

Written evidence submitted by the Charity Law Association

Response to the call for evidence by the Department for Culture, Media and Sport in relation to the Charity Commission

31 March 2020

1. Introduction

- 1.1 The Charity Law Association (**CLA**) is a professional body for lawyers and other professional advisors to the charity sector, and for academics working in this area, with over 1000 members throughout the UK. It is concerned with all aspects of the law relating to charities.
- 1.2 This submission is provided in response to a call for evidence by the DCMS Committee in the context of calling the Charity Commission Chair and CEO to an evidence session on 18 March 2020. In its call for evidence, the DCMS Committee expressed its intention to examine the Commission's track record and performance since appointment of Baroness Stowell as Chair in 2018, including the Charity Commission's high-profile investigations (expressly including that into Save the Children) and the implementation of the Commission's current strategy.
- 1.3 The views expressed in this submission represent some views expressed by individual members of the Executive Committee of the CLA drawing from their professional experience, and not the views of their organisations, the CLA or its Executive Committee as a whole.

2. Summary

The key points we wish to make to the Committee are:

- 2.1 The Commission is currently underfunded – this should be addressed.
- 2.2 We support the Commission's desire to see the draft Charities Bill enacted.
- 2.3 We recognise it is a significant challenge for the Commission to produce guidance that is clear and easily understood by lay trustees. However, we are concerned that the volume and tone of the material that trustees are currently expected to read, know and apply places an undue burden on volunteer trustees and may discourage individuals from becoming or continuing as trustees
- 2.4 In the current circumstances of unprecedented challenge faced by the charity sector, it is essential that charities are able to innovate and that responsible risk-taking is not deterred.
- 2.5 There are useful lessons to be learned by trustees from the Commission's reporting on its regulatory interventions. However, we are concerned that inquiry outcome reports can appear to set unachievable standards of perfection for trustees with the benefit of hindsight, without always recognising the practical challenges that the trustees may have faced at the time, nor explaining what could have been done differently to achieve a different result. The most serious findings of the Save the Children inquiry report appear to run contradictory to

published Charity Commission guidance, without distinguishing why, which gives rise to mixed messages for trustees.

3. Charity Commission resourcing

3.1 In our experience, the Charity Commission's staff are experienced and committed and provide invaluable services to help new and existing charities. However, a pronounced lack of resources at the Commission following funding cuts since 2010 has continued to have a substantial impact on its legal work with charities. It often takes several months for a case officer to be allocated to a charity registration application and there are often very lengthy turnaround times for straightforward consents and orders, exacerbated by the lack of direct access to case officers.

3.2 We would encourage Parliament to recognise the important role played by the Commission and increase the Commission's funding to allow it to perform that role to the best of its ability, particularly during these times of unprecedented challenge to the sector and the wider society that it vitally serves.

4. New Charities Bill

4.1 In autumn 2017 the Law Commission issued a report on Technical Issues in Charity Law, the culmination of a three-year project intended to address unnecessary complexities and inconsistencies in charity law and regulation. It is estimated that the 43 recommendations contained in the Law Commission's report would result in greater flexibility and scope of innovation by charities and £27.76 million in savings for the charity sector, both much needed in the current times of unprecedented challenge for the sector.

4.2 The Charity Commission worked closely with the Law Commission and has supported the adoption of its recommendations, which it considers to be "*sensible and timely*". The Commission stated following the release of the report that "*We will continue to work with government and other stakeholders to ensure that the impact of these changes are fully understood and would support government bringing forward the implementation of these proposals in the coming months.*" Unfortunately, the Government has not yet responded to the Law Commission's report or found legislative time to introduce a new Charities Bill implementing its recommendations. We appreciate the Charity Commission's contribution to the Law Commission's review and promotion of its recommendations. We support the Charity Commission and the Law Commission in continuing to advocate for the implementation of those recommendations at the earliest opportunity.

5. Charity Commission guidance

5.1 Scope

5.1.1 We recognise it is a significant challenge for the Commission to produce guidance that is easily understood by lay trustees, whilst also providing clarity in relation to the application of often complex legal issues. However, we are concerned that the right balance has not yet been found, particularly taking account of the extremely high standards that the Commission seeks to apply to volunteer trustees. We believe that the volume of material that trustees are currently expected to read, know and apply places an undue burden on volunteer trustees, particularly in the current context of exceptional practical and operational challenge to the charity sector.

5.1.2 We are concerned that, in practice, it is unrealistic to expect volunteer trustees to be mindful or even aware of all of the Charity Commission's guidance documents, around 50 of which are referenced in its published list of [Charity Commission guidance documents](#). As a specific example, the Commission last year issued guidance for [charities with a connection to a non-charity](#), but it seems likely that many of those setting up or governing a charity falling within the many categories of relationship that would fall within the scope of the guidance (the CLA identified at least 24 different charity relationships covered by this guidance) would be unaware of its existence. For example, if searching the Commission's website for relevant guidance for running a trading subsidiary or setting up a corporate foundation, from the name of the guidance alone a lay trustee would not necessarily realise it was relevant.

5.2 **Tone**

5.2.1 We appreciate the Commission's desire to ensure that its guidance clearly sets out the duties and obligations of trusteeship. However, we are concerned that a tendency to focus on the risks, obligations and potential liabilities of being a trustee (whilst sometimes failing to emphasise the rewards and positive experience of trusteeship) could have the unintended consequence of putting potential or existing trustees off becoming or continuing as trustees. We believe it is an important function for the Commission to promote engagement with the charity sector as a rewarding and beneficial opportunity.

5.2.2 Whilst of course we acknowledge the very important role of the Commission as regulator and the need for it to produce clear guidance that helps trustees to understand their legal duties, we would suggest that the promotion of minimum good practice is better done through encouragement and information rather than generating fear of sanctions. This should help the right balance to be struck between the Commission's role, on the one hand, as regulator and, on the other hand, as enabler and guide.

5.2.3 In a similar vein, it is important for the Commission to use permissive language rather than setting out prescriptive rules, thereby acknowledging the broad range of reasonable discretion that trustees are able to exercise and that a different approach may be appropriate to a similar issue in a different context. We think that in the Commission's guidance there should generally be a greater recognition of proportionality – what is good practice for larger charities should not necessarily be expected of smaller ones.

5.3 **“Must” and “should”**

5.3.1 In much of its guidance, the Commission has a practice of distinguishing between “must” and “should”. The former term is intended to indicate legal or regulatory requirements that trustees must comply with, while the latter indicates good practice that the Commission expects trustees to comply with. However, the Commission sometimes uses “must” where there is no corresponding legal duty, providing a misleading impression of the legal requirements.

5.3.2 We think a more helpful approach would be to explain the general legal principles that apply to different areas of charitable endeavour, and the duties, responsibilities and practical implications for trustees that flow from those principles. However, as a minimum, we consider it essential for the Commission to ensure that it applies the use the terms ‘must’

and ‘should’ appropriately and consistently, using “must” only where there is a corresponding legal duty.

- 5.3.3 Wherever the Commission introduces new standards for what charities “should” do, the Commission should ensure that it carries out an impact assessment of the standards being recommended. Its practice in this regard has been variable. However, the Commission has a statutory duty to have regard to the principles of best regulatory practice, which includes acting proportionately. Imposing new standards without assessing the potential impact on charities is not acting proportionately.

5.4 Risk management

- 5.4.1 The word “risk” is used extensively in Charity Commission guidance. This is understandable given the important role that charity trustees play in identifying and mitigating risks relating to their charities. However, the Commission’s use of the word can give the impression that the taking of risk is always bad when this is not the case. It is the business of charities in promoting their objectives to take risks, but not to take “undue risk”. The consequences of taking a risk may be positive or negative. However, the tone of some Charity Commission guidance can be prohibitive and steer trustees away from risk altogether, such that the benefits of taking risks may not be harnessed. In the current circumstances of unprecedented challenge faced by the sector, it is essential that charities are able to innovate, which will inevitably involve responsible risk-taking.

5.5 Public expectations

- 5.5.1 The Commission has in recent years tended to couch many of its public statements in terms of “public expectations” of charities. This approach appeared to start with publication of the Commission’s Charity Commission Statement of Strategic Intent 2018 - 2023¹ in October 2018. It refers several times to the “high expectations” of the “public” and states the Commission’s aim to “use [its] voice more strongly to encourage the behaviour that people expect of charities”. We do not consider this approach is helpful, or correct.
- 5.5.2 “Public expectations” is something which is not susceptible to any clear definition and, to the extent which it can be identified at all (which is questionable at best), is necessarily changeable. Public expectations have no need to be weighed down by what the law requires or permits. If a testator chooses to benefit charity rather than their family, what are the “public expectations” of the charity in that situation? Whether they say the charity should “do the decent thing” and hand over the family’s “inheritance” (although the family are not beneficiaries of the charity) or the opposite, the charity trustees’ decisions are bound by the law.
- 5.5.3 Continual statements that charities should be “distinct from other organisations in their attitude and behaviour, in their motivations and methods” do not help charity trustees on the ground to comply with their duties and run their charities as well as possible in the circumstances (let alone the current circumstances); nor do we believe they help the public in having a realistic understanding of what charities do and the framework within which they operate, or the regulator’s role in that.

¹ <https://www.gov.uk/government/publications/charity-commission-strategy-2018-2023/charity-commission-statement-of-strategic-intent-2018-2023>

5.5.4 We believe the stronger, and more helpful, statement from the Commission would be to refer to guidance which is clear on charity trustees' duties and which is proportionate in the expectations of trustees beyond those duties.

6. **Use of regulatory powers**

6.1 Noting the Committee's intention to examine the Charity Commission's high-profile investigations, including that into Save the Children, we set out some observations from a legal perspective, based on our shared experience of advising charities through such processes (and/or their trustees, past and present), and on how charities should interpret the Commission's decisions in connection with their own governance.

6.2 We do not doubt the usefulness to the sector of lessons that can be learned from the Commission's regulatory findings. Trustees rely on the Commission's guidance and decisions in the governance of their own charities. The Commission's regulatory work is challenging, having fairly to account for conflicting views regarding historical incidents and consider large volumes of evidence. The challenges are exacerbated, requiring clear and objective leadership, when dealing with high profile charities in relation to matters that have attracted significant media attention.

6.3 We are concerned that inquiry outcome reports can appear to set unachievable standards of perfection for trustees. It would be helpful if the reports set out for trustees the practical steps which might reasonably be expected of them, and achievable at the time (not with hindsight), if faced with the circumstances giving rise to the report.

6.4 Ultimately, trustees are individuals who, no matter how prominent the charity or the trustees, remain (in most cases) unremunerated volunteers, contributing their time and experience for the greater good, and facing an extensive (and ever-expanding) range of challenging decisions throughout their trusteeship.

6.5 Taking the recent Save the Children inquiry report as an example, the most serious legal findings in the report are the two findings of 'mismanagement in the administration of the charity', which are not directed expressly at the trustees but in practice fall on them as those by definition having the general control and management of the administration of a charity.

6.6 There is a risk that the findings of mismanagement could give rise to confusion for trustees in the sector more widely, because some may read the report as not sufficiently distinguishing the facts and findings as outlined within it from the Commission's published guidance, nor explaining what the trustees could have done at the time that would have led to a different outcome.

6.7 In particular, the report states that the findings of mismanagement relate firstly to a decision taken by some trustees in reliance on advice provided at the time and secondly to a failure to disclose the identity of someone about whom allegations had been raised in a serious incident report. However, current Charity Commission guidance suggests that trustees should be able to rely on specialist advice when making decisions, and that the identity of individuals need not be disclosed when reporting serious incidents.

6.8 It is of course possible that the facts of the Save the Children inquiry were sufficient to warrant findings that diverge from the Commission's published guidance, but if that is the case then it would be useful for the sector if that divergence could be identified and

explained (whether within the report, or as updates to the guidance, or both), so that trustees more broadly can be certain how to act when faced with similar circumstances.

- 6.9 Trustees can and will make mistakes and decisions which may seem reasonable at the time may with the benefit of hindsight be found wanting. We consider that it should not be an unreasonable expectation that trustees who have acted in good faith and with reasonable care and followed Commission published guidance at the time should not be criticised for doing so (much less found to have exercised mismanagement).