charities report relevant incidents and share appropriate information is welcomed in light of the seriousness of recent allegations and the issues which the Charity Commission has said it experiences in relation to the reporting of serious incidents. Whilst charities have a regulatory duty to report incidents which negatively impact their assets, work, beneficiaries or reputation, the fact that most do not do so is something that the sector and the Commission must seek to address. It is important to educate both charities and the public that the reporting of incidents can be indicative of responsible leadership and good processes rather than simply of poor behaviour. The Code of Ethics might be an appropriate place to emphasise this point.

### iv) Right to be safe

It seems as though this principle is concerned primarily with the right to be safe from the behaviour of others, rather than with physical safety which will be covered by, for example, health and safety requirements, fire regulations and insurance policies. It might be useful to highlight this distinction. Many of the behavioural aspects of embedding the right to be safe are also covered from a legislative and regulatory perspective, such as through equality legislation or safeguarding. It might be expected that a code of ethics acknowledges minimum requirements and directs the reader appropriately, but then goes further, seeking to encourage the highest attainable standards of conduct which are proportionate and appropriate to individual charities' circumstances.

It is very important that the issues of behaviour and interactions between those who come into contact with a charity are tackled in an explicit and forthright manner and the allegations of unacceptable conduct at a number of charities have rightly prompted calls for such behaviour to be addressed. The Charity Governance Code was written and published prior to these allegations being made public and future iterations of the Governance Code are likely to strengthen its position on this issue. In its current form, the Code of Ethics may benefit from providing more recommended practice to assist charities in establishing and embedding appropriate processes and safeguards, for example through training, staff/volunteer statements of expectation, contracts for personnel which address conduct and values, a robust code of conduct, speak-up/whistleblowing policies, compliments, complaints and comments policies and disciplinary processes. Once again, this presents the question of whether a more appropriate place for such detail is the Charity Governance Code.

As noted earlier, it would be preferable were the aspects of this principle which relate to diversity and inclusion given a section of their own. Though these are related to the right to be safe, they are at the same time much wider. Protecting people from inappropriate, discriminatory, offensive or harmful behaviour, and ensuring that everyone is treated with dignity and respect, rightly belong in the section on the right to be safe. However, a more proactive approach to diversity and inclusivity and the social and organisational benefits these can bring warrant these considerations being separated out. This would allow the 'right to be safe' to focus on protecting individuals, establishing robust safeguarding and reporting policies and providing other support, such as appropriate training.

Though the wording could be slightly refined, the Code of Ethics makes the good point in the third bullet point that it will be necessary for charities to ensure that training is provided for staff, volunteers and trustees. Effective induction programmes and ongoing training are essential in order to effectively embed any code of conduct or ethics.

### **Concluding comments**

One area of the draft Code which we feel might benefit from additional material is that of establishing, embedding and nurturing the organisational culture of each charity. This forms a hugely important part of instilling and promoting ethical behaviour. Having in place appropriate policies and processes is an essential first step. However, behaviour comes down to people and where a culture prevails of bypassing rules, or where sanctions for transgressions are insufficient, even the best policies can be ineffective in producing desired standards of conduct.

We believe that the underlying intention of the Code of Ethics and much of the material it contains are laudable in terms of addressing a significant issue facing the sector. However, we are also of the view that it would be most useful to incorporate the Code of Ethics into the next iteration of the Charity Governance Code. To retain a separate standalone document risks repetition and will provide yet another governance burden for charities to bear. To fillet out those areas which are more fully dealt with in the Charity Governance Code would perhaps leave a Code of Ethics which lacks substance and grounding.

Should the Code of Ethics continue as a document in its own right, we hope that our suggestions will be considered to make it as effective as possible. Should you wish to discuss them further or require any clarification, please feel free to contact me.

Yours sincerely,

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