



The Governance
Institute

ICSA: The Governance Institute

Saffron House
6–10 Kirby Street
London EC1N 8TS

020 7580 4741
info@icsa.org.uk
icsa.org.uk

Daniel Robinson
Law Commission
Post Point 1.53
1st Floor Tower
52 Queen Anne's Gate
London
SW1H 9AG

31 October 2016

Dear Mr Robinson,

Technical issues in charity law: Supplementary consultation – changing a charity's purpose and trust corporation status

On behalf of ICSA: The Governance Institute I am pleased to submit comments on the above consultation.

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, 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. Our members' wealth of expertise and experience of charities, of the independent examiner regime and their detailed understanding of charity and company legislation and regulation, has informed our submission.



Specific questions

2.31 We provisionally propose that, if powers of amendment are aligned:

- 1) trustees of an unincorporated charity should have the power – with the consent of the Charity Commission – to change the charity’s purposes without having to establish a section 62 cy-près occasion; and**
- 2) the section 67 similarity considerations should apply when the Charity Commission decides whether or not to give its consent.**

Do consultees agree?

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 when amending governing documents appear to be sensible. The opportunity to reduce confusion and to empower trustees, within appropriate parameters, will be welcomed by trustees and those advising them as a means of fostering a better understanding of their duties and the framework within which charities must operate.

The retention of applying s67 similarity considerations by the Charity Commission when reviewing applications for regulated changes appears to be a suitably pragmatic middle ground to the issues surrounding the ongoing relevance of cy-près schemes. The approach appears to balance the need to respect historical context while introducing a way forward that is more attuned to modern charity law.

2.35 We invite the views of consultees as to whether the section 67 similarity considerations are appropriate in their application to a new amendment power for unincorporated charities.

The proposed wording for the three considerations to be taken into account by the Charity Commission when applying the s67 considerations appear to be sensible and a move toward a less confusing situation. Any proposal that makes it easier for trustees to understand and fulfil their legal responsibilities, while not unduly weakening appropriate scrutiny and oversight arrangements, is generally to be welcomed.

2.41 We invite the views of consultees as to whether the Charity Commission should be required to have regard to the s67 similarity considerations when it decides whether to consent to a company or CIO changing its purposes (as well as when it decides whether to consent to an unincorporated charity changing its purposes under a new aligned amendment power).

On balance, there should be a uniform approach and a consistent level of scrutiny attached to any changes affecting the organisation’s charitable purposes. While this might notionally increase the regulatory bar charitable companies and CIOs have to meet, it should be seen as a marginal

inconvenience when weighed against a sceptical public's lack of understanding as to why two different approaches to the same outcome are merited.

**2.49 We provisionally propose that the section 62 cy-près occasions should be retained as pre-conditions to the Charity Commission making a cy-près scheme.
Do consultees agree?**

Where there is an identifiable need to assist in the robust and effective oversight of all charities, and an existing, albeit slightly amended, solution is in place, it would appear to make sense to retain that solution. A review of the use of that power at a later date, after the introduction of a new approach to s67 cy-près and change of purposes, would be welcome to assess whether the continued need for s62 occasions still exists.

I trust the above comments add to the Commission's thinking on improving charity law in regard to the specific issues raised. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours sincerely,

Louise Thomson FCIS
Head of Policy, Not for Profit
ICSA: The Governance Institute
Tel: 020 7612 7040
Email: lthomson@icsa.org.uk