

BRIEFING NOTE:

27 February 2017

This note provides an update on (1) the draft revised Charity Governance Code and (2) the Charity Commission's Revised Regulatory Statement.

Draft revised Charity Governance Code

At a glance:

- Charity Commission publishes its response to the draft revised Governance Code
- Charity Commission proposes withdrawal of its publication CC10 *Hallmarks of an Effective Charity*
- Code consultation closes on 3 March 2017

Background

In addition to the numerous Charity Commission publications which set out both legal requirements and best practice recommendations in relation to various aspects of charity governance, the charity sector has had its own code of governance since 2005. It was updated in 2010 and now a Code Steering Group (comprising representatives from various charity sector bodies) is consulting on a new version. This can be downloaded here: <http://www.governancecode.org/consultation/>.

The consultation closes on 3 March.

Contents

The draft Code builds on earlier editions but now places greater emphasis on values, accountability, transparency, probity, maintaining control, leadership and the diversity of opinions and skills.

It sets out eight governance principles. This first is the "Foundation Principle": that all trustees understand their roles and legal responsibilities and, in particular, they have read and understand:-

- the Charity Commission's guidance CC3 *The Essential Trustee, what you need to know, what you need to do* <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>; and
- their charity's governing document.

Observations

Trustees' legal duties and responsibilities: more detail?

In its response to the draft Code the Charity Commission says that it welcomes the Foundation Principle, but there could be more emphasis on ensuring that trustees meet their duties and responsibilities. In our view, rather than making a passing reference to CC3, it would be helpful if the Code were to include brief details of the six key legal duties and responsibilities of charity trustees as set out in CC3.

In addition, although the draft Code seeks to highlight the legal and regulatory context to which the various principles in the Code relate, in our opinion there is scope for greater clarity and cross referencing in this regard.

What the draft Code does not contain

In its response, the Charity Commission noted that the draft does not appear to cover a charity's relationship with trading subsidiaries or members of any group structure.

There is no reference to the Code of Fundraising Practice ("Fundraising Code"). While it is appreciated that it is impossible for the Code to cover every aspect of charity governance, given the recent launch of the Fundraising Regulator and that this is probably the last chance for charities to self-regulate their fundraising practices, in our view, it would be helpful if there was at least a brief reference to the Fundraising Code. (Please see the links below to our fundraising updates and also the Fundraising Regulator's consultation on proposed changes to the Fundraising Code:

http://filanthropia.co.uk/Briefing_note_fundraising_update_27_Sept_2016.pdf

[http://filanthropia.co.uk/Charity_fundraising_update_\(II\)_31%20January_2017.pdf](http://filanthropia.co.uk/Charity_fundraising_update_(II)_31%20January_2017.pdf)

<https://www.fundraisingregulator.org.uk/2017/02/03/consultation-changes-code-fundraising-practice-launched-fundraising-regulator/>).

Status of the Code

Although the Charity Commission acknowledges that it does not "own" the Code, it has confirmed that it will endorse and promote it as a standard of good governance practice to which all charities and their trustees should aspire, as is proportionate to the particular circumstances. In line with this, the Commission proposes to withdraw its publication CC10 *The Hallmarks of an Effective Charity*.

Non-compliance with the Code: the Charity Commission's stance

Consistent with the Commission's apparent conflation of what charities MUST do and what they SHOULD do¹, in its response to the Code consultation the Commission says:

¹It appears that the failure by charities and their trustees to follow the "best practice" recommendations in CC3 and other guidance published by the Charity Commission may be taken as evidence by the Commission of breach of trust or misconduct or mismanagement, thus allowing the Commission to invoke its regulatory and protective powers.

“We will consider further how we can take account of charities’ consideration and application of the Code in our regulatory interactions with them and in the requirements and expectations for reporting.”

Will, therefore, charities and their trustees ignore the Code at their peril? Greater clarity on this would be helpful.

Charity Commission Revised Regulatory Statement

The Charity Commission has published a 10 point statement of its revised regulatory approach: <https://www.gov.uk/government/publications/charity-commission-statement-of-mission-regulatory-approach-and-values/charity-commission-statement-of-mission-regulatory-approach-and-values>.

When announcing the revised statement the Commission stated that it has been published with a view to placing further emphasis on enabling and supporting charities. With the seemingly ever increasing demands of charities and their trustees so far as governance is concerned, such a shift in emphasis will no doubt be most welcome.

The Commission confirms that it will focus on supporting trustees primarily through improving its advice and guidance. To this end, the Commission plans to review and streamline its guidance – given the sheer volume of guidance that the Commission has published in recent years, any such simplification will inevitably be much appreciated by charity trustees (and their advisors!)

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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.