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BRIEFING NOTE:
7 February 2018

House of Lords report on charities: *Stronger charities for a stronger society* - Government and Charity Commission respond

Background

In March 2017 the House of Lords published its report on issues affecting the charity sector ("the Report"). The Report set out over 100 conclusions and recommendations directed at numerous bodies including the Government, the Charity Commission, the Governance Code Steering Group and various infrastructure bodies on a range of issues including:-

- improving charity governance;
- improving charities' accountability;
- contracts and commissioning and grant funding;
- encouraging volunteering;
- the impact of Brexit on charities; and
- the regulation of charities.

Please see the link below to our note published last April which summarised the key findings of the Report[1].

The Government's response to the Report was published in December 2017. It has responded to all 42 of the Report's recommendations, even though not all of them were specifically directed at the Government. We comment below on the key responses only.

The Charity Commission briefly responded to the Report shortly after it was published but in January this year it issued a formal and more detailed response. Unlike the Government's response, the Commission focuses only on six specific recommendations and we comment on these below.

At a glance, the Government:-

1. **Echoes the sentiments in the Report that *"Charities are at the very heart of civil society".***

2. **Encourages as a matter of good practice the adoption of the revised Charity Governance Code (published in July 2017)[2] and, as recommended in the Code, agrees that charities publish compliance with the Code in their annual report.**

[1] https://filanthropia.co.uk/House_of_Lords_report_on_charities_March_2017.pdf

3. **Confirms that it has no plans, as recommended in the Report, to launch a public consultation on introducing a statutory duty for employers to allow employees to take time off work to perform trustee roles.**

However, the Government agrees that more should be done to promote the benefits of trusteeship and it refers to the establishment by the Office for Civil Society in 2016 of the Skills Exchange Alliance.[3] This comprises business and voluntary sector representatives and works to support the growth in the quality and quantity of employer supported volunteering.

The Government also encourages greater trustee diversity – a theme which has been championed in a recent research jointly commissioned by the Office for Civil Society and the Charity Commission.[4] It should also be noted that trustee board diversity is one of the seven governance principles set out in the Charity Governance Code.

4. **Agrees that more should be done to promote stronger connections between charities and businesses.**

In this context, the Government refers to (1) its Inclusive Economy Partnership which it launched in 2017[5], which aims to bring together business, civil society and government to help address the challenges faced by those on low to middle incomes and (2) the development of the new Civil Society Strategy[6]. (It appears, however, that in reality the primary focus of the new Strategy will be to improve co-ordination between various government departments which work with charities and to make better use of existing government resources).

5. **Welcomes the recommendation that all charities should seek independent evaluation of their impact on their beneficiaries and that public sector commissioners assess such evaluation when awarding contracts. However, the Government does not accept that there is need for Government guidance on standardised impact reporting.**

The Government confirms that commissioners of public services should already take account of evidence of impact, where appropriate and *"charities that can evidence impact and value for money will be in a stronger*

[2]Please see our briefing note on the revised Governance Code:

https://filanthropia.co.uk/Briefing_note_finalised_Charity_Governance_Code_3rd_edition_(July_2017).pdf

[3] https://www.zurich.co.uk/zurichcommunitytrust/skills-exchange/

[4] https://www.gov.uk/government/news/charities-must-do-more-to-promote-diversity-on-their-boards-new-research-shows

[5] http://iep.challenges.org/

[6] The Civil Society Strategy was announced by the Department for Digital, Culture Media and Sport ("DCMS") in November 2017. It is led by Tracy Crouch, Minister for Civil Society, and will work with other departments, particularly the Department for Communities and Local Government. It is planned that a "listening exercise" will be launched early this year and findings will be reported later in the year.

position to successfully bid for contracts." In rejecting the need for further guidance on impact assessment and reporting, the Government refers to its minimum grant standards introduced in 2016[7]. However, there is no specific reference to impact assessment and reporting in these standards and in our view greater clarity, as recommended in the Report, would be welcomed by charities.

It also appears that the Government is pursuing reliance on existing sector led impact initiatives such as Inspiring Impact.[8]

6. **Confirms that, in the light of the recommendation that contracts and commissioning processes need to be reformed as they are currently skewed against smaller charities, it wants more small and medium sized charities to access the public services market and improve outcomes for service users.**

The Government glosses over the recommendation that it should support the establishment of a voluntary sector bidding consortia. Instead, it confirms, that the work of the Civil Society Implementation Group (a collaboration between Government, charities, commissioners and umbrella bodies) will look at, amongst other things, barriers to small and medium sized charities accessing the public services market and it will feed into the new Civil Society Strategy.

Note also that following the collapse of Carillion in January this year, the Public Administration and Constitutional Affairs Committee has launched an inquiry to look at how Government and the public sector manages the risks of outsourcing the delivery of public services[9]. The Committee is inviting written submissions on a range of questions: although there is no specific mention here of public service delivery by charities, one hopes that that this will be considered by the Committee and that there will be some "joined up thinking" by Government on this issue.

7. **Evades addressing the recommendation that realistic and justifiable core costs of charities are included in public sector contracts and does not offer much comfort that contracts will, where appropriate, allow for the promotion by charities of innovation in service development and delivery.**

8. **Confirms that it is considering the Law Commission's report *Technical Issues in Charity Law* (September 2017) which addresses, amongst other things, some of the legal and technical barriers of charities looking to merge.**

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[7] https://www.gov.uk/government/publications/grants-standards/grant-standards

[8] http://inspiringimpact.org/

[9] https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/news-parliament-2017/lessons-collapse-carillion-inquiry-launch-17-19/

9. **Evades addressing the recommendation that the Office for Civil Society undertakes an audit of the potential impact of Brexit on charities, including the impact on the loss of funding.**

While the Government accepts that charities *"have important views on exiting the EU",* it is only able to confirm that it is *"gathering information"* and that the Office for Civil Society will *"keep working across departments to ensure that the views of civil society organisations are represented in the negotiations."*

Summary of Charity Commission responses:-

1. **The Commission endorses the recommended good practice in the Charity Governance Code that charity trustees should serve for a maximum of nine years. However, it rejects any notion of mandatory time limits on the basis that "*there may be many reasons why particular charities might be unable to follow this good practice."***

Instead the Commission confirms that charities must assess the risks and implement their own policies and procedures which they can explain and justify. Having said that, the Commission confirms that it will review its *"draft articles of association"* (presumably by this it means its model governing documents) to see how they might better reflect the Governance Code.

2. **In the light of the recommendation that the Commission sets an example to the sector by having a diverse board, the Commission highlights the fact that the DCMS (not the Commission itself) is responsible for such appointments.**

The Commission then goes on to confirm that it will continue to work with the DCMS to *"attract and recruit candidates with the broadest range of expertise, skills and backgrounds"*. At the time of writing, the DCMS has confirmed that it has selected the Conservative peer Baroness Stowell (formerly leader of the House of Lords and member of David Cameron's government) as its preferred candidate for the new Charity Commission chair[10] to take over from William Shawcross[11] later this month. However, there is some concern within the sector that the role is becoming increasingly politicised. Andrew Hind (who was the first CEO of the Charity Commission - 2004 to 2010) has today (7 February) written a very interesting article for Civil Society News in which he asserts that *"a government-appointed chair's role has seriously damaged the Commission's reputation as an impartial body operating above the political fray."*

3. **The Commission accepts the recommendation that it should take a positive approach to support and assist charities seeking to merge.**

It refers to its various guidance on mergers[12] and recommends that trustees regularly review their charity's

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[10] https://www.gov.uk/government/news/preferred-candidate-selected-for-charity-commission-chair

[11] https://www.gov.uk/government/people/william-shawcross

[12] https://www.gov.uk/guidance/how-to-merge-charitieshttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407825/Making_mergers_work.pdf

effectiveness, which should include the possibility of merging (as covered in the Commission's *"15 questions trustees should ask"* document[13]). The Commission confirms that it is currently reviewing its finance guidance and will consider whether further advice on mergers is needed.

The Commission also highlights that with limited resources it has to concentrate on its core regulatory work. Consequently, the extent to which it is able to assist charities further in relation to mergers will depend on whether it is able to secure additional funding for its enabling work. (See 6 below).

4. **The Commission does not accept the recommendation that its model documents should be amended to include time limited options by way of prompting new charities to consider their lifespan at inception.**

The Commission confirms that although it would be possible to create time-limited trusts, it is not clear whether this would be legally possible for other structures. It further asserts that amending its model documents would have considerable resource implications for the Commission. The Commission indicates that a better way of addressing the Select Committee's suggested aim in the Report would be for promoters of new charities to consider if there are existing charities with whom they can partner (as encouraged in the Commission's pre-registration guidance CC21(a): *How to set up a charity*[14]), rather than establishing a new charity. The Commission also refers to its "15 questions" document (see 3 above), which addresses the possibility of charities merging or winding up.

5. **In response to the recommendation that the Commission improves its advice to charities and their staff with regard to serious incident reporting, the Commission refers to its recently updated guidance entitled *How to report a serious incident in your charity* (September 2017)[15]**

The guidance confirms that the Commission requires charities to report a serious incident (actual or alleged) which has resulted, or might result, in significant:-

- loss of a charity's money or assets;
- damage to a charity's property; and/or
- harm to a charity's work, beneficiaries or reputation.

In addition, the guidance confirms that trustees of charities with an annual income over £25,000 must as part of the annual return sign a declaration confirming that there were no serious incidents during the relevant financial year that should have been reported to the Commission but were not.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398566/Checklist_for_mergers.pdf

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/601505/Charity_governance_finance_and_resilience_15_questions_trustees_should_ask.pdf

[14] https://www.gov.uk/guidance/how-to-set-up-a-charity-cc21a

[15] https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity

Note that in its advice to charities that have received donations from the Presidents Club Charitable Trust (published on 26 January 2018 in the light of the infamous fundraising dinner[16]), the Commission reminded trustees of their duty to report any serious incidents which could harm their charity's reputation.

6. The Commission accepts the recommendation that it clarifies how (1) a mandatory charge would benefit the sector and (2) the additional revenue would be spent.

The Commission (1) asserts that the sector as a whole will benefit from better support which will contribute to maintaining public trust and confidence in charities and (2) confirms that any additional funding would be spent only on its enablement work and not on its regulatory work.

Subsequent to the publication of the Commission's response to the Report, on 22 January 2018 the Commission issued a press release in which it announced that it had been awarded by the Government an additional £5 million per year. This is an interim solution to help the Commission respond to significant increases in demand on its core regulatory functions, including registration and compliance.

In the press release the Commission confirmed that it expects to launch a consultation later this year seeking charities' views on:-

- a proposal whereby the 2,000 largest charities on the Register of Charities, namely those with annual incomes over £5 million, will make an annual contribution to the Commission's enabling work. It is expected that this would see the Commission receiving around £7.5 million a year. (There is no mention as to whether the contribution is likely to be mandatory or voluntary, but the fact that a significant number of charities have not yet paid the voluntary levy to the Fundraising Regulator may have some bearing on this issue); and

- the enabling work that charities and trustees would like to see the Commission expanding and developing. The Commission states that this element of the consultation is likely to focus on smaller charities that do not have paid staff and might look to the Commission for advice and guidance on managing their charities.

Charities and their trustees will no doubt be awaiting the consultation with bated breath. It is expected that the proposals will receive very mixed views. On which "side of the fence" a charity sits may very much depend on its size – especially given the fact that it appears that larger charities will be expected to make a contribution, primarily for the Commission's enabling work that will be focused on smaller charities.

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This note provides a general summary only and it does not constitute legal advice. It is recommended that specific advice is sought in relation to the particular facts of a given situation. If you have any queries on any aspect of this note, please contact Sarah Chiappini: sarah@filanthropia.co.uk

[16] https://www.gov.uk/government/news/returning-money-to-charities