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Governance Codes and Charity Law in England and Wales

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Governance Codes and Charity Law in England and Wales

Keith James Arrowsmith

A thesis submitted in partial fulfilment of the requirements of
Sheffield Hallam University
for the degree of Master of Laws by Research

October 2019

DECLARATION

I hereby declare that:

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- 2 None of the material contained in the thesis has been used in any other submission for an academic award.
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ABSTRACT

A thesis to consider whether the development of voluntary governance codes of practice for the registered charity sector in England and Wales has had any material effect on charity law.

The thesis reviews the development of the codes since their first publication in 2005, and how they relate to the legal duties of charity trustees, primary legislation that applies to charity governance, the regulators of the registered charity sector, and relevant case law. It also looks forward to potential changes in the law and the codes in the near future.

Good governance has been codified in the corporate sector but remains voluntary for charities. With public trust in charities remaining steady at a historic 2016 low point, the codes of practice could be a mechanism to measure and evidence good governance, and to provide charity trustees with certainty that they have fulfilled their duties.

The thesis considers what amounts to governance, and how governance relates to the charity trustees' legal duties and obligations. It reviews the evidence that the codes have been used by legislators, regulators and the judiciary. The thesis concludes that voluntary codes of practice have made little difference to date and suggests that the codes are not seen as a necessary tool for good charity governance.

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PREFACE

This thesis has only been possible with the support of my supervisor, Dr James Marson at Sheffield Hallam University, my work colleagues at Counterculture Partnership LLP, the staff at the Law Society's library, my family and friends.

The limitless support of my husband has been crucial to this and everything else.

A paper based on this thesis will be presented by the author at the Charity Law Association's meeting in London in November 2019 and at the *Governance Now Conference* organised by the Cultural Governance Alliance in London in November 2020.

CHAPTER 1 INTRODUCTION

1.1 Introduction to charity governance

The responsibility for the general control and management of the administration of a charity lies with its trustees.¹ The powers and duties of those trustees derive from five sources:² the common law relating to charities; the Charities Act 2011; the law relating to the charity's legal structure; the charity's particular constitutional instrument, and specific legislation relating to that particular charity or class of charities.³

The process by which a charity trustee fulfils that duty is often referred to as 'governance', a term derived from the Latin word meaning to steer or give direction, and now widely used in the corporate and voluntary sectors, although without a universally applied definition. Governance can be found in any situation where there is a process of governing, and a well run charity should demonstrate good governance.

A lack of good governance will not necessarily mean that an organisation will fail, and in a very general sense, any failure of trustees to comply with their duties could be seen to be a failure of governance. Charity governance failures not only risk reputational damage to a particular charity, but also risk damage to the third sector and the loss of public confidence in the ability of organisations to fulfil their charitable aims. In research published in 2018, it was noted that the public's trust in charities had remained at a historic low level since 2016, and that the public expected charities to have high standards of conduct, with transparency and accountability for what they have achieved; how they manage their resources, and how their actions support their charitable purposes.⁴ A method of applying and measuring good governance to the

¹ Charities Act 2011, s 177.

² William Henderson and Jonathan Fowles, *Tudor on Charities* (10th edn, Sweet & Maxwell 2015) 776.

³ For example, the British Museum Act 1963 relates solely to the charitable British Museum and the Housing Association Act 1985 relates to charitable housing associations.

⁴ 'Trust in Charities' (*The Charity Commission for England and Wales*, 11 July 2018) <www.gov.uk/government/publications/trust-in-charities-2018> accessed 30 September 2019.

sector would seem a valid tool to achieve and evidence the meeting of those expectations.

The codification of good governance can be traced back to 1991 when the UK Government set up the Committee on the Financial Aspects of Corporate Governance in response (amongst other reasons) to the much criticised collapse of Coloroll corporate group and the Polly Peck consortium.⁵ Under its chair, Sir Adrian Cadbury, the Committee published its report (the Cadbury Report) in 1992.⁶ One of the Cadbury Report's recommendations was that all boards of directors of UK listed companies should comply with the Committee's Code of Best Practice, and other companies should aim to do so.⁷ If a company did not comply, it should explain why not.⁸ The Cadbury Report's Code of Best Practice has been updated and revised many times, the current version being published as the UK Corporate Governance Code in July 2018.⁹

The Cadbury Report included a definition of corporate governance as:

... the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place.¹⁰

Although this definition of governance could apply to the charity sector, corporate governance is obviously (and necessarily) concerned with the relationship between the company's board of directors and the company's shareholders. Charities do not serve

⁵ The Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on The Financial Aspects of Corporate Governance* (Gee 1992) Preface and para 4.60.

⁶ *ibid.*

⁷ *ibid* 54.

⁸ *ibid* 54 para 2.

⁹ 'History of the UK Corporate Governance Code' (*Financial Reporting Council*, undated) <www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code/history-of-the-uk-corporate-governance-code> accessed 20 July 2019.

¹⁰ *The Cadbury Report* (n 5) 14.

the financial interests of their owners (if any), instead seeking to benefit the public at large or a significantly large section of the public.¹¹

At approximately the same time that the Cadbury Report's recommendations were being formulated, the National Council for Voluntary Organisations (NCVO) considered governance for the voluntary sector. It also published its recommendations in 1992.¹²

The first voluntary sector specific governance code of practice was published by sector umbrella organisations in June 2005¹³ (2005 Code). Although the 2005 Code does not give its own definition of governance, it refers to a definition published elsewhere,¹⁴ being: 'the systems and processes concerned with the overall direction, effectiveness, supervision and accountability of an organisation'.¹⁵

A second edition (2010 Code) was published in October 2010,¹⁶ and a third edition (2017 Code), known as the *Charity Governance Code*¹⁷ in 2017. The 2017 Code includes in its online glossary a simplified definition of governance as 'the system by which companies are directed and controlled'¹⁸ and it assumes that all charity trustees are committed to 'good governance and want to contribute to their charity's continued improvement'.¹⁹ It is unfortunate that the 2017 Code's definition of governance refers to 'companies',

¹¹ 'Public benefit: rules for charities' (*The Charity Commission for England and Wales*, 14 February 2014) <www.gov.uk/guidance/public-benefit-rules-for-charities> accessed 28 September 2019.

¹² The Working Party on Trustee Training of the National Council for Voluntary Organisations, *On Trust: Increasing the Effectiveness of Charity Trustees and Management Committees* (NCVO 1992).

¹³ ACEVO, Charity Trustee Networks, ICSA, and NCVO on behalf of The National Hub of Expertise in Governance, *Good Governance: A code for the voluntary and community sector* (NCVO 2005).

¹⁴ Chris Cornforth, *The Governance of Voluntary and Community Organisations: An Overview* (Co-operatives UK 2003).

¹⁵ *2005 Code* (n 13) 4.

¹⁶ The Governance Code Steering Group, *Good Governance: A Code for the Voluntary and Community Sector* (2nd edn, NCVO 2010).

¹⁷ Charity Governance Code Steering Group, *Charity Governance Code* (3rd edn, NCVO 2017).

¹⁸ *ibid* <www.charitygovernancecode.org/en/glossary> accessed 21 July 2019.

¹⁹ *2017 Code* (n 17) 7.

since charities are not restricted to corporate structures, and good governance should apply to all charities.

1.2 Objective

The author has practised charity law during a period that has spanned the development and publication of the 2005 Code, the 2010 Code and the 2017 Code (together the Governance Codes). The objective in conducting this research was to consider whether the development of the Governance Codes for the charity sector in England and Wales has had any material effect on charity law, and whether those codes of practice help charity trustees to comply with their legal duties. The assumption is that the development of voluntary codes of practice have made little difference, and that they had provided little help to charity trustees.

1.3 Methodology

To consider the impact of the Governance Codes, the author reviewed their development, referring to contemporaneous publications. Searches were completed of secondary sources in The Law Society Library in London²⁰ and online legal databases²¹ to collate references to the Governance Codes from 2005. All case reports published from 2005 by the sector's main regulator, the Charity Commission for England and Wales (the Commission), were also reviewed.

Searches were made for 'charit*' and ('code' or 'governance' or 'hallmark' or 'commission*' or 'proceeding*'. When searching for references to 'charity proceedings', further searches were made for references to the relevant statutory provisions.²²

Results relating to matters other than governance, such as tax legislation, were not considered further.

²⁰ Books, encyclopaedias, loose-leaf services and journals.

²¹ Westlaw, Lexis library, Bailii, Lawtel, Practical Law, and the UK Legislation database.

²² Charity Act 1993, s 33 and Charities Act 2011, s 115.

1.4 Structure

This thesis sets out the development of the Governance Codes since 2005, and how the Governance Codes relate to the legal duties of charity trustees (Chapter 2). The relationship between the Governance Codes and primary legislation that has been enacted since 2005 is considered to see if the language or principles set out in the Governance Codes have been reflected in statute (Chapter 3).

Having established the relationship between the Governance Codes and statutes, the relevance of the Governance Codes to the regulators of the registered charity sector, especially the Commission²³ (Chapter 4) is considered, and how the Governance Codes have been referenced in relevant case law (Chapter 5) is analysed. The reports of the Select Committees and the Law Commission are considered to see if any proposed statutory reform makes reference to the Governance Codes (Chapter 6). Last, the assumption that the Governance Codes have had little effect to date is considered, (Chapter 7) and a role for the Governance Codes in the future (Chapter 8) is suggested.

Abbreviations are listed in Appendix A on page 106. The bibliography includes court cases in Appendix C and reports from sector regulators in Appendix D to Appendix G.

1.5 Limitations

Although reference to other codes and other sectors will be made, this thesis will only consider the charity sector, as regulated by the Commission. When the author commenced this research, a limitation of the subject matter to cultural organisations was considered, but given the nature of the published Governance Codes, and the lack of specific information about cultural charity governance, this thesis considers the effect of the Governance Codes for all charities (regardless of their objects) that are subject to the Charities Act 2011.

Charities form part of the larger third sector which also consists of community focussed, volunteer led and other co-operative institutions and membership groups that do not distribute their profits to their members. They include community interest companies,

²³ Charities Act 2011, s 13(1).

community benefit societies, social clubs, trade bodies and co-operatives. Although earlier versions of the Governance Code were expressed to be relevant to the wider sector, the 2017 Code is specifically drafted for the charity sector. The principles set out in this thesis may apply to the third sector in general, but it does not consider the effect of the Governance Codes on those third sector institutions that are not charities.

This thesis does not directly consider charities that are exempt from the requirement to register with the Commission and are unable to do so voluntarily,²⁴ although the Governance Codes may well remain relevant, those organisations have (or will have) a different principal regulator and specific regulations that apply to their field of activity (for example, education law). Specific sectoral regulation is beyond the scope of this thesis.

A further limitation relates to the geographic limits of the Charities Act 2011, which defines a charity as being an institution subject to the supervision of the High Court.²⁵ Codes for organisations that are supervised and regulated elsewhere are not considered.

Financial reporting, especially the Statements of Recommended Practices (commonly known as SORPs) relating to the charity sector developed by the accounting profession as a mechanism to ensure transparency and consistency are not considered. Financial governance can be a powerful tool for good governance, but the Governance Codes do not separate out financial governance from any other sort of governance, and so a detailed consideration of the charity SORPs is also beyond the scope of this thesis.

Information published after 30 September 2019 has not been considered.

²⁴ Charities Act 2011, s 30(2)(a).

²⁵ Charities Act 2011, s 1(1).

CHAPTER 2 GOVERNANCE CODES AND THE DUTIES OF TRUSTEES

2.1 Introduction

This chapter sets out the legal duties of charity trustees, the development of the Governance Codes, and how they relate to each other. Consideration will be given as to whether the Governance Codes provide a useful framework for the understanding or measurement of those legal duties.

2.2 Charity trustees

Under the Charities Act 2011, charity trustees are ‘the persons having the general control and management of the administration of a charity’.²⁶ It follows that the trustees, acting together, have ultimate legal responsibility for the governance of their charity.

The Commission recognises four legal structures for registered charities: the trust; the unincorporated association; the charitable company limited by guarantee, and the charitable incorporated organisation²⁷ (or CIO). The trust is the only legal structure that does not have a voting membership, and therefore it is the only legal structure for registered charities where the trustees have ultimate responsibility and also ultimate control of their charity. The other three structures are all designed to be membership organisations, with, by default, a voting membership who appoint their board of trustees. Under the model constitutions published by the Commission, ultimate control is retained by the voting members, who may vote to appoint and remove trustees and vote to approve any proposed changes to their charity’s governing document.²⁸ The Commission acknowledges that, in some circumstances, it is appropriate for all of the voting members to be trustees, and all of the trustees to be voting members (thus

²⁶ Charities Act 2011, s 177.

²⁷ ‘Charity types: how to choose a structure’ (*The Commission*, 2014) <www.gov.uk/guidance/charity-types-how-to-choose-a-structure> accessed 28 July 2019.

²⁸ ‘Setting up a charity: model governing documents’ (*The Commission*, 2012) <www.gov.uk/government/publications/setting-up-a-charity-model-governing-documents> accessed 28 July 2019.

aligning ultimate responsibility with control). This can be evidenced in, for example, the Commission's model constitution of a CIO whose only voting members are its trustees.²⁹

Regardless of whether the trustees have ultimate control, they will have significant legal duties to fulfil, and face censure and personal liability if they fail to fulfil those duties. Trustees cannot avoid those obligations by using a different title, and many are used in the charity sector.^{30 31} The overriding duty of trustees is to carry out their role in accordance with their charity's constitution, and not to deviate from its terms.³² They must act in the best interests of their charity,³³ and promote its purposes.³⁴

Unlike the role of company director,³⁵ those duties are yet to be codified by statute. Some charities are companies, and the company directors are also the charity's trustees. In such circumstances, the trustee is obliged to comply with the duties of company directors as well as the general duties of trustees.

Trustees must comply with the Trustee Act 2000, which specifies a general duty of care for the administration of property which is held on trust as the exercise of:

such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.³⁶

²⁹ The Commission, *Constitution of a Charitable Incorporated Organisation whose only voting members are its charity trustees* (2016) 3.

³⁰ Chris Priestley, *The ICSA Charity Trustee's Guide* (3rd edn, ICSA Publishing 2012) 9.

³¹ Keith Arrowsmith, *The Methuen Amateur Theatre Handbook* (Methuen 2001) 210.

³² *Re Greater Manchester Educational Trust* [1980] Ch Com Rep 28 – 30.

³³ *A-G v Kerr* (1840) 2 Beav 420 (Lord Langdale MR).

³⁴ *Harries v Church Commissioners for England and Wales* [1993] 2 All ER 300.

³⁵ Companies Act 2006, ss 170 to 177.

³⁶ Trustee Act 2000, s 1(1).

Trustees of CIOs are subject to duties set out in the Charities Act 2011 s 221:

(1) Each charity trustee of a CIO must exercise the powers and perform the functions that the charity trustee has in that capacity in the way that the charity trustee decides, in good faith, would be most likely to further the purposes of the CIO.

(2) Each charity trustee of a CIO must in the performance of functions in that capacity exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that the charity trustee has or purports to have, and

(b) if the charity trustee acts as such in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

These general statements of the trustee's duties are supplemented and qualified by other statutes.³⁷ Different commentators express those duties in different ways. For example, The Institute of Chartered Secretaries and Administrators (ICSA) set out 15 duties in their guide,³⁸ whereas NCVO summarise the duties as:

- Duty to comply with the governing document;
- Duty of care;
- Duty to comply with the law;
- Duty to protect the charity's property;
- Duty to act in the interests of beneficiaries and avoid conflicts of interest;
- Duty to act collectively; and
- Duty not to financially benefit unless authorised.³⁹

³⁷ *Halsbury's Laws* (5th edn, 2015) Vol 8.

³⁸ ICSA, *The role and duties of charity trustees (England and Wales)* (2018) 6 – 7.

³⁹ Peter Dyer (ed), *The Good Trustee Guide* (NCVO 2010) 31 – 38.

2.3 Purpose of codes of practice

Codes of practice can provide a framework for behaviour for a particular sector, group or profession. A particular code may be published to regulate the membership of a group or profession, for example, the Code of Conduct for Solicitors forms part of the Solicitor's Regulation Handbook.⁴⁰

Some Codes of Practice that are relevant to parts of the charity sector are published under statutory authority. For example, the Mental Capacity Act 2005 requires the Lord Chancellor to publish a Code of Practice to guide those with duties and functions under the Act.⁴¹ Once published, that Code has statutory force, meaning that it creates legal duties for specified people who work with or care for adults who may lack capacity to make decisions for themselves, whether in the charity sector or not.

Other statutory codes do not have statutory force but are persuasive if a dispute is considered by the courts. For example, the Equality Act 2006 (as amended by the Equality Act 2010), which applies to all charities, allows for the Equality and Human Rights Commission to issue Codes of Practice to 'ensure or facilitate compliance with the Equality Act 2010 ... or to promote equality of opportunity'.⁴² The Equality and Human Rights Commission's *Employment Statutory Code of Practice* makes it clear that it:

... does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.⁴³

Many codes of practice are non-statutory and are designed to promote best practice with a particular sector or field of practice. Codes of practice may help make the relevant

⁴⁰ Solicitors Regulation Authority, *SRA Handbook* (ver 21 2018).

⁴¹ Mental Capacity Act 2005, s 42.

⁴² Equality Act 2006, s 14(2).

⁴³ Equality and Human Rights Commission, *Employment Statutory Code of Practice* (2011) 23.

regulations more accessible, more relevant, and may well be more flexible and easier to update than statutory codified duties.

Specific parts of the charity sector have developed their own codes of practice, but the Governance Codes are the only current published comprehensive governance codes of practice for the whole sector.

2.4 The Governance Codes

The Committee on the Financial Aspects of Corporate Governance was set up by the Financial Reporting Council, the London Stock Exchange and the accountancy profession in May 1991.⁴⁴ The Committee's purpose was to review the financial reporting and accountability aspects of corporate governance,⁴⁵ and therefore its suggested Code of Best Practice⁴⁶ had a focus that was not easily adopted by not for profit organisations. It formulated a series of checks and balances between the board and its executive management, and between the company and its auditors. It originally consisted of 19 provisions, compared to the 41 provisions of the latest version.⁴⁷

The voluntary sector's response was slower, perhaps 'overdue'.⁴⁸ The 2005 Code was created to clarify the main principles of governance and to help organisations 'in decision-making, accountability and the work of their boards'.⁴⁹ Although primarily written for the benefit of trustees of voluntary and community organisations, the 2005 Code was expressed to also be aimed at (amongst others) chief executives, funders, donors, professional advisors and regulators.⁵⁰ It was endorsed by the NCVO, the ACEVO, the Charity Trustee Networks, the ICSA, the National Hub of Expertise in Governance and the Commission.⁵¹ It states that it is compliant with the legal and

⁴⁴ *The Cadbury Report* (n 5) 14.

⁴⁵ *ibid* 11.

⁴⁶ *ibid* 58 – 60.

⁴⁷ Financial Reporting Council, *UK Corporate Governance Code* (2018).

⁴⁸ *2005 Code* (n 13) 4.

⁴⁹ *ibid*.

⁵⁰ *ibid* 5.

⁵¹ *ibid* 6.

regulatory requirements,⁵² without explaining which are relevant. The authors do not go so far as to confirm that compliance with the 2005 Code will fulfil all of a charity trustee's duties. The 2005 Code specifically states that it is not a legal or regulatory mandatory requirement, and that compliance is voluntary, although it suggests that organisations should explain areas of non-compliance.⁵³ Organisations are invited to state their compliance with the Code in their annual reports.⁵⁴

The 2005 Code has one overreaching objective of equality, expressed as a way of 'ensuring equity, diversity and equality of treatment for all sections of the community,'⁵⁵ seven key themes, known as 'principles', and 92 provisions. The first key principle, board leadership, recognises that charity trustees:

have and must accept ultimate responsibility for directing the affairs of their organisation, ensuring it is solvent, well-run, and delivering the outcomes for which it has been set up.⁵⁶

All other supporting provisions of this key principle are expressed as non-mandatory requirements. The supporting provisions for the 2005 Code's other key principles specify five additional mandatory provisions.⁵⁷

The Governance Hub completed a review process of the 2005 Code, and a revised second edition was published in 2010. The new edition was designed, in part, to answer the criticism that the first edition was not accessible to smaller organisations and less experienced boards.⁵⁸ It also recognised that the sector had changed due to the economic downturn, and governance needed to adapt to suit.⁵⁹ The 2010 Code was published in two versions (one designed for smaller organisations with no paid staff), and a separate executive summary was published for easy reference.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid* 8.

⁵⁵ *ibid* 7.

⁵⁶ *ibid* 10.

⁵⁷ *ibid* 12, 23, 26.

⁵⁸ *2010 Code* (n 16) 2.

⁵⁹ *ibid* 3.

The way the 2010 Code expresses the relevant legal obligations also changed. Now the authors outline:

... the main areas of law which we consider are relevant to each principle. All board members will need to have access to more detailed guidance on their legal duties. Charity trustees will also need to refer to Charity Commission guidance on charity law and regulation.⁶⁰

And

The principles set out good practice but these are closely linked with the responsibilities of charity trustees and other legal requirements that may be imposed on board members. Under each principle we have highlighted the areas of law which we consider to be most relevant.⁶¹

Any trustees reading the 2010 Code for a full and comprehensive summary of their relevant duties and obligations would therefore be disappointed. Although the 2010 Code offers relative brevity (now one overarching principle of equality, six key principles and 32 provisions), it expresses its principles as only an indication of the relevant legal duties, rather than any attempt to provide a succinct codification of them.

Obligations in the 2010 Code are set out in its supporting material. Despite the Code's nervousness of presenting itself as comprehensive, the six mandatory provisions in the 2005 Code have been expanded to 29 supporting obligations, ten of which are expressed to be obligatory for charity trustees.⁶²

The third and current edition of the Governance Code was published in 2017 although unhelpfully the published version of the 2017 Code is not dated⁶³ and the PDF version of the 2017 Code does not include the glossary available online.⁶⁴ It is published in two versions (one for smaller charities who are not subject to audit). This version of the Governance Code is addressed only to charities registered by the Commission. This is a

⁶⁰ *ibid* 4.

⁶¹ *ibid* 5.

⁶² *ibid* 8.

⁶³ *2017 Code* (n 17).

⁶⁴ *2017 Code* (n 18).

marked difference to the two previous versions and no explanation is given for the narrowing of its scope.

The authors suggest 'Good governance enables and supports a charity's compliance with relevant legislation and regulation' and 'The Code is not a legal or regulatory requirement ... [but] is deliberately aspirational'.⁶⁵

The 2017 Code is therefore not a statement of the legal obligations for charity trustees, but rather a tool to help the sector restore the public's faith in registered charities by demonstrating 'exemplary leadership and governance'.⁶⁶ Rather than be a statement of what the law expects of those tasked with governing registered charities, the 2017 Code assumes compliance:

Compliance with the law is an integral part of good governance. This Code does not attempt to set out all the legal requirements that apply to charities and charity trustees, but it is based on a foundation of trustees' basic legal and regulatory responsibilities. The seven Code principles build on the assumption that charities are already meeting this foundation.⁶⁷

The 2017 Code has one overreaching principle of organisational purpose, six further principles, 22 key outcomes, 76 recommended practices and an online glossary. No distinction is made between which practices are mandatory and which are not. The 2017 Code is therefore the longest of the editions by far. This is a potential barrier, especially for trustees and charities with limited resources.

Although the Governance Codes can be seen to have credibility having been prepared by sector representatives, the committee approach to drafting may also be a barrier, since no one organisation takes ownership of the end result, or acts as a point of contact for governance compliance issues. As will be shown below, this scattergun approach was a criticism levelled at the charitable fundraising governance bodies.

⁶⁵ *2017 Code* (n 17) 1.

⁶⁶ *ibid.*

⁶⁷ *Ibid* 2.

Compliance with the Governance Code is complex to measure or audit, since many of its provisions are expressed to be aspirational. With no easily recognised compliance badge or logo, or central database of those who have adopted the Governance Code, it may continue to be hard to identify the take up of the Governance Code by charities over time.

2.5 Other codes of practice for charitable activities

The Commission published its own code in 2004 entitled *The Hallmarks of an Effective Charity*. It is similar to the Governance Codes in that the Hallmarks are designed to encourage good practice as a tool to fulfil legal obligations:

Compliance with the law is an integral part of good governance and effective performance. This guidance does not attempt to set out all the legal requirements that apply to charities and charity trustees.⁶⁸

The code is divided into six principles, and 44 statements of recommended practice. Of those 44 statements, eight are expressed to be legal requirements.

The Commission was criticised for producing the Hallmarks in 2006⁶⁹ on the basis that there was confusion between the different available codes of practice, and there was a lack of clarity as to which provisions were obligatory and which were voluntary. The Hallmarks were revised in July 2008 but withdrawn in 2017.

At the same time the 2005 Code was being prepared, the Institute of Fundraising set up a separate scheme to promote best practice and good governance in relation to fundraising from the public.⁷⁰ A Code of Fundraising Practice (the Fundraising Code) was published, and the latest version, effective from 1st October 2019 was published by the

⁶⁸ The Commission, *The Hallmarks of an Effective Charity* (CC10 2008) 2.

⁶⁹ 'Charity Commission told to end 'confusing' efforts at guidance' (*Third Sector*, 8 February 2006) <www.thirdsector.co.uk/charity-commission-told-end-confusing-efforts-guidance/article/623036> accessed 28 July 2019.

⁷⁰ *2005 Code* (n 13) 32.

Fundraising Regulator⁷¹ (established in 2016 to take over fundraising regulation). The Fundraising Code is considered further below.⁷²

The ICSA published a guidance note⁷³ which refers to the Nolan Principles, and suggests standards for governance and leadership for charity trustees. The Nolan Principles were first set out by Lord Nolan in 1995 as standards expected of public office holders, and they now form part of the Ministerial Code.⁷⁴ The ICSA's note acknowledges the need for trustees to understand and comply with legal and regulatory requirements and 'also to adopting good governance in a form that is effective and proportionate'.⁷⁵ However the guide does not distinguish between governance and leadership. The note expresses its guidance as three 'standards' of values, competence and probity rather than a code of practice, and justifies that stance because of the need for trustees and charity managers to 'conduct themselves in accordance with the highest standards' both inside and outside of a charity environment.⁷⁶

Elsewhere, the Northern Ireland's Developing Governance Group published its code in 2008, which was revised in 2016.⁷⁷ The Scottish Charity Regulator published guidance for Scottish charity trustees in 2016,⁷⁸ and Scotland's Third Sector Governance Forum

⁷¹ 'New Fundraising Code published' (*Fundraising Regulator*, 6 June 2019) <www.fundraisingregulator.org.uk/more-from-us/news/new-fundraising-code-published> accessed 28 July 2019.

⁷² Para 4.9 on page 55.

⁷³ ICSA, *Guidance note, Charity trustee standards for governance and leadership* (October 2018).

⁷⁴ 'The Ministerial Code' (*Cabinet Office*, 23 August 2019) Annex A <www.gov.uk/government/publications/ministerial-code> accessed 30 September 2010.

⁷⁵ ICSA, *Charity trustee standards* (n 73) 2.

⁷⁶ *ibid* 3.

⁷⁷ Developing Governance Group, *Code of Good Governance* (1st edn 2008, 2nd edn 2016).

⁷⁸ Scottish Charity Regulator, *Guidance and Good Practice for Charity Trustees* (2016, revised 2017).

published a code of practice for the third sector in November 2018.⁷⁹ This last code is notable for its brevity, with five principles each expressed in less than a page of text.

2.6 Other codes of practice for parts of the charitable sector

Some parts of the charitable sector have developed their own codes of practice. For example, the National Housing Federation's *Code of Governance*,⁸⁰ which makes it mandatory for any organisation that adopts its Code to publish an annual statement of compliance with a reasoned statement about any areas of non-compliance.

Any organisation seeking public funding for sport and physical activity must demonstrate an appropriate high standard of good governance, making compliance with UK Sport's Code⁸¹ mandatory for funded organisations.

Arts Council England does not produce its own governance code. The Clore Leadership Programme founded the Cultural Governance Alliance⁸² and published *A Practical Guide to Governance in the Arts and Museums*,⁸³ but compliance is not mandatory for membership of the Alliance or funding from ACE.

2.7 Quality Standards

A recognised quality standard can offer charities an externally verified approval process, and compliance with a standard can easily demonstrate a charity's commitment to quality assurance to stakeholders and funders.

In 2006, National Occupational Standards (or NOS) for Trustees and Management Committee Members in the Voluntary and Community Sector were approved by the UK

⁷⁹ Scotland's Third Sector Governance Forum, *The Scottish Governance Code for the Third Sector* (2018).

⁸⁰ National Housing Federation, *Code of Governance* (1999, revised 2000, 2004, 2009, 2010 and 2015).

⁸¹ UK Sport, *A Code for Sports Governance* (2017).

⁸² 'Cultural Governance Alliance' (*The Clore Leadership Programme*, undated) <www.cloreleadership.org/programmes/governance/cultural-governance-alliance> accessed 30 September 2019.

⁸³ Keith Arrowsmith, Prue Skene and Tom Wilcox, *A Practical Guide to Governance in the Arts and Museums* (The Clore Leadership Programme 2017).

Education Regulatory Authorities.⁸⁴ The Standards were created to complement the 2005 Code,⁸⁵ and demonstrated a standard of competence and outcomes relevant to a trustee's role. The NOS set out four units which refer the reader to the legal requirements and best practice for good governance. The Standards were adopted by the sector skills council, Skills Third Sector (now defunct), and remain a recognised NOS, despite not being updated. None of the four units make it clear which responsibilities are legal obligations.

The NCVO currently offer two quality standards, *Trusted Charity Essentials* and the *Trusted Charity* quality mark, which was previously known as *PQASSO*.⁸⁶ The former is an online free tool for smaller organisations to benchmark their activities in 10 key areas. The latter is a paid-for online self-assessment tool, followed by an external validation by an independent assessor. It is currently in its fourth edition. It has 11 'quality areas', the first of which is governance. Accreditation lasts three years, but there is no publicly accessible online database of who has achieved the Trusted Charity quality mark. A copy of the standard is only available upon payment of a fee. This creates a potential conflict of interest since NCVO is both a contributor to the Governance Code and a provider of quality standard services.

2.8 Conclusion

The legal duties of charity trustees are not comprehensively defined in statute. Unlike directors of public limited companies, there is no obligatory or statutory code of practice for charity trustees. The 2017 Code covers governance aspects of trustee duties, but compliance with it is not obligatory since its provisions go further than the generally accepted legal obligations of the trustees.

The authors of the 2017 Code set up trustees to fail: the 2017 Code's terms are designed to be aspirational and may never be achieved in full by smaller charities with limited

⁸⁴ *National Occupational Standards for Trustees and Management Committee Members in the Voluntary and Community Sector* (NCVO 2006) 2.

⁸⁵ *ibid* 44.

⁸⁶ 'NCVO Quality Standards' (NCVO, undated) <www.ncvo.org.uk/practical-support/quality-and-standards> accessed 30 September 2019.

means. Further, the 2017 Code only addresses charity trustees, and not others (including CIO members) who may be under the same or similar duties.⁸⁷ Measuring compliance with the 2017 Code is difficult, and no one body is tasked with the promotion of the Governance Code or governance for charities in general.

The number of different codes of practice across the different jurisdictions may cause difficulties for those organisations that operate in more than one nation. In any event, most of the published codes referred to above have been updated from time to time, but none of the publishers provide easily accessible online copies of the previous versions of the codes, or an easy way to compare versions. This could mean that, should an issue arise in the future, it will be difficult for a trustee to review what was best practice at the relevant time.

Other alternatives, such as quality marks are either out of date or are only available upon payment of a fee.

Having established the nature and scope of the Governance Codes, their impact on legislation will now be considered.

⁸⁷ Discussed further in para 3.2 below.

CHAPTER 3 THE GOVERNANCE CODE AND LEGISLATION

3.1 Introduction

Since the publication of the 2005 Code, three charity sector specific statutes have been passed, and many other public general and local acts have been brought into force that refer to the charity sector.

In considering whether the Governance Codes have had any material effect on legislation, the provisions of all Acts that have received Royal Assent since 01 January 2005 that have not been repealed and that apply to bodies regulated by the Commission have been reviewed.

Of the 129 potentially relevant general statutes,⁸⁸ three are directly relevant to trustee duties and the Governance Code, another one deals with conflicts of interests for charitable company directors, and the rest, although relevant to charity law, were not relevant to the governance of registered charities.

3.2 The Charities Act 2006

The genesis of the Charities Act 2006 (2006 Act) can be traced back to July 2001 when the government announced a review of the not for profit sector by the Cabinet Office's Strategy Unit and the Home Office.⁸⁹ At the time it was thought that 'much of the legal context for charity and voluntary action is now outdated'.⁹⁰ The Review recognised that regulation of charities may contribute to making sure that governance is conducted properly to protect the public, donors and promote public confidence.⁹¹ The Review concluded that the 'company corporate governance regime is not tailored to fit the trustee governance structure,'⁹² and discussed the benefits of creating new charitable (and social enterprise) structures.

⁸⁸ <www.legislation.gov.uk> search for general Acts enacted between 2005 and 2019 with keyword 'charit*', last accessed 30 September 2019.

⁸⁹ Strategy Unit Report, *Private Action, Public Benefit* (Cabinet Office 2002) 11.

⁹⁰ *ibid* 5.

⁹¹ *ibid* 26.

⁹² *ibid* 57.

A second governance theme explored in the Review related to the need for charities to recruit and retain high quality trustees from diverse backgrounds, suggesting that charities should disclose in their annual reports how trustees are selected and equipped for their role. This suggestion is taken up in the 2017 Code in Principle 5, where the importance of a rigorous approach to trustee recruitment, performance and development are recognised,⁹³ and in Principle 6, where it is recommended that the charity should publish what it has done to address board diversity.⁹⁴

Trustee behaviour, and trustee duties are also addressed in the Review:

Good governance is crucial to ensuring that organisations are operating effectively. Governance problems can have a profound impact, especially when organisations are forced to dedicate considerable resources to resolving internal disputes. For most organisations, however, governance problems mean that they are less enterprising and less focused on quality improvement than they might be because board members lack the necessary skills, knowledge and expertise. Board recruitment, retention and training are therefore crucially important.⁹⁵

No specific recommendations were made in the Review to address the identified lack of skills, knowledge and expertise of trustees. A consultation process followed, with the Home Office publishing its findings in 2003.⁹⁶ Although specific recommendations were made in relation to the legal structure for charities,⁹⁷ recruitment of trustees and payments to trustees,⁹⁸ very little else was included in relation to the trustees' governance of charities. The government introduced a draft Bill in May 2004, which was passed in 2006.

The 2006 Act amends the Charities Act 1992 and the Charities Act 1993 (the 1993 Act). The only specific reference to 'governance' in the 2006 Act is in relation to the internal operations of the Commission by inserting into the 1993 Act a new section, 1D, by which the Commission must have regard 'to such generally accepted principles of good

⁹³ 2017 Code (n 17) 17.

⁹⁴ *ibid* 21.

⁹⁵ Strategy Unit Report, *Private Action, Public Benefit* (n 89) 69.

⁹⁶ Home Office, *Charities and Not-for-Profits: a Modern Legal Framework* (2003).

⁹⁷ *ibid* 15.

⁹⁸ *ibid* 26.

corporate governance as it is reasonable to regard as applicable to it'.⁹⁹ This means that although the Commission is obliged by statute to have regard to good governance, the charities it regulates do not.

That said, some of the provisions of the 2006 Act updated aspects of charity law that may have an indirect impact on governance, and the duties of trustees. For the first time, this statute includes a general statutory definition of charity,¹⁰⁰ charitable purposes,¹⁰¹ and public benefit.¹⁰² By setting out a modern framework for trustees to operate under, governance may well have become easier to understand. The 2006 Act also abolishes the presumption that charitable purposes for the relief of poverty, the advancement of education and the advancement of religion are for the public benefit.¹⁰³ All charity trustees must now be able to justify the public benefit of their charity's activities.

The 2006 Act also includes a statutory duty for trustees,¹⁰⁴ which inserts a new section 3B into the 1993 Act, requiring charity trustees to apply to the Commission for their charity to be registered, and to keep their registration up to date, but this did no more than repeat the existing law. Similarly, the duty of trustees to exercise reasonable care and skill when deciding to pay a trustee for services rendered, or to pay for trustee indemnity insurance, is repeated¹⁰⁵ in terms that are the same as those set out in the Trustee Act 2000.¹⁰⁶

The 2006 Act introduces a new charitable structure,¹⁰⁷ known as a charitable incorporated organisation (or CIO):

The CIO is the first legal form to be created specifically to meet the needs of charities. Its purpose is to avoid the need for charities which wish to benefit from

⁹⁹ Charities Act 2006, s 7.

¹⁰⁰ Charities Act 2006, s 1 and Explanatory Notes to the Charities Act 2006, para 15.

¹⁰¹ Charities Act 2006, s 2 and Explanatory Notes to the Charities Act 2006, para 19.

¹⁰² Charities Act 2006, s 3 and Explanatory Notes to the Charities Act 2006, para 26.

¹⁰³ Charities Act 2006, s 3.

¹⁰⁴ Charities Act 2006, s 9.

¹⁰⁵ Charities Act 2006, ss 36 and 39.

¹⁰⁶ Trustee Act 2000, s 1.

¹⁰⁷ Charities Act 2006, s 34 and sch7.

incorporation to register as companies and be liable to dual regulation by Companies House as well as the Charity Commission.¹⁰⁸

A CIO is similar to a body corporate with a constitution, rather than articles of association. Like a company, it has a voting membership with limited liability. Schedule 7 of the 2006 Act inserts a new Schedule 5B into the 1993 Act, which includes two specific provisions relating to the CIO's trustees' duties. Paragraph 8 of Schedule 5B makes it clear that the trustees must 'act within the CIO's constitution and in accordance with any constitution limitations on their powers'. This does no more than repeat the position for directors of charitable companies. Paragraph 9 includes an obligation to act in good faith:

It is the duty of –

(a) Each member of a CIO, and

(b) Each charity trustee of a CIO,

to exercise his powers, and (in the case of a charity trustee) to perform his functions, in his capacity as such, in the way he decides, in good faith, would be most likely to further the purposes of the CIO.¹⁰⁹

Paragraph 10 repeats the duty to use reasonable care as set out in the Trustee Act 2000 section 1. So, as far as the charity trustee is concerned, the duties owed by CIO trustees are the same as trustees of other charitable structures. However, Paragraph 9 states that the duty to act in good faith also applies to the charity's membership.

Whether or not a member of a charitable company or a charitable unincorporated association owes a duty to their charity is uncertain. The Commission issued guidance which stated:

The Charity Commission considers that the rights that exist in relation to the administration of a charitable institution are fiduciary, regardless of the identity

¹⁰⁸ Explanatory Notes to the Charities Act 2006, para 131.

¹⁰⁹ Charities Act 2011, s 220.

of the person or persons on whom the rights are conferred. Therefore this applies to both individual and corporate members.¹¹⁰

But:

Some uncertainty does exist, however, about the extent to which members of charitable companies are legally obliged to vote in the best interests of the charity of which they are a member. It has been argued that the members of charitable companies are in the same position legally as the members of non-charitable companies.¹¹¹

It therefore appears that, at least for CIO structures, any doubt is resolved by making the member's duty to act in good faith clear through statutory provision. It would seem that the duty of the charity trustee and the duty of the CIO's members are the same, and in the absence of any further statutory guidance as to the meaning of the fiduciary duty, the same obligations could apply to both trustee and member. However, the 2006 Act did not clarify whether members of charitable companies or charitable unincorporated organisations are also under the same fiduciary duty, or any duty at all. The matter is being considered by the courts and is discussed further in paragraph 5.6 below.¹¹²

The Governance Codes make no distinction between the charitable structures, and do not address any governance obligations of a charity's members. In Principle 7 of the 2017 Code, it is suggested that the trustees should inform the members of the charity's work, and have clear policies on who is eligible for membership of the charity, but no suggestion is made that the trustees should inform the members of their rights and fiduciary obligations at all.¹¹³

The 2006 Act makes no other reference to the duties of trustees (or members). Perhaps is it not surprising that the Act does not refer to governance in general terms, or the

¹¹⁰ The Commission, *Membership Charities* (RS7, The Commission 2004) 33.

¹¹¹ *ibid* 44.

¹¹² Page 80.

¹¹³ *2017 Code* (n 17) 23.

Governance Codes in particular, given much of the development work for the 2005 Code took place after the preliminary drafting of the statute had been completed.

Conversely, the Governance Codes have been reviewed and updated since 2006, but yet no mention is made of the clear duty of CIO members to act in good faith, or how that duty relates to the work of the trustees. At least in this aspect, the Governance Codes may be seen to be unhelpful, leaving any member wishing to understand their role in governance unsatisfied.

3.3 The Charities Act 2011

The Charities Act 2011 (the 2011 Act) was prepared by the Law Commission, working with the Office for Civil Society and supported by the Commission. It consolidates much of the existing charities legislation but does not change the existing law or introduce any new policy.¹¹⁴ It received Royal Assent on 14 December 2011 and came into force on 14 March 2012. The 2011 Act is not a comprehensive statement of charity law. Some provisions of the Charities Acts of 1992 and 2006 relating to public charitable collections and fundraisers were not consolidated.

The only specific reference to 'governance' in the 2011 Act is in relation to the internal operations of the Commission. What was previously section 1D of the Charities Act 1993 now appears in section 16 (6).

Trustee duties are referred to, but, as may be expected of a consolidating statute, do no more than repeat the existing law in a more clearly structured way. The statutory fiduciary duty for CIO members is repeated.¹¹⁵ No reference is made to the Governance Codes.

3.4 Charities (Protection and Social Investment) 2016

This statute (the 2016 Act) covers three areas of charity law:

¹¹⁴ 'Press release: Charities Act 2011' (*Cabinet Office*, 15 December 2011) <www.gov.uk/government/news/charities-act-2011> accessed 11 August 2019.

¹¹⁵ Charities Act 2011, s 220.

- 1) the protection of charities, by equipping the Commission to address cases of abuse more effectively;¹¹⁶
- 2) the ability of charities to make social investments;¹¹⁷ and
- 3) the prevention of intrusive fundraising practices by placing more stringent obligations on charities who wish to use professional fundraisers, including reporting obligations for larger charities,¹¹⁸ and by extending the Commission's reserve powers for the future.¹¹⁹

The 2016 Act does not make any specific reference to 'governance' at all, despite the 2016 Act's aim, at least in part, to improve the governance of charities. The 2016 Act grants the Commission the power to issue and publish official warnings to charities (or individual trustees) if it considers a breach of trust or duty, or other misconduct or mismanagement has occurred.¹²⁰ Government intended official warnings to be:

... a more reasonable and proportionate way of dealing with breaches of statutory provisions of the Charities Act 2011, breaches of fiduciary duty or other mismanagement where the risks and impact on charitable assets and services are relatively low. Sometimes this may be as a more proportionate alternative to use of remedial powers such as suspensions, or removal of trustees or restitution action against trustees.¹²¹

The Commission provided examples of situations in which it expected to issue official warnings. Those examples included governance problems:

Breaches of a charity's governing document that lead to governance problems. For example, not running internal elections properly or repeated failure to call Annual General Meetings. This can lead to complaints and disputes within a charity but often the impact is not great enough to justify the use of current powers. A

¹¹⁶ Charities (Protection and Social Investment) Act 2016, ss 1 to 12.

¹¹⁷ Charities (Protection and Social Investment) Act 2016, s 15.

¹¹⁸ Charities (Protection and Social Investment) Act 2016, s 13.

¹¹⁹ Charities (Protection and Social Investment) Act 2016, s 14.

¹²⁰ Charities (Protection and Social Investment) Act 2016, s 1.

¹²¹ Explanatory Notes to the Charities (Protection and Social Investment) Act 2016, para 41.

published Warning could promote compliance and increase transparency and wider public trust and confidence.¹²²

The Commission has no power to issue an official warning to a member of a CIO, despite the requirement for such members to act in the best interests of their charity. This would seem to create a different regulatory regime for members to trustees, despite both roles having the same duties. Official warnings are further considered in paragraph 4.6 below.¹²³

The opportunity to refer to the Governance Code (or failures to comply with the Governance Code) as a factor when deciding whether or not the Commission should use its new powers was not taken up by the legislators. The recommended practice set out in Principle 7 of the 2017 Code refers to developing a culture of openness within the charity, and especially the complaint handling processes,¹²⁴ but does not specifically refer to warnings, suspensions or disqualification of trustees.

The 2016 Act places a new obligation on professional fundraisers to enter into agreements that include arrangements for charities to monitor compliance, and for the annual reports of larger charities to include a fundraising compliance statement. Given the public outcry relating to fundraising practices¹²⁵ in the lead up to the passing of the 2016 Act, it is surprising that the legislation does not include further duties or obligations on trustees. It seems that the intention of parliament was to reinforce the responsibility of trustees to 'ensure that fund-raising for their charity is undertaken responsibly and in a manner that does not damage public trust and confidence in their charity or the

¹²² Explanatory notes to the Charities (Protection and Social Investment) Act 2016, para 44.

¹²³ Page 51.

¹²⁴ 2017 Code (n 17) 23.

¹²⁵ Explanatory Notes to the Charities (Protection and Social Investment) Act 2016, para 26.

wider charity sector¹²⁶ but the only mechanism in the 2016 Act to achieve that aim is an obligation of greater transparency for audited charities.¹²⁷

Charities are given the power to make investments that both directly further a charity's purposes and achieve a financial return for the charity.¹²⁸ The power may only be exercised if the trustees:

- (a) consider whether in all the circumstances any advice about the proposed social investment ought to be obtained;
 - (b) obtain and consider any advice they conclude ought to be obtained; and
 - (c) satisfy themselves that it is in the interests of the charity to make the social investment, having regard to the benefit they expect it to achieve for the charity (by directly furthering the charity's purposes and achieving a financial return).
- (3) ... from time to time review the charity's social investments.¹²⁹

This process of obtaining and considering specialist advice is found elsewhere, including the obligations set out in the Trustee Act 2000, and will be familiar to trustees who have purchased land or buildings.¹³⁰ The recommended practice associated with Principle 5 of the 2017 Code refers to the board collectively accessing 'independent professional advice, such as legal or financial advice, at the charity's expense if needed for the board to discharge its duties'.¹³¹

No other provisions in the 2016 Act relate to trustee duties or their governance functions.

¹²⁶ Explanatory Notes to the Charities (Protection and Social Investment) Act 2016, para 27.

¹²⁷ Charities (Protection and Social Investment) Act 2016, s 13(4).

¹²⁸ Charities (Protection and Social Investment) Act 2016, s 15.

¹²⁹ Charities Act 2011, s 292C.

¹³⁰ For example, The Commission, *Acquiring Land* (CC33 2001) section 5.

¹³¹ 2017 Code (n 17) 18.

3.5 The Companies Act 2006

The only other statute that contains a reference to governance arrangements for trustees is the Companies Act 2006. That Act contains, in Chapter 2 of Part 10, the scope and nature of the general duties of company directors.¹³² Those general duties are a statutory code of conduct, which, prior to the Act coming into force, were set out in equitable and common law rules. The Law Commission and the Scottish Law Commission (together, the CLR) published their joint report¹³³ and recommended a partial codification of company director's main fiduciary duties and duties of care and skill, which should not be exhaustive.¹³⁴ In particular they wanted:

- To provide greater clarity on what is expected of directors and make the law more accessible. In particular they sought to address the key question "in whose interests should companies be run?" in a way which reflects modern business needs and wider expectations of responsible business behaviour;
- To make development of the law in this area more predictable (but without hindering development of the law by the courts);
- To correct what the CLR saw as defects in the present duties relating to conflicts of interest.¹³⁵

It is surprising that a similar argument did not prevail when considering trustee duties, leaving the commercial sector with, arguably, greater clarity and more predictability than the charity sector.

The defects in the duties relating to conflicts of interest were addressed by the Companies Act 2006.¹³⁶ The new regulations allow transactions between the company and its directors which do not need to be authorised by the members or independent board members, but rather declared. The Act also permits board authorisation of most

¹³² Companies Act 2006, ss 171 to 177.

¹³³ Law Commission and Scottish Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Law Com No 261, 1999).

¹³⁴ *ibid* para 4.53.

¹³⁵ Explanatory Notes to the Companies Act 2006, para 301.

¹³⁶ Companies Act 2006, s 175.

conflicts of interest arising from third party transactions by a director. Section 181 modifies those provisions for charitable companies.

The 2017 Code addresses conflicts of interest in Principle 3, expecting trustees to disclose actual or potential conflicts and to deal with them in accordance with the charity's constitution and a regularly reviewed conflicts of interest policy.

3.6 Other Statutes

In the period in question, 125 other UK Public General Acts were passed that made reference to charities.¹³⁷ None make reference to the Governance Codes.

3.7 Local Acts

Seven local Acts of parliament were passed in the period in question referring to the charity sector.¹³⁸ None make any reference to governance, and none relate to trustee duties.

3.8 Secondary Legislation

60 United Kingdom Statutory instruments with 'charity', 'charitable' or 'charities' in their name were passed in the period in question.¹³⁹ None make any reference to 'governance', and none relate to trustee duties.

On that basis, a wider consideration of other statutory instruments was not undertaken.

3.9 Conclusion

Despite the development of the Governance Codes over a period during which three charity sector specific statutes were passed, no attempt by the legislators was made to codify the duties of trustees, by reference to the Governance Codes or otherwise.

¹³⁷ <legislation.gov.uk> search for general Acts enacted between 2005 and 2019 with the keyword 'charit*', accessed 11 August 2019.

¹³⁸ <legislation.gov.uk> search for local Acts enacted between 2005 and 2019 with keyword 'charit*', accessed 11 August 2019.

¹³⁹ <legislation.gov.uk> search for UK Statutory Instruments passed between 2005 and 2019 with keyword 'charit*' in the title, accessed 11 August 2019.

At the same time, a statutory duty to act in the best interests of a CIO has been introduced for members, but no attempt has been made to clarify whether the same duty applies to other charitable membership organisations.

The 2017 Code does not acknowledge any duties of charitable members and does not refer to the Commission's new power to issue official warnings. It therefore seems that legislation and the Governance Codes have always been separate, with nothing to indicate that the legislators are aware of the existence of the Governance Codes at all.

The next chapter will consider whether the sector's regulators are aware, and take account of, the Governance Codes.

CHAPTER 4 THE GOVERNANCE CODE AND REGULATORS

4.1 Introduction

The Commission was constituted by the Charitable Trusts Act 1853¹⁴⁰ and incorporated by the 2006 Act.¹⁴¹ It is the non-ministerial government department tasked with being the statutory registrar and regulator for charities in England and Wales.¹⁴² The Commission's general functions include giving advice and guidance to charities; identifying and investigating allegations of misconduct or mismanagement in the administration of charities, and taking action relating to maladministration of charities.¹⁴³

Similar bodies exist in Scotland and Northern Ireland, the activities of which are beyond the scope of this thesis. Charitable organisations in England and Wales may also be registered by the Financial Conduct Authority (if they are Registered Societies) or by the Regulator of Social Housing (if they are Housing Associations) or by Companies House (if they are charitable companies). Charitable chartered bodies are regulated by the Privy Council (insofar as it approves changes to chartered bodies' charter and bylaws). 'Excepted' charities do not need to register with the Commission or submit annual returns. This group of organisations include churches, Scout and Guide Groups, armed forces funds and student unions if their income is under £100,000. Despite being 'excepted' from registration, the Commission regulates their activities.¹⁴⁴ 'Exempt' charities do not register with the Commission and are directly regulated by other bodies. The Commission may investigate an exempt charity's activities by statutory inquiry at the request of its principal regulator. Exempt charities include some universities and

¹⁴⁰ Public Administration Committee, *The Role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006* (HC 2013-14, 76-1).

¹⁴¹ Charities Act 2006, s 6.

¹⁴² 'About us' (*The Commission*, undated)

<www.gov.uk/government/organisations/charity-commission/about> accessed 18 August 2019.

¹⁴³ Charities Act 2011, s 15.

¹⁴⁴ 'Excepted Charities' (*The Commission*, 11 June 2014)

<www.gov.uk/government/publications/excepted-charities/> accessed 30 September 2019.

other educational establishments that are regulated by the Department for Education, and some museums and galleries of national importance and the British Library which are regulated by the Department for Digital, Culture, Media and Sport.¹⁴⁵

In addition to the Commission, the Fundraising Regulator, the Information Commissioner and Her Majesty's Revenue and Customs have a regulatory role across the sector. The impact of the Governance Codes will be assessed for each body.

4.2 The Commission as a source of guidance

One of the Commission's functions is to encourage and facilitate the better administration of charities.¹⁴⁶ It may 'give advice or guidance with respect to the administration of charities as it considers appropriate'.¹⁴⁷ The advice or guidance may relate to the charity sector, any class of charity or a specific charity, and can be given in any form or manner that the Commission considers appropriate.¹⁴⁸ The Commission's publications have been moved from its own website to the gov.uk website, and all of its guidance is now published in PDF and HTML format online.

In June 2003, the Commission published a framework that set out how it regulates charities.¹⁴⁹ It was followed by *The Hallmarks of an effective charity (CC60)*¹⁵⁰ which was the Commission's suggested code of practice for the sector. The publication was subject to some criticism, with umbrella organisations complaining that it was confusing for a regulator to publish aspirational guidance.¹⁵¹ The Commission revised its Hallmarks, and the second edition was published as *CC10*.¹⁵² It:

¹⁴⁵ The Commission, *Exempt charities (CC23 2013, updated 9 August 2019)* <www.gov.uk/government/publications/exempt-charities-cc23/exempt-charities> accessed 30 September 2019.

¹⁴⁶ Charities Act 2011, s 15(1)2.

¹⁴⁷ Charities Act 2011, s 15(2).

¹⁴⁸ Charities Act 2011, s 15(3).

¹⁴⁹ The Commission, *The Charity Commission and Regulation* (June 2003).

¹⁵⁰ The Commission, *The Hallmarks of an Effective Charity (CC60 April 2004)*.

¹⁵¹ Nathalie Thomas, 'Charity Commission told to end confusing efforts at guidance' (2006) 413 Third Sector 2.

¹⁵² *The Hallmarks of an effective charity* (n 68).

... sets out the standards that will help trustees to improve the effectiveness of their charity, and the principles that the commission's regulatory framework exists to support... Whilst a few of these are legal requirements, most are matters of good practice.¹⁵³

Both editions of the Hallmarks therefore share the Governance Code's aim to assist trustees to comply with their duties without promising that the framework is comprehensive. At the time that CC10 was published, the Commission's view was that the Governance Code and the Hallmarks were complementary.¹⁵⁴ Hallmark 3 of CC60 states:

An effective charity is run by a clearly identifiable trustee body that has the right balance of skills and experience to run the charity effectively, acts in the best interests of the charity and its beneficiaries, understands its responsibilities and has systems in place to exercise them effectively.

This was refined in CC10 to become *Hallmark 2: A strong board*:

An effective charity is run by a clearly identifiable board or trustee body that has the right balance of skills and experience, acts in the best interests of the charity and its beneficiaries, understands its responsibilities and has systems in place to exercise them properly.

In its response to the consultation on the draft version of what became the 2017 Code, the Commission acknowledged 'the importance of effective governance in underpinning charities' effectiveness and legal compliance'. It states that its remit is 'to enable and promote good practice in trusteeship' but:

The regulator can endorse and promote, but not own or enforce, standards of good practice ... We will consider further how we can take account of charities' consideration and application of the [2017] Code in our regulatory interactions with them and in the requirements and expectations for reporting.¹⁵⁵

This seems to leave trustees with no comprehensive statement as to their governance obligations, nor even a clear statement as to what effect any failure to follow the 2017

¹⁵³ *ibid*, 3.

¹⁵⁴ *ibid*.

¹⁵⁵ The Commission, *New code of governance consultation – a response from the Charity Commission for England and Wales* (01 February 2017).

Code, or any other code, would have in the Commission's regulatory decision-making processes.

CC10 was withdrawn by the Commission on 13 July 2017.¹⁵⁶ In the Commission's publication scheme, reference is now made to the 2017 Code as being 'a practical tool to help charities and their trustees develop high standards of governance'.¹⁵⁷

The Commission's CC60 referred to its other publications, which included *Responsibilities of Charity Trustees (CC3)*.¹⁵⁸ That guidance has since been revised and reissued as *The Essential Trustee*.¹⁵⁹ The first version of the guidance sets out 'briefly and simply the duties of charity trustees'¹⁶⁰ mainly by reference to circumstances trustees may encounter. Later versions (despite running to 40 pages) only explain 'the key duties ... and what trustees need to do to carry out those duties competently'.¹⁶¹ It summarises the trustee's main legal responsibilities as making sure:

- a trustee is eligible to be a charity trustee;
- a trustee acts with reasonable care and skill in the charity's best interests;
- a trustee complies with the charity's constitution and the law;
- the charity's resources are managed responsibly; and
- the charity is accountable and carrying out its purposes for the public benefit.¹⁶²

¹⁵⁶ *The Hallmarks of an effective charity* (n 68).

¹⁵⁷ 'Publication scheme' (*The Commission*, undated)

<www.gov.uk/government/organisations/charity-commission/about/publication-scheme> accessed 18 August 2019.

¹⁵⁸ The Commission, *Responsibilities of Charity Trustees* (CC3 September 1999, revised January and March 2002).

¹⁵⁹ The Commission, *The Essential Trustee* (CC3, 1 March 2012, revised 10 July 2015, 1 March 2018, and 3 May 2018).

¹⁶⁰ *Responsibilities of Charity Trustees* (n 158) 1.

¹⁶¹ *The Essential Trustee* (n 159) 2.

¹⁶² *ibid* 4-6.

In setting out trustees' potential liability to charities, the Commission reassures by stating the law 'generally protects trustees who have acted honestly and reasonably from personal liability to their charity'.¹⁶³

In explaining why the guidance is relevant, the Commission states:

When the Commission looks into cases of potential breach of trust or duty or other misconduct or mismanagement, it may take account of evidence that trustees have exposed the charity, its assets or its beneficiaries to harm or undue risk by not following good practice.¹⁶⁴

Given the Commission has welcomed the Governance Code as a tool for good practice, it is therefore disappointing that the Commission has not clarified how the guidance in CC3 relates to the Governance Code, and how compliance with the Governance Code will be taken into account when considering compliance matters. The Governance Code is only given as an example of a tool for compliance reviews.¹⁶⁵

The Commission takes a different attitude when considering the relationship between its guidance and the Fundraising Code. The Commission defines taking responsibility for a charity's fundraising as including:

Identifying and following any recognised standards that apply to your charity's fundraising. These are in the Fundraising Regulator's Code of Fundraising Practice. The Code outlines both the legal rules that apply to fundraising and the standards designed to ensure that fundraising is open, honest and respectful. The Commission expects all charities that fundraise to fully comply with the [Fundraising] Code.¹⁶⁶

It therefore seems that the Commission expects trustees to comply with the Fundraising Code, but not the Governance Code.

¹⁶³ *ibid* para 10.1.

¹⁶⁴ *ibid* 3.

¹⁶⁵ *Ibid* 30.

¹⁶⁶ The Commission, *Charity Fundraising: a guide to trustee duties* (CC20 November 2016) 6.

Under the Charities Act 2011, trustees must have regard to the Commission's guidance on the public benefit requirement for all activities of all charities.¹⁶⁷ This legal obligation is reflected in rationale for Principle 7 of the 2017 Code:

The public's trust that a charity is delivering public benefit is fundamental to its reputation and success, and by extension, the success of the wider sector.¹⁶⁸

It therefore seems that there has been some attempt to align the Governance Code to the expectations of the Commission, even if the Commission's attitude to the Governance Code is ambivalent.

Even though the Hallmarks has been withdrawn, the Commission has continued to provide sector wide guidance in the form of its regulatory alerts.¹⁶⁹ Alerts published since January 2010 appear on the Commission's website. Those Alerts are written with charity and the general public in mind, but some cross reference other guidance published by the Commission, and signpost other organisations, such as the Information Commissioner's website. 27 Alerts are currently published. No Alerts refer to the Governance Codes or the Hallmarks.¹⁷⁰ One Alert, in relation to data protection law, makes specific reference to the Fundraising Code.¹⁷¹

4.3 The Commission as regulator: Reports

The objectives for the Commission set out in the Charities Act 2011 include the promotion of compliance by charity trustees with their legal obligations in managing charities and the promotion of public trust and confidence in the sector.¹⁷² The

¹⁶⁷ Charities Act 2011, s 17.

¹⁶⁸ *2017 Code* (n 17) 27.

¹⁶⁹ 'Regulatory alerts: Charity Commission' (*The Commission*, 10 May 2013) <www.gov.uk/government/collections/regulatory-alerts-charity-commission> accessed 25 August 2019.

¹⁷⁰ Each report searched for key terms 'governance' 'code' or 'hallmark'.

¹⁷¹ 'Regulators issue joint alert about compliance with data protection law' (*The Commission*, 9 December 2016) <www.gov.uk/government/news/regulators-issue-joint-alert-about-compliance-with-data-protection-law> accessed 25 August 2019.

¹⁷² Charities Act 2011, s 14.

Commission operates a risk based framework¹⁷³ (subject to a review process at the time of writing) so that the Commission intervenes when it has the most effective impact. The Commission is granted information gathering powers, including the power to obtain search warrants,¹⁷⁴ and to require delivery of documentation.¹⁷⁵

When the Commission has concerns about a trustee or a charity it will use the risk framework to decide whether or not to intervene, and if intervention is justified, what type of intervention is required. It may decide not to take any action. Since the Commission does not publish its rationale for not taking action in relation to any specific circumstance, it is not possible to take a view on whether the Governance Code has had any effect on intervention decisions.

The Commission may decide to investigate by way of an operational compliance case, which is not treated as a formal investigation, but rather as an opportunity for the Commission to conclude its work by providing advice or an action plan to the relevant trustees. Those types of outcomes are only published by the Commission in exceptional circumstances. Reports are shown on the Commission's website for approximately two years before being archived.¹⁷⁶ Of the 25 reports that are currently published,¹⁷⁷ the following three are the only reports that make specific reference to the Governance Code or the Fundraising Code:¹⁷⁸

Our Brave Heroes – 16 March 2017:¹⁷⁹ The Commission received complaints from members of the public that fundraising statements made by the organisation described

¹⁷³ 'Policy Paper: Regulatory and Risk Framework' (*The Commission*, 5 February 2018) <www.gov.uk/government/publications/risk-framework-charity-commission/regulatory-and-risk-framework#contents> accessed 18 August 2019.

¹⁷⁴ Charities Act 2011, s 48.

¹⁷⁵ Charities Act 2011, s 52.

¹⁷⁶ 'Case reports: Charity Commission' (*The Commission*, 10 May 2013) <www.gov.uk/government/collections/case-reports-charity-commission> accessed 18 August 2019.

¹⁷⁷ Listed in Appendix D at page 116.

¹⁷⁸ Each report searched for key terms 'governance' 'code' or 'hallmark'.

¹⁷⁹ 'Our Brave Heroes: case report' (*The Commission*, 16 March 2017) <www.gov.uk/government/publications/our-brave-heroes-case-report> accessed 18 August 2019.

it as being a charity, although it was not registered with the Commission. Concerns about the governance of the organisation were noted, and the Commission provided ‘firm, detailed advice about the reforms to its governance’.¹⁸⁰ Despite raising these governance concerns, the Commission makes no reference to the Governance Code, nor the Hallmarks, but does make reference to the Fundraising Code.

Presidents Club Charitable Trust – 12 July 2018:¹⁸¹ The media reported allegations of harassment of female staff by attendees of a fundraising dinner. The Commission found that the trustees did not take into account the Fundraising Code’s guidance that trustees should ensure that ‘the charity operates responsibly and ethically, in line with its own aims and values’¹⁸² but makes no reference to the Governance Code.

Imamia Mission London (UK) – 5 September 2018:¹⁸³ Following allegations of rigged elections and an improper sale of the charity’s London property, the Commission investigated and concluded that the trustees had exposed the charity to undue risk, could improve their accountability, and had failed to act in accordance with the principles of good decision making. The Commission recommended that trustees should act in a proper and appropriate manner and makes a reference to the Governance Code as promoting ‘the principles of openness and accountability’.¹⁸⁴

To put this in context, for just one year, the Commission reports that ‘serious failings in trusteeship or governance featured in approximately two thirds of our 2,615 assessment cases’¹⁸⁵ but sees fit to refer to the Governance Code in only one published Report. Given the number of governance failures identified by the Commission, such a low

¹⁸⁰ *ibid* page 2.

¹⁸¹ ‘Presidents Club Charitable Trust: case report’ (*The Commission*, 12 July 2018) <www.gov.uk/government/publications/charity-case-report-presidents-club-charitable-trust/presidents-club-charitable-trust-case-report> accessed 18 August 2019.

¹⁸² *ibid* section 5.

¹⁸³ ‘Imamia Mission London (UK): case report’ (*The Commission*, 5 September 2018) <www.gov.uk/government/publications/charity-case-report-imamia-mission-london-uk/imamia-mission-london-uk-case-report> accessed 18 August 2019.

¹⁸⁴ *ibid* Decision, Our conclusions, and Lessons for other trustees.

¹⁸⁵ The Commission, *Charities Back on Track 2009-2010* (22 September 2010) 8.

number of Governance Code references supports the thesis that the Governance Codes have made little impact.

4.4 The Commission as regulator: Inquiries

For higher risk cases, the Commission may ‘institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes’.¹⁸⁶ Once a section 46 statutory inquiry has been instigated, the Commission is granted protective powers, including the power to:

- Suspend or remove any person from their charitable duties;
- Appoint interim managers or additional trustees;
- To restrict transactions, freeze accounts or vest property in the Official Custodian for Charities;
- Order any action (or order any action to stop) with the Commission considers expedient; and
- Wind up the charity.¹⁸⁷

Once an inquiry has been concluded, the Commission may (but is not obliged to) publish an inquiry report. A link to any published inquiry report appears on the charity’s entry in the Commission’s published database of charities but only if accessed using its main search function, and not the beta search function¹⁸⁸ for at least six months,¹⁸⁹ and on the Commission’s list of inquiry reports for approximately two years before being

¹⁸⁶ Charities Act 2011, s 46.

¹⁸⁷ Charities Act 2011, ss 76 to 85.

¹⁸⁸ <apps.charitycommission.gov.uk/showcharity/registerofcharities/RegisterHomePage.aspx> and <beta.charitycommission.gov.uk> both accessed 18 August 2019.

¹⁸⁹ ‘Policy Paper: Where we take enforcement action’ (*The Commission*, 23 May 2013) <www.gov.uk/government/publications/how-we-ensure-charities-meet-their-legal-requirements/where-we-take-enforcement-action> para 1 accessed 30 September 2019.

archived.¹⁹⁰ 81 inquiry reports are currently published,¹⁹¹ all of which set out some form of governance failure. The following are the only inquiry reports that make specific reference to the Governance Code or the Fundraising Code or other codes of conduct.¹⁹²

Human Aid UK – 3 March 2017:¹⁹³ Concerns were raised in relation to a planned event at which speakers with controversial or extremist views were due to take part. The Commission opened an inquiry to examine the financial management of the charity, and whether the trustees had complied with their duties. The Commission concluded that the charity had not ‘exercised sufficient oversight of its work with partners’ and there was ‘an overall lack of adequate documentation to evidence the charity’s due diligence and monitoring of the end use of all the charity’s funds’ which amounted to mismanagement.¹⁹⁴ The Commission refers to the Fundraising Code in relation to working with volunteers.

The Veterans Charity – 10 September 2018:¹⁹⁵ The police informed the Commission that four people connected with the charity, including one trustee, had been arrested due to concerns about fundraising activities. The Commission concluded that there had been mismanagement in the administration of the charity with evidence of ‘poor governance and poor financial management’.¹⁹⁶ The Commission noted that the charity’s fundraising processes were ‘inconsistent with the Code of Fundraising Practice and fell below the standards expected by the Commission’.¹⁹⁷

¹⁹⁰ ‘Inquiry reports: Charity Commission’ (*The Commission*, 6 October 2014) <www.gov.uk/government/collections/inquiry-reports-charity-commission> accessed 18 August 2019.

¹⁹¹ Listed in Appendix E at page 116.

¹⁹² Each report searched for key terms ‘governance’ ‘code’ and ‘hallmark’.

¹⁹³ ‘Human Aid UK: Inquiry report’ (*The Commission*, 3 March 2017) <www.gov.uk/government/publications/human-aid-uk-inquiry-report> accessed 18 August 2019.

¹⁹⁴ *ibid* 10.

¹⁹⁵ ‘Charity Inquiry: The Veterans Charity’ (*The Commission*, 10 September 2019) <www.gov.uk/government/publications/charity-inquiry-the-veterans-charity> accessed 18 August 2019.

¹⁹⁶ *ibid* Decision, Conclusions.

¹⁹⁷ *ibid* Decision, Findings.

Ghulam Mustafa Trust – 7 March 2019:¹⁹⁸ Members of the public had complained to the Commission that the charity’s Facebook page contained offensive content. The Commission concluded that the charity ‘had no governance infrastructure in place or other policies or controls to assist the trustees’.¹⁹⁹ The Commission required the trustees (amongst other actions) to review its social media posts and remove any that may affect their charity’s reputation, and to draft, approve and implement a trustee code of conduct. Despite making such an order, the Commission makes no reference to the Governance Code.

Oxfam GB – 11 June 2019:²⁰⁰ Safeguarding concerns were raised about the charity’s work, including in Haiti in 2010. The Commission launched a two-part inquiry, one related to the allegations of wrongdoing of Oxfam’s staff in Haiti, and the second had a wider safeguarding remit. The Inquiry found that ‘Unlike some other organisations at the time, Oxfam GB did have a code of conduct in place that made it clear that harassment, intimidation and exploitation was prohibited...’²⁰¹ The Inquiry also found that some ‘material facts were not disclosed or explained about the breadth and full nature of the breaches of the code of conduct and misconduct investigations.’²⁰² The Commission concluded that the ‘charity’s governance and culture with regard to safeguarding has repeatedly fallen below standards expected and failed to meet promises made’.²⁰³ An independent review team recommended changes to Oxfam GB’s code of conduct in relation to safeguarding,²⁰⁴ but made no reference to the Governance

¹⁹⁸ ‘Charity Inquiry: Ghulam Mustafa Trust’ (*The Commission*, 7 March 2010) <www.gov.uk/government/publications/charity-inquiry-ghulam-mustafa-trust> accessed 19 August 2019.

¹⁹⁹ *ibid* Findings.

²⁰⁰ ‘Charity Inquiry: Oxfam GB’ (*The Commission*, 11 June 2019) <www.gov.uk/government/publications/charity-inquiry-oxfam-gb> accessed 19 August 2019.

²⁰¹ The Commission, *Oxfam GB: Summary of Inquiry findings and conclusions* (11 June 2019) 5.

²⁰² *ibid* 10.

²⁰³ *ibid* 32.

²⁰⁴ The Commission, *Oxfam GB: Statement of the Results of an Inquiry* (11 June 2019) 108.

Code. The Commission's handling of this inquiry has been criticised and its findings called into doubt.²⁰⁵

Birmingham Diocesan Trust – 03 September 2019:²⁰⁶ Safeguarding concerns were raised by the Roman Catholic Church's independent inquiry into child sexual abuse, which selected the charity as a case study in May 2016. The charity's own audit, and the Commission's inquiry raised serious concerns with the charity's safeguarding policies, procedures and governance arrangements. The Commission found failings in relation to the charity's safeguarding oversight and governance, which meant that individuals had not been protected adequately. The Commission ordered the charity to follow the Catholic Safeguarding Advisory Service policies and procedures; implement quality assurance processes and management and reporting systems; and to improve the delivery of training and support and response to any future allegations. Despite finding inadequate governance arrangements, no reference is made to the Governance Code.

Grove Mountain – 20 September 2019:²⁰⁷ The Commission found that the charity was not operating for exclusively charitable purposes and the trustees failed to keep records, make annual returns and operate robust financial controls. All four trustees were removed from office, and an interim manager was appointed by the Commission who wound up the organisation. The Commission makes reference to its guidance on internal financial controls and to its trustee guidance, but not the Governance Codes.

Aid and Peace Trust – 30 September 2019:²⁰⁸ The Commission found that although the charity's objects were to advance education in Bangladesh, the trustees were unable to

²⁰⁵ Andrew Purkis, 'Rough Justice: The Charity Commission and Oxfam' (Charity Law Association Annual Conference, London, October 2019).

²⁰⁶ <www.gov.uk/government/publications/charity-inquiry-birmingham-diocesan-trust/birmingham-diocesan-trust> accessed 30 September 2019.

²⁰⁷ 'Charity Inquiry: Grove Mountain' (*The Commission*, 20 September 2019) <www.gov.uk/government/publications/charity-inquiry-grove-mountain> accessed 30 September 2019.

²⁰⁸ 'Aid and Peace Trust (formerly a registered charity)' (*The Commission*, 30 September 2019) <www.gov.uk/government/publications/charity-inquiry-aid-and-peace-trust/aid-and-peace-trust-formerly-a-registered-charity> accessed 30 September 2019.

demonstrate that its activities were within its charitable objective and failed to file annual returns or manage conflicts of interest. The Commission makes reference to its own trustee guidance, but not the Governance Codes.

4.5 The Commission as regulator: Interim Managers

As Commission also has power to appoint an Interim Manager to act in stead of the trustees of a charity after opening a statutory inquiry under the Charities Act 2011,²⁰⁹ provided that the Commission is of the view that there has been misconduct or mismanagement, or to protect the charity's assets. This took place, for example, in relation to *Grove Mountain* referred to above. The Commission publishes a list of Interim Managers that are appointed to charities at any one time.²¹⁰ The list contains a note of the reasons for the appointments but does not expand on the governance issues that are set out in its Inquiry reports.

4.6 The Commission and Official Warnings

In December 2013 the National Audit Office published reports questioning the Commission's effectiveness as a regulator generally²¹¹ and its specific handling of its failings relating to The Cup Trust.²¹² The NAO concluded that the Commission was slow to react and reluctant to use its enforcement powers, which had damaged public confidence in it as a regulator.

In part as a response to those criticisms, the power to issue official warnings was granted to the Commission by the 2006 Act,²¹³ which came into effect on 1 November 2016.²¹⁴ Warnings can be issued to individuals or charities if the Commission considers a breach

²⁰⁹ Charities Act 2011, s 76(3)(g).

²¹⁰ 'Charity Interim Managers in place' (*The Commission*, 1 April 2015) <www.gov.uk/government/collections/charity-interim-managers-in-place> accessed 25 August 2019.

²¹¹ National Audit Office, *The regulatory effectiveness of the Charity Commission* (4 December 2013).

²¹² National Audit Office, *The Cup Trust* (4 December 2013).

²¹³ Charities (Protection and Social Investment) Act 2016, section 75A.

²¹⁴ The Charities (Protection and Social Investment) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2016 para 4 (a).

of trust or duty, or other misconduct or mismanagement has taken place. Warnings therefore should be expected to deal with matters that touch on matters of governance. In the Commission's guidance on warnings, it states that it will decide whether to publish the warnings on a case by case basis, using the same principles it applies to other regulatory publications. If it chooses to publish, it will normally do so on the gov.uk website.²¹⁵ No list of official warnings is published, but details may be included in the Commission's published case reports, or Inquiry reports. The first published official warning²¹⁶ was given in July 2017 to the National Hereditary Breast Cancer Helpline after it had failed to comply with the Commission's action plan. The Commission published a case report setting out the background of its concerns.²¹⁷ The report states that the 'warning specifies the actions the Commission considers the charity needs to take to resolve the outstanding [sic] and prevent further breaches'.²¹⁸ The actual warning is not published. The case report refers to other Commission guidance, but not any of the Governance Codes.

Of the 25 Case Reports published on the Commission's website, only the report referred to above contained a reference to an official warning being given. A review of Commission press releases resulted in a further eight published official warnings being identified.²¹⁹

One of those eight was issued to the RSPCA on 20 August 2018. It is unusual in that the warning itself is published.²²⁰ The warning refers to failures of the board of trustees, and

²¹⁵ The Commission, *Official warnings to charities and trustees: Q and A* (December 2016) 6.

²¹⁶ Kirsty Weakley, 'Charity Commission issues first official warning' (*Civil Society*, 03 July 2017) <www.civilsociety.co.uk/news/charity-commission-issues-first-official-warning-to-cancer-charity.html> accessed 30 September 2019.

²¹⁷ 'National Hereditary Breast Cancer Helpline: case report' (*The Commission*, 3 July 2017) <www.gov.uk/government/publications/national-hereditary-breast-cancer-helpline-case-report> accessed 30 September 2019.

²¹⁸ *ibid* 2.

²¹⁹ Search of The Commission's pages on <www.gov.uk> containing 'official' or 'warning' since November 2016 accessed 30 September 2019.

²²⁰ 'Official Warning under Section 75A of the Charities Act 2011' (*The Commission*, undated) <assets.publishing.service.gov.uk/government/uploads/system/

in particular the officers of the board and sets out the action that should be taken, including an instruction that the board ‘must adhere to the charity’s code of conduct’. Another published official warning, addressed to Marc Blanchette personally on 6 February 2019.²²¹ Mr Blanchette was a trustee of the charity, Expectations UK. Here, the expected action to be taken by the charity’s trustees included a governance review. A third, addressed seven trustees of the Khatme Nubuwwat Centre charity published on 19 February 2019 appeared on the charity’s details on the Commission’s website²²² (but not the beta version). This warning relates solely to the submission of annual accounts on time. A fourth, addressed to Oxfam dated 7 June 2019, also appears on the charity’s details on the Commission’s website²²³ (the website mistakenly refers to two official warnings). In this instance, the Commission does not list any required action, instead choosing to reserve its position for future regulatory action. A fifth, to four trustees of The Islamic Educational Society of Blackburn,²²⁴ refers to changes required to accounting and financial procedures.

[uploads/attachment_data/file/735362/Charity_Commission_-_Official_Warning_to_RSPCA.pdf](#)> accessed 25 August 2019.

²²¹ ‘Official Warning of The Charity Commission for England and Wales to Marc Blanchette being a trustee of Expectations UK (1152491) (“the charity”)' (*The Commission*, 6 February 2019) <[apps.charitycommission.gov.uk/Schemes/463687.pdf](#)> accessed 25 August 2019.

²²² ‘Khatme Nubuwwat Centre’ (*The Commission*, 21 March 2019) <[www.gov.uk/government/publications/charity-inquiry-khatme-nubuwwat-centre/khatme-nubuwwat-centre](#)> accessed 25 August 2019.

²²³ ‘Official Warning of The Charity Commission for England and Wales to Oxfam – 202918’ (“the Charity”) (*The Commission*, 7 June 2019) <[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807954/Oxfam_GB_Official_Warning.pdf](#)> accessed 25 August 2019.

²²⁴ ‘Official Warning of The Charity Commission for England and Wales to Hassan Ebrahim Karolia, Moosa A Patel, Yakub Chopdat and Hasan Desai, being charity trustees of The Islamic Educational Society of Blackburn (Registered No: 526572) (“the Charity”)' (*The Commission*, 1 July 2019) <[apps.charitycommission.gov.uk/schemes/474593.pdf](#)> accessed 25 August 2019.

The last Case Report of note relates to a warning to The Institute of Economic Affairs issued by the Commission on 5th February 2019, but withdrawn in June 2019.²²⁵ This is the only recorded instance of an official warning being withdrawn.

None of the press releases or published warnings contain references to the Governance Code.

4.7 The Commission and trustee disqualification

The Charities Act 2011 also grants the Commission a discretionary power to make disqualification orders, banning individuals or organisations from being a charity trustee for all charities, specified charities or a class of charity for a period of up to fifteen years.²²⁶ The Commission does not publish a list of disqualification orders, but instead publishes an online register of all persons who have been removed as a charity trustee either by the Commission or by an order of the High Court since 01 February 1993.²²⁷ The register is only searchable by surname, and does not provide any details of the order, other than the date it was issued. It is therefore not possible to comment further as to whether disqualification orders reference the Governance Codes or not.

4.8 The Commission and annual reports and accounts

The Commission published between May 2014 and December 2018 a series of reports in relation to its accounts monitoring reviews.²²⁸ The reports contain research findings and recommendations relating to the sector's accounting and reporting. None contained any reference to any of the codes of conduct.

²²⁵ 'Official Warning Under Section 75A of the Charities Act 2011' (*The Commission*, undated). <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815720/Official_Warning_Institute_of_Economic_Affairs_June_2019.pdf> accessed 25 August 2019.

²²⁶ Charities Act 2011, s 181A.

²²⁷ 'Why some individuals can't act as charity trustees' (*The Commission*, 1 April 2013) <www.gov.uk/guidance/charity-trustee-disqualification> accessed 25 August 2019.

²²⁸ 'Charity accounts monitoring reviews' (*The Commission*, 6 August 2014) <www.gov.uk/government/collections/accounts-monitoring-charity-commission> accessed 25 August 2019.

Since September 2008 the Commission has also published annual reports on its own work to ‘prevent, detect and tackle wrongdoing and harm in charities and promote charity law’.²²⁹ They are now entitled ‘Dealing with wrongdoing and harm’, and were previously known as ‘Tackling abuse and mismanagement’. The Commission specifically states that:

Each report includes links to relevant guidance for charities. Trustees should use the reports to reflect on, and where necessary, improve their charities’ governance to ensure that serious non-compliance does not occur.²³⁰

Of the eleven²³¹ that are available from the Commission’s website, the Fundraising Code is referred to five times, and the Hallmarks are referred to once every year between 2012 and 2016. The Commission’s endorsement of the Governance Code is referred to in the 2017 report. The format of the annual report changes over the period, and the most dramatic change takes place in the last report, published 29 January 2019, in which governance is only mentioned in passing when referring to the duty of trustees to report serious incidents to the Commission.

4.9 The Fundraising Regulator

Fundraising activities for the charitable sector have been the subject of separate codes of practice since at least 2006, when the Fundraising Standards Board (FRSB) was established as the self-regulator for the sector.²³² It created a voluntary scheme for its members, but it was criticised for being underfunded and its sanctions being ineffective.²³³ Its role was replaced by the creation of The Fundraising Regulator, a private company limited by guarantee, which became the self-regulatory body for all charitable fundraising that takes place in the United Kingdom, with responsibility for the

²²⁹ ‘Dealing with wrongdoing and harm in charities’ (*The Commission*, 9 September 2008) <www.gov.uk/government/collections/tackling-abuse-and-mismanagement-in-charities> accessed 25 August 2019.

²³⁰ *ibid.*

²³¹ *ibid* accessed 30 September 2019.

²³² Sir Stuart Etherington, Lord Leigh of Hurley, Baroness Pitkeathley and Lord Wallace of Saltaire, *Regulating Fundraising for the Future: Trust in charities, confidence in fundraising regulation* (NCVO 2015) 22.

²³³ *ibid* 8.

publication of the Fundraising Code.²³⁴ As a non-statutory body, funded by the sector, it also has limited resources and sanctions. It has entered into memoranda of understanding with the Commission, the Information Commissioner and others.²³⁵

If it believes an organisation is in breach of the Fundraising Code it may make a referral to the Commission. The Fundraising Regulator indicates that it will refer fundraising complaints to the Commission that demonstrate evidence of serious concerns about trustee conduct, which might include significantly poor governance.²³⁶

The latest edition of the Fundraising Code makes reference to the responsibilities of charities and those who govern them.²³⁷ It makes specific reference to the Governance Code as a source of guidance on a trustee's duty to act in the best interests of their charity at all times.²³⁸ In Section Two of the Fundraising Code it sets out a charity board's general duties, as well as the specific duties relating to risk assessments, dealing with donations, handling complaints, payment of fundraisers, disclosures for public collections, use of donated funds, and accounting and reporting.

The decisions made by the now defunct FRSB are no longer publicly available.²³⁹ Since the Fundraising Regulator has been in existence, it has received 1793 complaints,²⁴⁰ which led to the publication of 21 investigation summaries, which have since been removed from its website. Those investigation summaries did not name the organisations being investigated. Four investigation reports²⁴¹ and ten new style

²³⁴ Fundraising Regulator, *Code of Fundraising Practice* (6 June 2019).

²³⁵ 'about us' (*Fundraising Regulator*, undated) <www.fundraisingregulator.org.uk/more-from-us/about-us> accessed 17 August 2019.

²³⁶ 'Memorandum of Understanding: Charity Commission and the Fundraising Regulator' (*Fundraising Regulator and The Commission*, 7 July 2016) 21 <www.gov.uk/government/publications/memorandum-of-understanding-charity-commission-and-the-fundraising-standards-board> accessed 17 August 2019.

²³⁷ *Code of Fundraising Practice* (n 234) 13.

²³⁸ *ibid.*

²³⁹ <www.FRSB.org.uk> accessed 18 August 2019.

²⁴⁰ 'Our Impact' (*Fundraising Regulator*, undated) <www.fundraisingregulator.org.uk/more-from-us/our-impact> accessed 30 September 2019.

²⁴¹ Listed in Appendix F at page 122.

investigation summaries²⁴² have also been published.²⁴³ The new style investigation summaries name the organisation being investigated. The details of the investigation reports and the investigation summaries do not appear in its directory of members (which highlights whether the organisation has paid a voluntary levy to the Fundraising Regulator), but rather are published in date order in its resource library. Taking each of the investigation reports in turn:²⁴⁴

Neet Feet Limited - 24 November 2016.²⁴⁵ Following allegations in the media of inappropriate behaviour on the part of a commercial fundraising company, the Fundraising Regulator instigated an investigation. Eight charities had contracted with Neet Feet Limited for the provision of their services, and seven were criticised for failing to take all reasonable steps to ensure that the company was complying with the Fundraising Code. The Regulator's decision makes reference to the Fundraising Code and the Charity Commission guidance on fundraising, and recommends improvements to the oversight of such service, and changes to the Fundraising Code.

Brain Tumour Research - 12 July 2018.²⁴⁶ A complaint was made by two members of the public that this charity published false statements on its website whilst fundraising. In reaching its decision that the charity did not fully address the complaint, and that some of its fundraising material could have been misunderstood. The Regulator's decision refers to the Fundraising Code only. It recommends that the charity 'considers the learning from this complaint' and that the charity's annual report which is published on the Commission's database should be duplicated on the charity's website. No governance issues are addressed.

²⁴² Listed in Appendix G at page 123.

²⁴³ 'Resource library' (*Fundraising Regulator*, undated) <www.fundraisingregulator.org.uk/more-from-us/resources> accessed 18 August 2019.

²⁴⁴ Each report searched for key terms 'governance' 'code' and 'hallmark'.

²⁴⁵ 'Decision: Neet Feet Ltd and eight charities' (*Fundraising Regulator*, 24 November 2016) <www.fundraisingregulator.org.uk/more-from-us/resources/decision-neet-feet-ltd-and-eight-charities> accessed 18 August 2019.

²⁴⁶ 'Decision: Brain Tumour Research' (*Fundraising Regulator*, 12 July 2018) <www.fundraisingregulator.org.uk/more-from-us/resources/decision-brain-tumour-research> accessed 28 August 2019.

The President's Club Charitable Trust - 13 July 2018.²⁴⁷ Following allegations in the media of inappropriate behaviour on the part of some guests at a fundraising event, the Fundraising Regulator instigated an investigation. The Regulator's decision makes reference to the Fundraising Code and the Charity Commission guidance on fundraising, but makes no specific recommendations at all.

International Liberty Association - 07 February 2019.²⁴⁸ The Fundraising Regulator received complaints relating to the charity's volunteers who made home visits to members of the public. The Regulator criticised the trustees for failing to monitor the work of fundraisers adequately and a failing to deal with the public's concerns in a timely manner. The Regulator required a follow up report in May 2019 (not published at the date of writing) and made recommendations for improvement. Despite identifying 'a systemic problem within the charity both in relation to fundraising and governance'²⁴⁹ no recommendation was made to follow the Governance Code, nor any report made to the Charity Commission.

Only Brain Tumour Research paid a levy to the Fundraising Regulator, and none of the others have registered with the Fundraising Regulator.²⁵⁰

Of the ten new style investigation summaries, nine different charities are cited, four being found to be in breach of the Fundraising Code.²⁵¹ The summaries do not specify which section of the Fundraising Code has been breached, instead setting out broad 'code themes'. It is therefore not possible to conclude whether any of the charities

²⁴⁷ 'Decision: The President's Club Charitable Trust' (*Fundraising Regulator*, 13 July 2018) <www.fundraisingregulator.org.uk/more-from-us/resources/decision-presidents-club-charitable-trust> accessed 18 August 2019.

²⁴⁸ 'Decision: International Liberty Association' (*Fundraising Regulator*, 7 February 2019) <www.fundraisingregulator.org.uk/more-from-us/resources/decision-international-liberty-association> accessed 18 August 2019.

²⁴⁹ *ibid* para 47.

²⁵⁰ <www.fundraisingregulator.org.uk/directory> accessed 18 August 2019.

²⁵¹ <www.fundraisingregulator.org.uk/more-from-us/resources/type/investigation-62/type/investigation-summary-65> accessed 30 September 2019.

identified in the summaries are found to be in breach of any of the Fundraising Code's principles that relate specifically to governance.

No details of the Fundraising Regulator's decisions appear on the Charity Commission public database, which leads to a conclusion that the Commission do not view the breaches of governance as meriting further action.

4.10 The Information Commissioner's Office

The Information Commissioner (ICO) is a corporation sole appointed by government under the Data Protection Act 2018 and the Freedom of Information Act 2000 to regulate personal data²⁵² and public access to official information.²⁵³ Charities are not normally public bodies, and therefore the provisions of the Freedom of Information Act do not normally apply to the sector. However, the Information Commissioner has power to issue Enforcement Notices against bodies including charities if any of the data protection principles have been breached.²⁵⁴ Failure to comply with an Enforcement Notice is an offence, which could lead to a compliance order²⁵⁵ or a financial penalty.²⁵⁶

The ICO's remit is wider than the charity sector, but its powers are of special concern to charities, especially those using personal data for fundraising purposes.

To date, fifteen charities have been the subject of a civil monetary penalty,²⁵⁷ and one charity worker has been prosecuted for sending sensitive personal data to her own personal email account without authorisation.²⁵⁸ Since 2015, the ICO has published three overview reports on the charity and voluntary sector, and undertaken 25 advisory

²⁵² Data Protection Act 2018, s 115.

²⁵³ Freedom of Information Act 2000, s 50.

²⁵⁴ Data Protection Act 2018, s 149.

²⁵⁵ Data Protection Act 2018, s 167.

²⁵⁶ Data Protection Act 2018, s 155.

²⁵⁷ 'Action we've taken' (*ICO*, undated) <ico.org.uk/action-weve-taken/> accessed 30 September 2019.

²⁵⁸ 'Jeannette Baines' (*ICO*, 6 June 2019) <ico.org.uk/action-weve-taken/enforcement/jeannette-baines/> accessed 17 August 2019.

visits, one of which the author was involved with.²⁵⁹ The details of advisory visits are not publicly published. Of the three overview reports, the last, published in April 2018²⁶⁰ makes special reference to governance arrangements. The eight charities reviewed were praised for having clear ‘governance structures in place with delegated responsibility from the board down’.²⁶¹ However, the ICO noted a lack of documented information management processes within their overall governance frameworks, and limited key performance indicators.²⁶²

The ICO refers to accountability as being one of the key data protection principles enshrined in the Data Protection Act 2018, because it is necessary to comply and demonstrate compliance.²⁶³ It could be said that accountability is also a key principle in governance. Principle 7 of the Governance Code suggests that ‘The board leads the organisation in being transparent and accountable’. It follows that if a charity wishes to follow the Governance Code, then, at least in relation to information management, it must comply with its legal duties under the Data Protection Act, but also its trustees must take note of the ICO’s guidance on how to be accountable.

Given the seriousness of the penalties levied by the ICO, and the arrangements between the ICO and the Commission to share information,²⁶⁴ it comes as some surprise that none of the fined charities were subject to inquiry by the Commission. It would seem that information governance breaches leading to fines of up to £200,000 do not merit further action by the Commission.

²⁵⁹ ‘Audits, advisory visits and overview reports’ (*ICO*, undated) <ico.org.uk/action-weve-taken/audits-advisory-visits-and-overview-reports/> accessed 17 August 2019.

²⁶⁰ ‘Findings from ICO information risk reviews at eight charities’ (*ICO*, August 2018) <ico.org.uk/action-weve-taken/audits-advisory-visits-and-overview-reports/findings-from-ico-information-risk-reviews-at-eight-charities/> accessed 17 August 2019.

²⁶¹ *ibid* 2.

²⁶² *ibid* 4.

²⁶³ ‘Accountability and governance’ (*ICO*, undated) <ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/> accessed 17 August 2019.

²⁶⁴ ‘MOU: Charity Commission and the Information Commissioner’ (*The Commission*, 19 September 2019) <www.gov.uk/government/publications/mou-charity-commission-and-the-information-commissioner> accessed 30 September 2019.

4.11 HMRC and the Fit and Proper Person test

Her Majesty's Revenue and Customs (HMRC) is a non-ministerial department responsible, for amongst other matters, administering charity tax reliefs. It is therefore not a regulator per se, but it has statutory powers to grant or withhold tax reliefs to charitable organisations, and funders and corporate supporters often rely on HMRC's recognition of an organisation as charitable, especially if the organisation is not required to register with the Commission. For example, Microsoft offers cheaper licenses for its products if an organisation is able to provide a Commission Registration number or an HMRC registration number.²⁶⁵

The Finance Act 2010 introduced a statutory definition of charities entitled to charity tax reliefs following the extension of UK charitable tax reliefs to bodies equivalent to charities and community amateur sports clubs in Europe.²⁶⁶ Under this Act, a charity (for tax purposes) must be established for charitable purposes only; and must fulfil a jurisdiction condition, a registration condition and a management condition. All conditions other than the last are similar to the requirements set out in the Charities Act 2011. The management condition is met if the charity's managers are 'fit and proper persons to be managers'.²⁶⁷ This phrase is not defined, and therefore takes its natural meaning. The test applies to 'managers' who may be trustees, but may also be others who have 'general control and management over the running of the charity or the application of its assets'.²⁶⁸

HMRC assumes that all people appointed by charities are fit and proper persons unless it holds information to show otherwise. Charities may also assume that their appointed

²⁶⁵ 'You must meet ALL FIVE of the following criteria to be eligible:' (*Microsoft*, undated) < <https://www.microsoft.com/en-us/nonprofits/eligibility> > accessed 30 September 2019.

²⁶⁶ Finance Act 2010, sch 6, part 1, para 1.

²⁶⁷ Finance Act 2010, sch 6, part 1, para 4.

²⁶⁸ 'Guidance on the fit and proper persons test' (*HMRC*, 23 November 2014, updated 9 March 2017) < www.gov.uk/government/publications/charities-fit-and-proper-persons-test/guidance-on-the-fit-and-proper-persons-test > accessed 30 September 2019 Who the test applies to.

managers are fit and proper persons if appropriate due diligence has been completed and HMRC has not made any further enquiries.²⁶⁹

Although there is obvious overlap between the requirements of the Commission and of HMRC:

... it doesn't necessarily follow that individuals who are considered by a charity regulator to be suitable to act as trustees of charities will always be considered to be fit and proper persons for the purposes of the management condition. This is because different charity regulators have different responsibilities and priorities from those of HMRC and therefore carry out different sorts of checks on trustees. Also, HMRC has access to certain information that isn't available to charity regulators.²⁷⁰

If a manager is involved in fraud, relating to tax, misrepresentation, identity theft or otherwise (and regardless of whether convicted of fraud or not), HMRC could reach a conclusion that a manager is not a fit and proper person. Such a conclusion could lead to a charity losing tax relief, which in turn could be a breach of the trustees' duties to protect their charities assets (since the payment of tax would be an improper use of a charity's assets).

HMRC makes no reference to governance in general or the Governance Code specifically in its guidance on the fit and proper persons test. Yet its test is clearly a mechanism for governance: it defines some people as being unfit to govern charities. HMRC does not publish its decisions to deem a person as being unfit, nor its decisions to remove tax reliefs from charities, so it is difficult to consider the impact of the test on governance in the sector.

The Governance Code does not refer to the fit and proper test, but the 2017 Code's Principle 3 (Integrity) refers to maintaining the charity's reputation, expecting trustees to 'adopt and adhere to a suitable code of conduct that sets out expected standards of probity and behaviour'.²⁷¹

²⁶⁹ *ibid* Introduction.

²⁷⁰ *ibid* What the fit and proper persons test is about.

²⁷¹ *2017 Code*, (n 17) 12.

4.12 Conclusion

Despite having a role in regulating the governance of charities, all of the bodies referred to in this chapter fail to have a comprehensive publication protocol for their interventions, which could prevent stakeholders and trustees from being aware of governance issues or obligations. Despite memoranda of understanding between the regulators, there is little evidence of cross referrals being made, or the Commission taking action when charities are found to be wanting by the other regulators.

References to the Governance Code are scarce, and do not seem to follow any logical pattern, despite the number of compliance cases being handled by the regulators. How the Commission takes note of the Governance Code appears to be different to the Fundraising Code, which introduces a level of uncertainty which is not justified.

Lastly, the language used by the regulators is not consistent, which references being made to abuse, breach of duty, breach of trust, harm, misconduct, mismanagement, cultural issues and wrongdoing. This may be a response by the regulators to their own powers (especially in the case of the Commission, whose powers are defined in statute) but could lead to uncertainty as to which duty or obligation applies in any one case, and whether governance arrangements are seen to be important or sufficient in each instance.

Having reviewed the relationship of the regulators to the Governance Code, the impact on case law is considered.

CHAPTER 5 THE GOVERNANCE CODE AND CASE LAW

5.1 Introduction

Governance matters are justiciable in the courts of England and Wales. In considering the relevant reported cases, a distinction must be drawn between disputes between a charity and third parties (such as suppliers or employees or beneficiaries) which are treated by the courts in the same way as any other commercial dispute, and those that arise relating the internal management or governance of the charity itself. The latter are known as ‘charity proceedings’ and are considered below.

5.2 Court cases and charitable proceedings

Since at least 1812, it has been possible to petition the courts using a summary procedure to seek determination of simple questions arising in the administration of a charitable trust.²⁷² To combat a growing trend of using charitable funds for litigation relating to charity governance, controls were introduced by parliament:²⁷³

to prevent charities from frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes.²⁷⁴

These petitions are known as ‘charity proceedings’, a phrase that is used in the Charitable Trusts Act 1853,²⁷⁵ since repealed, and now defined as:

proceedings in any court in England or Wales brought under the court’s jurisdiction with respect to charities, or brought under the court’s jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.²⁷⁶

Charity proceedings may only be taken by the charity itself, or by any of its trustees, or any other person if they have an interest in the charity.²⁷⁷ Other than the Commission itself and the Attorney General, no other person may bring charity proceedings without

²⁷² Charities Procedure Act 1812 (52 Geo 3 c 101).

²⁷³ Charitable Trusts Act 1853, s 17.

²⁷⁴ *Muman v Nagsenda* [1999] 4 All ER 178 (CA) 184 (Mummery LJ).

²⁷⁵ Charitable Trusts Act 1853, s 17.

²⁷⁶ Charities Act 2011, s 115(8).

²⁷⁷ Charities Act 2011, s 115(1).

the consent of the Commission²⁷⁸ or a High Court judge.²⁷⁹ Consent will only be granted if there is a legitimate interest to be heard, which is not frivolous or unfounded, which cannot be resolved by the Commission itself but is in the best interests of the charity for the case to proceed.²⁸⁰ If the Commission refuses to make an order, an applicant may apply to the court to authorise the proceedings before the matter can proceed.²⁸¹

A filter is not unique to charity proceedings. For example, the charity proceedings filter is referred to in a case²⁸² considering the effect of the Mental Health Act's provision²⁸³ that requires the leave of the High Court to bring proceedings.

The Commission does not publish its decisions relating to the granting of consent for charity proceedings, and there is no court structure that deals only with charity disputes in the same way that, for example, there is a Technology and Construction Court to hear disputes about buildings, engineering and surveying.

It therefore follows that, for as long as there has been a Governance Code, any court case that is concerned with the governance or administration of the charity can only have been brought by the Attorney General, or the Commission, or with the consent of the Commission or a High Court judge. All cases are assigned to the Chancery Division of the High Court.²⁸⁴

A search of all reported cases heard in the Chancery Division of the High Court, Court of Appeal and Supreme Court from 01 January 2005 has been undertaken using Westlaw UK, Lexis Library, Practical Law, Lawtel and Bailii. Results of those searches have been cross checked against cases referred to in the main charity law reference textbooks and journals. What follows is an analysis of those cases that refer to charity proceedings, or

²⁷⁸ Charities Act 2011, s 115(2).

²⁷⁹ Charities Act 2011, s 115(5).

²⁸⁰ James Kilby, 'Charity Proceedings' (2006) 9(1) Charity Law and Practice Review, 23.

²⁸¹ Charities Act 2011, s 115(5).

²⁸² *Robert Edward Seal v Chief Constable of South Wales Police* [2005] EWCA Civ 586.

²⁸³ Mental Health Act 1983, s 139(2).

²⁸⁴ CPR 64.1(3).

the relevant statutory provisions relating to charity proceedings or the Commission giving leave for a case to proceed.

A second search was also undertaken to review any cases that are not charity proceedings, but refer to the Governance Codes or other charity codes of practice, including the Hallmarks.

5.3 Cases that are not charity proceedings

In *Khaira v Grewal*,²⁸⁵ members of a Sikh community in Swindon claimed that the trustees of their charity were in breach of their duties and sought relief. Both the claimants and the defendants were aware of the charity's constitution, which included a disciplinary procedure, and both had been in correspondence with the Commission. Both were willing to submit to a mediation process. The Commission had not granted consent for the charity proceedings, but had not, at the date of the hearing, refused. It was held that until such time as consent was either granted or refused, the matter could not proceed before the court. The court was of the view that it 'would be in everyone's best interest if the Charity Commission were to take a speedy decision'.²⁸⁶ No reference is made to the Governance Codes, nor any other source of guidance for the trustees, but the court expressed a hope that the parties would submit to mediation without delay. In expressing such a hope, an opportunity to encourage the trustees to refer to the available governance guidance was not taken up.

In *Freund v Feldman*,²⁸⁷ members of a Jewish Hasidic community in London dispersed to worship in five synagogues and disputed the ownership of buildings originally purchased to expand the original community's school. When those buildings were put up for sale, the claimants, representing one of those five synagogues, attempted to stop the sale on the basis they had an interest in the properties. The court held that the claimants failed because the claimants were not the representatives of the original community, but rather one of the five dispersed communities, and that any claim against the new

²⁸⁵ [2005] EWHC 1413 (Ch).

²⁸⁶ *ibid* [17].

²⁸⁷ [2005] EWHC 1306 (Ch).

owners of the buildings, being a charity, would also fail because Commission consent had not been obtained for any charity proceedings to take place. No reference is made to the Governance Codes, nor any other source of guidance for the trustees. The trustees of the original community were able to continue to manage the buildings (or the proceeds of sale of the properties) as they originally intended. No criticism is made of those original trustees, and their governance of the charity.

Similarly, in *Barron v Herefordshire CC*,²⁸⁸ Mr Barron's claim that the County Council, as sole trustee of the Buchanan Trust, had acted unfairly, inequitably and unlawfully; in error; wrongfully, and in breach of trust²⁸⁹ was treated as charity proceedings, but struck out for failure to obtain Commission or the court's consent. The reason for a requirement to obtain Commission consent is stated as providing:

... what has been called "a protective filter" to protect charities from being harassed by a multiplicity of hopeless challenges. The question of whether consent should be given is therefore of significance and the requirement is not to be taken lightly.²⁹⁰

Given the very small number of charity proceedings, it could be argued that charities are being overprotected, and the standards of governance have become lax given the low likelihood of any challenge. In any event, the court went on to consider whether it would be appropriate to stay the proceedings to allow consent for charity proceedings to be obtained, but decided that there was 'no real prospect of Mr Barron establishing that the Trustees acted in breach of trust'.²⁹¹ Despite finding against the claimant, the court expressed a hope that the parties may find a way of reaching a negotiated settlement.

The boundaries of charity proceedings were also discussed in *R on the application of London Borough of Brent v FED 2000*.²⁹² Here, the Local Authority wished to enforce obligations arising under education standards legislation against two charities, and the courts were asked whether the Commission's consent was required. It was held that the

²⁸⁸ [2008] EWHC 2465 (Ch).

²⁸⁹ *ibid* [6].

²⁹⁰ *ibid* [12].

²⁹¹ *ibid* [26].

²⁹² [2005] EWHC 2771 (Admin).

claim did not amount to charity proceedings, because the proceedings 'have been brought not in order to challenge the administration of a trust, but to bring a public law challenge'.²⁹³ In another case, the court held that a claim did not amount to charity proceedings because there was no charity.²⁹⁴

Other proceedings brought by members of a charity were found not to be charity proceedings, because they had no financial interest in the charity and therefore lacked any standing to apply for relief,²⁹⁵ and if proceedings are brought by only one local inhabitant, then the dispute cannot be charity proceedings for the lack of a second local inhabitant.^{296 297}

5.4 Cases when the Commission refuses consent for charity proceedings

A decision by the Commission to deal with a governance issue under its own powers rather than consent to charity proceedings was considered in *Seray-Wurie v The Charity Commissioners for England and Wales*.²⁹⁸ Here, Dr Seray-Wurie requested a declaration that he was a trustee of the East End Citizens Advice Bureau, a charitable company. His position was unclear because the charity had not followed the procedure for retirement by rotation of the trustees set out in the three versions of its articles of association that had been adopted during the period in question. The Commission proposed to use their powers²⁹⁹ to authorise a general meeting at which the trustees could stand for election, and the membership of the board would be certain, at least until the next time a trustee retires under the retirement by rotation provisions. The Commission refused consent for charity proceedings on the basis that it was their opinion that the case 'can be dealt with by them under the powers of this Act'.³⁰⁰ The claimant applied to the court for leave to bring proceedings. However, the court took the view that the Commission's refusal was to enable 'a practical solution to be found which avoids the need for court

²⁹³ *ibid* [14].

²⁹⁴ *Rehman v Ali* [2015] EWHC 4056 (Ch).

²⁹⁵ *Mohamed v Abdelmamoud* [2018] EWCA Civ 879.

²⁹⁶ Charities Act 2011, s 115(d).

²⁹⁷ *Miah v Hoque* [2018] EWHC 2645 (Ch).

²⁹⁸ [2006] EWHC 3373 (Ch).

²⁹⁹ Charities Act 1993, s 26.

³⁰⁰ Charities Act 1993, s 33(3).

proceedings. Court proceedings are likely to be drawn-out and expensive. There is an obvious public interest in avoiding the unnecessary expenditure of charitable funds'.³⁰¹ No reference is made to the Governance Codes, nor any other source of guidance for the trustees. The court refused to allow the case to proceed as charity proceedings. The Claimant later made a claim against the Commission for defamation, which he also lost.³⁰² This case shows the court's reluctance to intervene on matters that can be dealt with by the Commission, which is seen to provide a more cost-effective method of resolving governance matters.

Whether the courts should intervene when the Commission refuses consent under the Charities Act 2011 was considered in *Rai v Charity Commission for England and Wales*.³⁰³ The court held that it was not acting 'as an appellate court against the decision of the Charity Commissioners: it is exercising its own jurisdiction'.³⁰⁴ This follows the wording of the Act, which makes it clear that charity proceedings can progress with either the consent of the Commission, or leave from the High Court.³⁰⁵ The matter before the High Court is therefore a new application, not a review of the Commission's refusal. However, if the matter is a new application, there is an inherent risk that the application made to the Commission is repeated before the courts, increasing costs and the time taken to reach a resolution. The court makes the point that it should see the same evidence as presented to the Commission, else the court would be making 'a less informed decision than that has already been made'.³⁰⁶ However, the court is not ignorant of the Commission's decision, which will be afforded 'an appropriate degree of respect because of the weight of expertise brought to bear on evaluating what is obviously a multi-factorial decision'.³⁰⁷

³⁰¹ [2006] EWHC 3373 (Ch) [24].

³⁰² *Seray-Wurie v The Charity Commission of England and Wales* [2009] EWCA Civ 153.

³⁰³ [2012] EWHC 1111 (Ch).

³⁰⁴ *ibid* [22].

³⁰⁵ Charities Act 2011, s 115(5).

³⁰⁶ *Rai* (n 303) [25].

³⁰⁷ *ibid* [26].

There is also a risk, acknowledged by the court, that the application becomes a ‘dress rehearsal’³⁰⁸ for the final hearing. The application process is designed to help prevent the resources of charities being depleted unnecessarily and in this case, it is estimated that at least £150,000 of charitable funds would be expended on resolving the dispute.³⁰⁹ The courts are familiar with applications for leave to proceed with cases (for example, when considering leave to appeal), and so this filtering process is in line with the court’s other work. However, the court holds in this case that the test should be:

... is the commencement of litigation the best (or the least worst) course in the interests of the charity as a whole to deal with the dispute? Litigation may be the best course for the Applicants to pursue to achieve their objective. But it is the charity’s interest (not that of the Applicants or proposed Respondents) that is the focus of the inquiry.³¹⁰

This seems to indicate that the courts will use a very fine filter on cases before them: litigation must be the very best course for the charity. It therefore comes as no surprise that the number of charity proceedings considered by the courts since 2005 is very small. If the court’s oversight of charitable governance is so sparingly available to applicants, then it follows that the Commission’s role, and, perhaps, the Governance Code’s part in encouraging good governance, becomes of greater importance as a more readily available check and balance on the activities of trustees.

In this case, the court held that, given some contentious points had been agreed between the parties, there was a ‘significant chance that an accommodation can be reached upon those [remaining] differences which does not involve the expensive prosecution of the present proceedings’.³¹¹ The application for permission was adjourned for two months to allow further time for agreement to be reached between the parties. It later transpired that mediation had not resolved the dispute, and leave was granted for the case to be heard.³¹²

³⁰⁸ *ibid* [24].

³⁰⁹ *ibid* [32].

³¹⁰ *ibid* [28].

³¹¹ *ibid* [34].

³¹² *Rai v Charity Commission for England and Wales* [2013] EWHC 1425 (Ch).

It is also clear that charity proceedings can relate to disputes between a charity and third parties, as long as the third party is a 'person interested in the charity' despite the phrase lacking definition in the Charities Act.³¹³ Here, a composer made an application to a music charity to promote his work, and to include his work in the charity's archive of emerging and established composers. When the charity refused to do so, he raised a complaint. The Commission refused permission for him to bring charity proceedings. The court, despite holding that the claimant was a person interested in the charity,³¹⁴ agreed with the Commission, because his complaint was of a private not public nature.³¹⁵ The court held that the claim was not legally sustainable, in part because the court costs would 'exhaust the assets of the Charity and prevent it from achieving its charitable objectives'³¹⁶ and that there was an alternative resolution in the form of a public statement on the charity's website.

Disputes can also arise when new board members disagree with the actions taken by previous board members. In *Garcha v Charity Commission for England and Wales*³¹⁷ the courts decided that a costs dispute would not amount to charity proceedings because it was 'not the least unsatisfactory way of resolving the dispute'.³¹⁸ The case report gives no indication of the court's view on what would amount to be a more satisfactory resolution.

Some indication of the time it takes for the Commission to consider applications for consent for charity proceedings is given in *Singh v Charity Commission for England and Wales*.³¹⁹ Following a disputed election of officers to a management committee of a Sikh temple, a complaint was made to the Commission. The Commission decided that the election was indeed invalid, and the claimants sought Commission consent for charity proceedings to challenge the election's validity. Rather than waiting for consent, the

³¹³ Charities Act 2011, s 115(1).

³¹⁴ *Rosenzweig v NMC Recordings Ltd* [2013] EWHC 3792 (Ch) [27].

³¹⁵ *ibid* [28].

³¹⁶ *ibid* [34].

³¹⁷ [2014] EWHC 2754 (Ch).

³¹⁸ *ibid* [12 g].

³¹⁹ [2016] 12 WLUK 652.

claimants launched court proceedings in October 2015. The Commission refused consent in March 2016, but not before injunctive relief had been granted by the court, and the claimants had served notice of discontinuance. In the interim period, legal costs had been expended, and it was necessary for the courts to consider what should happen to the proceedings, and the injunctive relief, given the Commission's refusal. The defendants were given four weeks to file a counterclaim and seek Commission consent for the proceedings to continue. The failure of governance, especially financial governance is clear from the case report, and some, if not all of the legal costs could have been saved with a swift review of the Commission's view (later retracted) as to the invalidity of the disputed elections.

5.5 Cases that amount to charity proceedings

A costs recovery case³²⁰ heard in 2005 refers to the Commission giving consent to charity proceedings for a dispute between a charitable school and its managing governor. When the £697,000 claim was abandoned by the charity, which choose to accept an offer of settlement of £5000, it was accepted by the charity's counsel that it would have been very unlikely that the Commission would have granted consent if the original claim had been made at the settlement figure.³²¹ With the charity's costs being reported as being £170,000³²² the need for a cost effective way of dealing with governance disputes is clear.

The first reported charity proceedings case that was decided after the publication of the 2005 Code was *Bukhari v Shah*.³²³ Here, the charity runs a mosque in London. The claimants requested declarations that they were the lawfully elected members of the trust board, and the defendants counterclaimed for a declaration that others were the trustees. Permission was granted for the counterclaim to be charity proceedings, but permission for the claim to be similarly treated had not been given. The court therefore struck out the claim for want of proper authorisation, and dealt with the counterclaim,

³²⁰ *E Ivor Hughes Educational Foundation v Leach* [2005] EWHC 1317 (Ch).

³²¹ *ibid* [9].

³²² *ibid* [10].

³²³ [2006] EWHC 3373 (Ch).

which since it too sought a declaration as to who should properly be regarded as the charity trustees covered the same ground.³²⁴ However, since this case only concerns an application for summary judgment, which was not granted, the details of the governance dispute was not considered. No reference is made to the Governance Codes, nor any other source of guidance for the trustees.

A similar dispute as to which of two groups should be properly seen to be the trustees of a charity was heard in December 2006.³²⁵ Here the court ordered a member's meeting rather than settle the dispute itself, with consideration of unconditional mediation.³²⁶ The court also helpfully set out ways of addressing the conflict of interest issues being faced by the charity, but made no reference to the Governance Code:

An obvious example is by achieving a balance of membership, and governance, that includes independent membership, and membership of other stakeholders, alongside membership of tenants. And by appropriate rules and arrangements to ensure transparency and avoid, for example, a tenant with a financial interest in a particular decision of the Company having a say in that decision.³²⁷

The first full case to be decided in the period relevant to this thesis does not take place until June 2009.³²⁸ Two actions were heard concerning a dispute between the members of the congregation of the Russian Orthodox Cathedral in London (one relating to the London Parish, the other the London Diocese). Resolutions were passed at meetings of the relevant governing bodies following a split in the congregation that took place in the Spring of 2006. The dispute concerned the use of property and assets by the Parish and Diocese in accordance with the terms of two trust deeds. The Commission consented to both charity proceedings in October 2007³²⁹ and the matter came before the court for trial in February 2009.³³⁰ The court heard evidence relating to the changes of the make up of the parish and those persons worshipping at the Cathedral, with one section

³²⁴ *ibid* [50].

³²⁵ *Ali v Rauf* [2006] EWHC 3420 (Ch).

³²⁶ *ibid* [40].

³²⁷ *ibid* [44].

³²⁸ *Dean v Burne and Dean v Bowlby* [2009] EWHC 1250 (Ch).

³²⁹ *ibid* [81].

³³⁰ *ibid* [86].

leaving to worship elsewhere. The matter turned on whether the valuable assets of the charity should follow the worshippers or should remain with the parish for the use of new parishioners. It was held that the latter was the correct interpretation.

This case highlights the length of time that a case can take to be heard by the courts, and the breadth of circumstances that can be classed as charity proceedings. As has been seen in other cases, the Commission can be reluctant to intervene, and when it does intervene, it can issue its own orders to deal with the dispute at hand. Here, it chooses to allow the dispute to proceed to court when it could have considered, for example, making a reference to an expert or arbitrator as to the proper meaning of the relevant provisions in the trust deeds. The court did not make any comment on the governance of the charity at all, since once the construction of the trust deed was settled, the governance arrangements for the trustees became clear.

A similar dispute³³¹ turned on whether one of the claimants was qualified to exercise a power conferred by the constitution of two charities to remove the defendants as trustees and replace them with other claimants. The Court of Appeal held that the:

... resolution of that issue depends on the religious beliefs and practices of Sikhs in general and the Nirmal Kutia Sikh institution in particular. The issue is not justiciable by the English courts. This does not depend solely on the construction of the trust deeds governed by English Law... The continuation of these proceedings will only inflict on them and their communities further waste of time and money in the fruitless pursuit of a judicial determination that cannot be made. Voluntary procedures are available through mediators, including specialists in disputes involving religious charities. Legal procedures may also be available through the scheme-making statutory powers of the Charity Commission. The present litigation has no realistic future in the courts and must be brought to a halt now.³³²

This may indicate a reluctance of the courts to specifically be involved in charity cases, or perhaps religious charity cases. Lord Justice Mummery sets out alternative dispute resolution procedures which would equally apply to other cases. No reference is made to the Governance Code as a framework for resolution of governance matters, and it

³³¹ *Khaira v Shergill* [2012] EWCA Civ 983, [2014] UKSC 33.

³³² *ibid* [77] – [79].

could be argued that the Governance Code is too generic to be of much assistance when dealing with matters of faith. However, the Supreme Court, on hearing the appeal, held that the dispute did not depend on the claimant's religious beliefs, but rather could be decided under standard trust law and contract law. The Supreme Court held that the charity proceedings should be allowed to proceed to trial but gave no indication on how the matter in dispute should be decided, referring the matter back to the High Court. After five years, the matter was settled (and not appealed) in a decision made by the High Court in March 2017, which found in favour of the claimants.³³³

In contrast, the court seems to have had no hesitation in deciding matters raised as charity proceedings for another faith based registered charity³³⁴ in 2012. Despite the Commission approving the charity's constitution on registration, and its meeting both claimants and defendants, the dispute between them escalated. The claimant applied for permission to commence charity proceedings, but the Commission refused. An application was made to the High Court, which was granted. The claimants then requested that the Commission appoint interim managers, which it did. The court was asked to consider whether the charity's governing document was the original constitution, or whether subsequent drafts had been approved by its membership and should supersede prior versions. The court held that the original constitution should apply to the charity and reminded all parties:

Nothing is to be gained, and much is to be lost, not merely to the Charity but for all Alevis by continuing the state of war within the community which has existed since May 2009.³³⁵

The Commission had set out its view on the matter in a letter to all parties, and the court's decision concurred with the Commission's view that the original constitution applied to the charity. It therefore appears that, although the charity proceedings were not a formal appeal by the claimants against the Commission's view, that is what it became: the claimants did not concur with the Commission's view, applied for

³³³ *Shergill v Khaira* [2017] EWHC 883 (Ch).

³³⁴ *Cifci v Erbil* [2012] EWHC 3170 (Ch).

³³⁵ *ibid* [70].

permission to take the matter to court, and when the Commission refused consent, took the matter to court in any event. This would seem to be an example of the fine filter that the courts profess to apply to such cases failing to prevent one faction within a charity from extending a 'state of war' for years.

In some instances, the courts will proceed to deal with a dispute, even if Commission consent has not been sought, and without any preliminary filter being considered as to whether the proceedings should be allowed.³³⁶

Cases before the courts also include those brought by interpleaders. For example, Southampton City Council brought a claim because it wanted to know to whom it should convey land under a building agreement.³³⁷ Here, two rival trusts were of the view that each was the correct party to take control of the Southampton Medina Mosque land and buildings. It is not clear from the report of the case whether the Commission's consent was given to charity proceedings, or to a declaration in relation to a disposition of the land held on trust under a building agreement.³³⁸ The court noted the lack of proper minutes and records of the trust, which contributed to the disagreements, and which seem to have contributed to the doubt as to who represented the organisation that was due to receive the land from the Council. That lack of transparency, regardless of the basis of the case, must be seen to be a failure of governance, and the Governance Code would have been relevant to the discussions before the court.

The lack of clarity in the case report as to the involvement of the Commission, and the relevant statutory provisions, means that there is a lack of transparency and certainty in relation to reported charity proceedings. It is not possible to tell from a review of the case reports whether cases such as this are governance disputes relating to the administration of the charity, or a dispute with a third party about a charity's transactions with a third party (in this case, Southampton City Council).

³³⁶ *Mohammed v Mohammed* [2018] EWHC 805 (Ch).

³³⁷ *Southampton CC v Southampton Medina Mosque Trust Ltd* [2010] EWHC 2376 (Ch).

³³⁸ Charities Act 1993, s 36.

That lack of clarity is also found in *Re Commonwealth Institute*³³⁹ where liquidators raised a number of administrative issues relating to the distribution of assets. These can be seen as governance issues and some relate to the disposal of land. The Attorney General and the Commission declined to take part in the court proceedings. It seems that the liquidators, as managers of the charity's assets, did not see themselves as subject to the charity proceedings filter, nor did the Commission see fit to intervene.

It is clear that charity proceedings can relate to disputes between a charity's membership and its trustees. In one case³⁴⁰ relating to the members of a charity that provides and manages a Sikh temple in Leicester, a dispute arose as to whether an invalid resolution purportedly passed by the members should be deemed to be binding on the trustees. A rule revision purported to change the time period after which existing memberships must be renewed, and the management of the admission of new members was alleged to have been faulty, in that 1200 new members were admitted, despite conditions of membership not being fulfilled. The court held that the revision had not been made in accordance with the charity's constitution, and that there was no estoppel or other reason that would mean that the proposed rule change should automatically apply in the future, when the charity's governing document already contains a mechanism for future review. It also held that, in the absence of allegations of impropriety, then the decision of the trustees not to draw the attention of prospective members to the conditions of membership cannot be challenged by the members.³⁴¹ Despite charity proceedings being defined as dealing with the administration of the trust, here the courts declined to regard an administrative matter as being relevant to the court, preferring instead for the membership to address the matter directly:

This is all a direct challenge, in my judgment, to the administrative arrangements that have been made by the defendants, and, in my judgment, is impermissible in the absence of an allegation of impropriety. If there is a criticism to be made, it is one that can be addressed by the amendment of the scheme that serves to set out prescriptively things like the language in which notices are to be given, and

³³⁹ [2014] EWHC 2218 (Ch).

³⁴⁰ *Marwaha v Singh* [2013] 2 EWCA Civ 1878.

³⁴¹ *ibid* [2013] 2 WLUK 445 [35].

advertisements and the terms of the forms that are to be used by the persons applying for membership. However, that is for the members to address by way of an amendment ballot and not for this court at any rate in these proceedings.³⁴²

On appeal³⁴³ the court held that it was possible for a court to intervene if the trustees have failed in their duty to take reasonable care, thus confirming the extent of the scope of charity proceedings to include not just cases of impropriety, but also to cases where trustees have acted unreasonably. The meaning of the constitution, and whether the purported trustees had been elected properly were considered in a later hearing,³⁴⁴ and what action should be taken to cure the defect required yet another judgment.³⁴⁵

The scope of the proceedings is relevant. It seems that cases can be heard and decided upon, and only later deemed to be charity proceedings on appeal.³⁴⁶ It is therefore perfectly possible for the courts to consider a dispute relating to a charity's governance, without any consideration of whether the matter has been properly authorised by either the Commission or the court. In this case, a disputed election to the Korean Residents Society lead to costs orders, which on further consideration by the courts revealed the lack of authority for the original proceedings. Although it was common ground between the parties that the lack of consent did not mean that the original proceedings were a nullity³⁴⁷ it introduces another aspect of uncertainty as to nature of governance proceedings before the courts.

Charity proceedings can also relate to the interpretation of a charity's constitution and whether actions taken are in breach of a constitution's provisions. In *Rai v Ahir*³⁴⁸ the courts were asked to decide whether newspaper notices relating to elections were unconstitutional. The court held that its role was not as an appeal court to decisions made by an executive committee if acting clearly and demonstratively within their

³⁴² *ibid* [35].

³⁴³ *ibid* [39].

³⁴⁴ *Sandu v Singh* [2018] EWHC 712 (Ch).

³⁴⁵ *Sandu v Singh* [2018] EWHC 841 (Ch).

³⁴⁶ *Park v Cho* [2014] EWHC 55 (Ch).

³⁴⁷ *ibid* [16].

³⁴⁸ [2014] EWHC 2299 (Ch) [41] – [54].

charity's rules.³⁴⁹ In *Trustees of the Celestial Church of Christ, Edward Street Parish v Lawson*³⁵⁰ the court was asked to decide what amounted to the charity's constitution, and whether the parochial committee had power to remove a de facto trustee. In hearing a preliminary issue in *Bisrat v Kebede*³⁵¹ the court held that the proper approach is to 'ascertain what the words used would have meant to a reasonable person who has all the background knowledge that would have been available to the parties in the situation that they were at the time of the relevant document'.³⁵² A failure to follow (even a poorly worded) constitution does not prevent a charity from existing, and its trustees from being responsible for its governance:

Despite the various failures of the charity trustees over many years to comply with the [constitution], the [charity] unquestionably exists as a body of members, with charitable objectives and with income received and assets held in trust to support the carrying out of those objectives. But those failures have led to this prolonged and costly dispute between members. It is necessary, therefore, for the good of the charity for steps to be taken by the current charity trustees to remedy those failures and to consider ways to improve governance in the future to ensure that the charity in the future is properly administered in accordance with its objectives. That may involve improving and updating the [constitution] or even adopting a new constitution and possible even a new legal form.³⁵³

This is the closest recommendation found in the reported cases that the courts make to a governance review.

Where there is doubt as to who are the properly appointed trustees, charity proceedings are relevant, and the courts can order interim injunctions before the Commission has had an opportunity to review any application for consent for charity proceedings³⁵⁴ and enforcement action for any failure to abide by a court injunction.^{355 356}

³⁴⁹ *ibid* [53].

³⁵⁰ [2017] EWHC 97 (Ch).

³⁵¹ [2017] EWHC 2123 (Ch).

³⁵² *ibid* [54].

³⁵³ *Latify v Alummyar* [2017] EWHC 3053 (Ch) [120].

³⁵⁴ *Choudhury v Stepney Shahjalal Mosque & Cultural Centre Ltd* [2015] EWHC 743 (Ch).

³⁵⁵ *Bisrat v Kebede* [2015] EWHC 840 (Ch).

³⁵⁶ *Bisrat v Kebede* [2015] EWHC 3166 (Ch).

5.6 Governance and charity membership

All charity structures other than trusts have a membership. The members have ultimate control over their charity, with power to appoint and remove trustees, and to alter the charity's constitution. Members of a charitable incorporated organisation must act in the best interests of their charity.³⁵⁷ As noted above, there is doubt as to whether the same duty exists for other charitable structures. Whether or not the same duty applies to members of a charitable company was considered in *Children's Investment Fund Foundation (UK) v A-G*.³⁵⁸ Here, the court was asked to approve a \$360million grant by one charity to another, which could be seen to be a payment for loss of office which requires the consent of the charity's members. The Commission approved the case as charity proceedings, even though the trustees themselves were not in deadlock and were not acting outside of their powers.³⁵⁹ The court considered whether the two trustees who were also members should be deprived of their right to consent to the payment of the grant due to the potential conflict of interest or due to contractual promises made in grant arrangements, and (finding that there were so deprived) whether the independent member owed a fiduciary duty to the charity.³⁶⁰ In confirming a fiduciary duty, the court took note of the Charities Act 2011 definition of a charity as an organisation that 'falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities'³⁶¹ and its definition of charity trustees as 'the persons having general control and management of the administration of the charity'.³⁶² Although the court held that members are not charity trustees, it held that they owe a fiduciary duty:

... the members of [the charity] do not stand outside the charity; they are part of the administration of the charity, and they cannot lay claim to any private interest ... It would be contrary to the whole regime established by the increasingly prescriptive legislative regime reflected in the Charities Act 2011 if the member of

³⁵⁷ Charities Act 2011, s 220.

³⁵⁸ [2017] EWHC 1379 (Ch).

³⁵⁹ [2017] EWHC 1379 (Ch) [69].

³⁶⁰ *ibid* [137] – [146].

³⁶¹ Charities Act 2011, s 1.

³⁶² Charities Act 2011, s 177.

a company such as [the charity] could vote in his own interests or in a manner detrimental to the charitable objects of the company.³⁶³

The independent member appealed³⁶⁴ arguing that he was not subject to a fiduciary duty, but the Court of Appeal disagreed:

... a member of [the charity] owes, in our view, a duty corresponding to that specifically imposed on members of CIOs by section 220 of the Charities Act 2011. In other words, the member must exercise the powers that he has in that capacity in the way that *he* decides, in good faith, would be most likely to further the purposes of [the charity].³⁶⁵

The case is subject to appeal to the Supreme Court.³⁶⁶

The Governance Codes do not address the obligations of membership, and how a charity may wish to address the undoubted duty of a CIO's member's fiduciary duty, and the presumed duty of a charitable company's member's duty. Nor does it distinguish between different types of structure for charity (only seeking to distinguish by size).

5.7 Governance Codes and the Charity Tribunal

The Charity Tribunal hears appeals from decisions made by the Commission. Cases that may be heard by the Charity Tribunal do not include reviews of whether or not the Commission should grant consent to charity proceedings.³⁶⁷

5.8 Conclusion

No references to the Governance Codes or the Hallmarks were found in any case report within the search parameters. This may be due to the nature of cases that make their way to the courts, which, by definition must be those that the trustees and the Commission have been unable to resolve informally. It may also be due to the nature of disputes heard at court, which relate to more fundamental administration issues, rather than the nuances of good practice. It is perhaps surprising that, in considering whether

³⁶³ *ibid* [145].

³⁶⁴ *Lehtimaki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605.

³⁶⁵ *ibid* [48].

³⁶⁶ *Lehtimaki v Children's Investment Fund Foundation (UK)* (SC, 11 February 2019).

³⁶⁷ Charities Act 2011, sch 6.

a board has acted appropriately, not one judge has seen fit to use the Hallmarks or the Governance Code as a measure of trustee compliance with their fiduciary duties.

This compares to frequent references to other codes of practice, including professional codes such as the Solicitor's Code of Conduct³⁶⁸ and those of membership organisations.³⁶⁹ It also compares unfavourably to the use of the courts of the UK Corporate Governance Code (previously known as the Combined Code) which sets out the obligatory standards of good practice for listed companies on governance matters.³⁷⁰

Even within the charity sector, there is little reference in the relevant reported cases to SORPs in relation to the use of an industry standard code of accounting principles. A search of reported cases³⁷¹ found only two references.³⁷²

³⁶⁸ For a recent example, see *Blyth v Nelsons Solicitors Ltd* [2019] EWHC 2063 (QB).

³⁶⁹ For a recent example, see *Trail Riders Fellowship v Hampshire CC* [2019] EWCA Civ 1275.

³⁷⁰ For recent examples, see *Assetco Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) and *Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm).

³⁷¹ Search terms 'SORP' or 'Statements of Recommended Practice'.

³⁷² *Friends of the Earth Trust Limited v The Commissioners for HMRC* [2016] UKFTT 0411 (TC) and *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch).

CHAPTER 6 THE GOVERNANCE CODE AND REFORMING BODIES

6.1 Introduction

In considering how the law may evolve to take account of the Governance Codes, the work of the relevant government departments, the House of Parliament's Select Committees and the work of the Law Commission was considered, being the bodies most likely to be involved in changes in the laws of England and Wales.

At the time that the 2005 Code was published, the Charities Bill was being debated in Parliament. The Cabinet Office was responsible for matters relating to charity law, including the progress of the bill in both houses. In 2010, responsibility passed to a new post in the Cabinet Office, the Minister for Civil Society.³⁷³ In 2016, responsibility moved to the Department for Digital, Culture, Media and Sport (as the department is now known) with the creation of a Parliamentary Under Secretary for Civil Society. The post is currently held by Baroness Barran MBE³⁷⁴ who is in charge of the Office for Civil Society. One of her responsibilities is to 'enable a strong regulatory environment with a capable and well-resourced Charity Commission in place'.³⁷⁵

Select Committees work in both of the United Kingdom's House of Parliament. There is a Commons Select Committee for each government department tasked with examining spending, policies and administration. Other Select Committees (of both houses) have remits that cover more than one department's work, or narrow scopes to focus on a specific area of concern.

³⁷³ 'Parliamentary Secretary (Minister for Civil Society)' (*Cabinet Office*, undated) <www.gov.uk/government/ministers/parliamentary-secretary-minister-for-civil-society> accessed 30 September 2019.

³⁷⁴ 'Parliamentary Under Secretary of State (Minister for Civil Society and DCMS)' (*Office for Civil Society*, undated) <www.gov.uk/government/ministers/parliamentary-under-secretary-of-state-68> accessed 30 September 2019.

³⁷⁵ 'About us' (*Office for Civil Society*, undated) <www.gov.uk/government/organisations/office-for-civil-society/about> accessed 30 September 2019.

6.2 The Cabinet Office

The 2006 Act required (at section 73) for the Secretary of State (then, the Minister for the Cabinet Office) to appoint a person to undertake a review of the Act, who must prepare a written report to be laid before parliament. The review was to report on the operation and effectiveness of the Act, and to consider whether any further changes should be made to improve the legal and regulatory framework for charities.³⁷⁶ Lord Hodgson of Astley Abbots was appointed as Reviewer on 8 November 2011, and his report was published in July 2012.³⁷⁷ The 2006 Act was unusual in including a mechanism for review.³⁷⁸

As noted above, the Governance Codes are not mentioned in the 2006 Act. That may have been a factor of timing: The Act, although passed in 2006, was drafted in 2004, based on a review that took place well before the first iteration of the Governance Code was created. However, it comes as a surprise that the Report only mentions governance of charities once,³⁷⁹ and no recommendations are made in relation to governance arrangements for charities.

Lord Hodgson is clear that all charities must comply with the law, and that they should also 'provide enough information for the public to be able to decide whether to support them'.³⁸⁰ Transparency is a recognised tenet for governance, and features in all versions of the Governance Code. It can also be seen in some of the provisions of the 2006 Act, including making charity annual accounts and reports available to the public on request.³⁸¹

However, the Report goes further:

But perhaps the privilege of being a charity involves a more demanding and less easily defined duty ... charity trustees have a moral responsibility to put the assets

³⁷⁶ Lord Hodgson of Astley Abbots, *Trusted and independent: giving charity back to charities* (The Stationery Office 2012).

³⁷⁷ *ibid.*

³⁷⁸ *ibid* 6.

³⁷⁹ *ibid* 67.

³⁸⁰ *ibid* 22.

³⁸¹ Charities Act 2011, ss 171 and 172.

and income raised to pursue their objectives to the best use that is reasonably possible rather than settling for minimum compliance ... anecdotal evidence suggests that there are a considerable number of moribund and semi moribund charities whose assets could be more productively deployed.³⁸²

Lord Hodgson therefore sees the aspects of leadership and governance of charities, or at least the obligation to make the best use of a charity's assets, to be a moral responsibility. He warns of the risk of political micro-management and the need for charities to be seen to be independent, recommending a clear, flexible regulatory framework and effective guidance.³⁸³

The Report sets out the duties of charity trustees in a similar manner as has been discussed above. Hodson chooses to set out a general duty to act in the best interests of a charity (and its beneficiaries), and five broad duties:

- 1 Ensuring the charity complies with charity law, the charity's own governing document, and other relevant legislation (e.g. employment law, health and safety etc);
- 2 Acting with integrity, avoiding conflicts of interest and misuse of funds;
- 3 Ensuring the charity remains solvent, and exercising prudence when investing the charity's money or borrowing on its behalf;
- 4 Using the charity's funds and assets responsibly to further the charity's aims, without exposing them to undue risk;
- 5 Using reasonable care and skill in their work, seeking professional advice where appropriate.³⁸⁴

The Report focuses on the potential risks of conflicts of interest in allowing payments for trustees, recommending that, by default, small charities should only be allowed to pay their trustees with the consent of the Commission, and the default reversed for

³⁸² *Trusted and independent* (n 376) 22.

³⁸³ *ibid* 24.

³⁸⁴ *ibid* 34.

large charities, presumably on the basis that larger charities will have the resources to comply with clear disclosure requirements.³⁸⁵

The Report also refers on the recruitment and term of office for trustees.³⁸⁶ Having set out specific reasons for good governance, Hodson does not recommend the adoption of a Governance Code, but does suggest that the Commission could publish key indicators to identify charities at higher risk of failure to meet legal obligations.³⁸⁷ That recommendation has not been taken up, perhaps because of the difficulty of expressing all of the legal obligations of charities, and deciding on the indicators of failure. It could be argued that, since good governance should reduce the risk of failure, a requirement to comply with a concise governance code could well assist to put this recommendation into effect.

The government responded to the Hodgson Report in September 2013. It did not accept the recommendation to allow larger charities to pay their trustees. The government undertook to review progress and to respond by September 2014.³⁸⁸ That review, led by PWC reported in 2014 and made recommendations that the fundraising regulators should work closer together.³⁸⁹

The Cabinet Office also undertook a specific review of charitable fundraising, announced in July 2015. Sir Stuart Etherington was appointed to chair a cross party review group and was tasked to make recommendations on the workings of the sector's self-regulation of fundraising. Most of the recommendations set out in his report relate to the work of the fundraising regulators, rather than the work of charity trustees.³⁹⁰ However, in considering the responsibilities of trustees and CEOs, reference is made to

³⁸⁵ *ibid* 39.

³⁸⁶ *ibid* 40.

³⁸⁷ *ibid* 123.

³⁸⁸ *ibid* 5.

³⁸⁹ 'Sustainability of fundraising self-regulation' (*Price Waterhouse Coopers*, July 2014) <pwc.blogs.com/files/sustainability-of-fundraising-self-regulation-summary-final-17-7-14.pdf> accessed 30 September 2019.

³⁹⁰ *Regulating fundraising for the future* (n 232).

the Commission's guidance on charities and fundraising, but not to the Governance Code.³⁹¹

6.3 Select Committees

Following publication of the Hodgson Report in July 2012, the Public Administration Select Committee (PASC) announced its intention to conduct an inquiry into the 2006 Act and four additional specific areas of concern.³⁹² The PASC published its report in June 2013.³⁹³

Although governance is a subject regularly discussed in the evidence the PASC heard, it is a word that is not used at all in its 2013 Report. That said, two sections of its report address governance concerns: fundraising and payment to trustees. In relation to the former, PASC recommends that no action be taken in relation to the statutory regulation of fundraising³⁹⁴ preferring to support the sector supported self-regulation, at least for a five-year period. In relation to the latter, PASC concluded that there should not be an automatic right for large charities to pay trustees, but rather to continue with the current case by case authorisation by the Commission.³⁹⁵

The Public Administration and Constitutional Affairs Committee (PACAC) launched an inquiry to examine the regulation of charity fundraising and the way that trustees of large charities govern fundraising. It published its report in January 2016.³⁹⁶ In common with the Etherington Review, PACAC were concerned about allegations made in the press that the sub-contractors of national charities were using exploitative and unethical fundraising methods. The Report concluded that charity trustees had 'failed in their duty

³⁹¹ *ibid* 61.

³⁹² House of Commons Public Administration Select Committee, *The Role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006* (HC 2013-14, 76) 6.

³⁹³ *ibid*.

³⁹⁴ *ibid* 39.

³⁹⁵ *ibid* 42.

³⁹⁶ House of Commons Public Administration Select Committee, *The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators* (HC 2015-16, 431).

to extend their governance to fundraising, particularly in the management of sub-contractors'.³⁹⁷ PACAC's Report recognises that:

Trustees are ultimately responsible for every aspect of their charity's activity, including fundraising. No system of regulation can be a substitute for effective governance by trustees. Good governance in general is about sustainability of reputation in the long-term, as well as the sustainability of finances... Trustees must have the right skills, information and attitude to prevent poor practice in the future.³⁹⁸

As would be expected of a report into fundraising, no specific mention of the Governance Codes is made, but many references are made to the Fundraising Code. At the time of the public outcry (May 2015) both a version of the Governance Code and the separate fundraising code existed, but yet the failures in governance still occurred. The Report states that trustees failed to understand that 'their primary role is governance' and failed to therefore manage reputational risk.³⁹⁹

The 2010 Code, at Principal 4, makes it clear that the trustees must ensure that the organisation understands and complies with all legal and regulatory requirements that apply to it, and that the use of delegated authority is properly supervised. However, PACAC's Report goes on to say that:

All the chief executives of the charities that gave oral evidence to us admitted that they did not scrutinise fundraising sub-contractors enough. The only possible conclusion is that, by failing in this responsibility, trustees were either negligent, or wilfully blind to what was being done in their names.⁴⁰⁰

Here, the Report seems, to some extent, to confuse leadership and governance. A trustee is unable to take action if those who are charged with the day to day operation of a charity fail to fulfil their role. An alternative conclusion may well be that trustees delegated the responsibility of fundraising to their chief executives, but their chief executives (and their teams) failed to manage that delegated authority properly. In any event, the Report did not recommend that the Governance Code (or any other code) be

³⁹⁷ *ibid* 3.

³⁹⁸ *ibid* 3.

³⁹⁹ *ibid* 13.

⁴⁰⁰ *ibid* 13.

adopted by trustees, or that the Governance Code, or any other code should be altered to take account of the perceived failings. Instead, the Report recommended that:

...trustees need to take positive action to ensure that they are not blind to their charity's fundraising activity ... It is vital that these changes are effective so that trustees can have confidence in the methods and ethics of fundraising conducted on their behalf, whether by employees, volunteers or by contractors.⁴⁰¹

To some extent, the same can be said for any charity's scheme of delegation for any matter. The risks may not have been especially evident with fundraising contracts given the speed of change of the marketplace, and especially the availability of new technologies to harvest and use personal data. The 2017 Code reflects that overall requirement by recommending at para 4.5.4:

Where a charity uses third party suppliers or services – for example for fundraising, data management or other purposes – the board assures itself that this work is carried out in the interests of the charity and in line with its values and the agreement between the charity and supplier.

In February 2016, PACAC published another relevant report, which was instigated by the collapse of the charity, Keeping Kids Company⁴⁰² (also known as Kids Company). At this time, the 2010 Code was widely available, and yet this Report does not refer to it at all. Instead the Report refers to Charity Commission guidance when considering the failure of the trustees:

The Charity Commission's guidance to Trustees warns that Trustees should not allow their judgement to be swayed by personal prejudices or dominant personalities, but this is what occurred in Kids Company ... There was a clear link between the failure to correct serious weaknesses in the organisation, and the failure to refresh its leadership.⁴⁰³

⁴⁰¹ *ibid* 14.

⁴⁰² Public Administration and Constitutional Affairs Committee, *The collapse of Kids Company: lessons for charity trustees, professional firms, the Charity Commission, and Whitehall* (HC 2015-16 433).

⁴⁰³ *ibid* 23.

Failure to act in the best interests of the charity, and a failure to maintain a strategy for board renewal are both breaches of the 2017 Code⁴⁰⁴ and yet this is not highlighted by the Report. The Commission's own inquiry is yet to conclude its work, pending ongoing litigation.

The latest Report published by a Select Committee is called *Stronger charities for a stronger society*.⁴⁰⁵ The committee started its work in May 2016 'to consider issues related to sustaining the charity sector and the challenges of charity governance, and to make recommendations'.⁴⁰⁶ The Report is the first to expressly refer to the Governance Code.⁴⁰⁷ It summarises its history and notes that the code is 'the *de facto* standard for the sector'.⁴⁰⁸ The Committee endorses the Commission's decision to refer to the Governance Code as the 'benchmark for governance in the charity sector'⁴⁰⁹ and the inclusion in the Governance Code of recommendations for appropriately resourced inductions for all new trustees.⁴¹⁰

The Report also notes that the Governance Code proposes that trustees should be appointed for fixed terms, and that no trustee should serve for more than nine years without board review.⁴¹¹ The Commission is tasked with updating its model constitutions to include a suggestion of time limits. At the time of writing, this has not been done.

The Committee also recommends that the Governance Code sets out the 'importance of executive and trustee relationships and the clear separation of their roles and responsibilities'.⁴¹² Although the latest edition does provide guidance on the supervision of a charity's executive, no specific mention is made of the recommended clear

⁴⁰⁴ 2017 Code (n 17) Principles 5 and 3 respectively.

⁴⁰⁵ Select Committee on Charities, *Stronger charities for a stronger society* (HL 2016-17 133).

⁴⁰⁶ *ibid* 6.

⁴⁰⁷ *ibid* 21.

⁴⁰⁸ *ibid* 22.

⁴⁰⁹ *ibid* 23.

⁴¹⁰ *ibid* 27.

⁴¹¹ *ibid* 29.

⁴¹² *ibid* 33.

separation of the two roles. The 2017 Code recommends in its introduction that charities should publish a statement relating to their use of the Governance Code, which was also a recommendation of the Committee,⁴¹³ and that (as per Principle 7 recommended practice) charities should provide regular information to stakeholders to enable third parties to measure the charity's success.⁴¹⁴ The Report does not go as far as recommending that charities are obliged to follow the Governance Code, but by including the Governance Code in its considerations, and referencing it in some of its recommendations, the Committee shows some recognition of its value to the sector.

6.4 Office for Civil Society

On 9 August 2018 the Office for Civil Society published the government's policy paper containing its strategy for working with and supporting civil society, a phrase it uses that includes the charity sector. The policy contains five chapters, the third of which contains information pertinent to charities and social enterprises.⁴¹⁵ Although the policy document does not refer to the Governance Code itself, it does recognise the importance of leadership and governance. It states in the introduction to chapter 3:

In particular the government is keen to work alongside the social sector to realise a future in which organisations are able to adapt and thrive, strengthen public trust and find new ways to resource and deliver their missions. This includes all in the sector feeling that their voice is respected in policy debates, where there is strong support available and ongoing and effective investment in leadership and governance.⁴¹⁶

Further, each chapter contains 'Missions', as a way to describe future commitments. Mission Eight relates to leadership, support and regulation. The government concludes that a number of sector led efforts are underway to strengthen governance (one of which could be the Governance Code). It commits to two actions:

⁴¹³ *ibid* 37.

⁴¹⁴ *ibid* 40.

⁴¹⁵ 'Civil Society Strategy: building a future that works for everyone' (DCMS, 9 August 2018) <www.gov.uk/government/publications/civil-society-strategy-building-a-future-that-works-for-everyone> accessed 30 September 2019.

⁴¹⁶ *ibid* 69.

The government will convene key civil society stakeholders over the next year, to explore the potential for a common vision and mission for strengthening the leadership of social sector organisations and the potential for specific government interventions. The government will work with civil society stakeholders and the Charity Commission to explore and agree on collective action to open up trusteeship to people from different backgrounds and with a broad range of skills, and encourage more young people under the age of 30 to become trustees.⁴¹⁷

At the time of writing, there is no public announcement from the government concerning the convening those stakeholders. In correspondence with the author, DCMS confirms that research has started in the ‘policy area, ascertaining from key stakeholders the major challenges in the sector, models that work, barriers to development, and future opportunities’.⁴¹⁸

6.5 The National Audit Office

The National Audit Office is an independent body that scrutinises public spending for Parliament. A search of its publications⁴¹⁹ found one reference to the Governance Code, in relation to its report on the Government’s Motability Scheme.⁴²⁰ The Scheme is run by a registered charity, Mobility. The Report compares the average tenure of the charity’s trustees of 18 years, with the recommended maximum tenure of nine years in the Governance Code.⁴²¹ Following the review, the charity’s solicitors used the Governance Code to benchmark its practice, and the Report records that 44 recommendations were made to address the issues raised.⁴²²

⁴¹⁷ *ibid* 77.

⁴¹⁸ Letter from Rebekah Forty, Ministerial Support Team to author (03 September 2019).

⁴¹⁹ <www.nao.org.uk/site-search/#stq=%22charity+governance+code%22&stp=1> accessed 14 January 2019.

⁴²⁰ National Audit Office, *The Motability Scheme Report (NAO, 30 November 2018)* <www.nao.org.uk/wp-content/uploads/2018/12/The-Motability-scheme.pdf> accessed 30 September 2019.

⁴²¹ *ibid* para 3.8.

⁴²² *ibid* para 3.26.

6.6 The Law Commission

The Law Commission is the statutory independent body created by the Law Commissions Act 1965 tasked with keeping the law of England and Wales under review and to recommend reform. If any further legislation is planned to take account of the Governance Code, it is likely to be in response to a Law Commission recommendation.

The Law Commission has undertaken one review relating to charity law since 2005. It resulted in the publication of two papers, the first relating to social investments by charities⁴²³ and the second covering all other aspects of its review.⁴²⁴

The first Report makes no reference to the Governance Code, but it does recognise that the Law Commission's proposed new power for trustees to make social investments must relate to a trustee's duties in much the same way as all other duties:

Accordingly, the power must be exercised in the best interests of the charity, for proper purposes, and in accordance with the charity trustees' fiduciary duties; charity trustees must consider the Charity Commission's guidance on public benefit; and charity trustees must not confer unlawful private benefit on third parties.⁴²⁵

Regulations relating to social investments were included by the government in the 2016 Act.

The second Report notes the existence of the Governance Code when considering whether charities governed by statute or royal charter would benefit from guidance in relation to the process of amending their constitutions.⁴²⁶ It also notes that the Governance Code recommends that trustees consider the benefits and risks of partnership working, merger and dissolution.⁴²⁷

⁴²³ Law Commission, *Social Investment by Charities: The Law Commission's Recommendations* (September 2014).

⁴²⁴ Law Commission, *Technical Issues in Charity Law (Law Com No 375, 2017)*.

⁴²⁵ *ibid* 10.

⁴²⁶ *ibid* 96.

⁴²⁷ *ibid* 268.

Throughout the second Report, the Law Commission refers to a trustee's fiduciary duty, a duty not to profit, to avoid conflicts of interest and to act even-handedly. In neither report does the Law Commission recommend any codification of those duties, nor the Governance Code, nor its adoption by the sector.

The government is yet to respond publicly to the second Report.

6.7 Conclusion

There have been several opportunities since the publication of the 2005 Code for Government, Select Committees and the Law Commission to review its effectiveness and usefulness, and whether the Governance Code should become a statutory recognised code of practice. None of those opportunities have been taken up.

However, in referring to the 2017 Code as a benchmark for the sector, a false sense of what the Governance Code's stated purpose may have been created: contrary to the previous editions, the current version is couched in terms that are aspirational, with a recognition that 'some elements of the Code will be a stretch for many charities to achieve'.⁴²⁸ To refer to an aspirational code as a benchmark may well cause some charities to lose faith in the governance of their activities, and cause trustees to fear that their fulfilment of their fiduciary duties do not go far enough.

⁴²⁸ 2017 Code (n 17) p1.

CHAPTER 7 THE GOVERNANCE CODE AND THE CHARITY SECTOR

7.1 Introduction

Having reviewed the impact of the Governance Codes on the law, this chapter reviews the impact of the Governance Codes on the sector, with special reference to recent attempts to deal with the Governance Codes' shortcomings.

The sector itself is of a broad nature. There are 168,186 charities registered with the Commission⁴²⁹ that have a total annual income of approximately £77bn.⁴³⁰ Nearly 40% of those registered charities have an annual income of under £10,000, and 1.3% have an annual income of £5m or more. Individuals in the United Kingdom support a broad range of charitable activities⁴³¹ including health and disability (25%); religious activities (19%); overseas aid and disaster relief (11%); animal welfare (8%); housing (7%); activities for young (9%) and old (4%) people; conservation (4%); sports, arts and recreation (3%), and education (2%). The Governance Codes therefore address both a very broad size of organisation and broad scope of objectives.

7.2 The Governance Code and annual reports

Trustees are described by the Commission as its first line of defence against mismanagement in charities, with the sector's auditors and independent examiners being the second.⁴³² In its most recent benchmark of charity accounts, the Commission found that of the 96 charities sampled with an annual income of over £1m (who are subject therefore to full audit), only 76% of the filed accounts met with their external

⁴²⁹ 'Recent charity register statistics: Charity Commission' (*The Commission*, October 2018) <www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission> accessed 30 September 2019.

⁴³⁰ *ibid.*

⁴³¹ 'CAF UK Giving (2019)' (*Charities Aid Foundation*, 2019) 14 <www.cafonline.org/about-us/publications/2019-publications/uk-giving-2019> accessed 30 September 2019.

⁴³² 'Accounts monitoring review: auditors' and independent examiners' compliance with their responsibilities' (*The Commission* 2019) 1 <www.gov.uk/government/publications/accounts-monitoring-review-auditors-and-independent-examiners-compliance-with-their-responsibilities> accessed 30 September 2019.

scrutiny benchmark, with the percentage falling to 37% for the 100 charities sampled with an annual income of between £25,000 and £250,000 which are subject to independent examination.⁴³³ Although not named, one sampled charity had appointed one of its trustees to complete its independent examination in clear breach of duties.

It would therefore seem that a significant proportion of those professionals with the responsibility of checking financial and governance compliance for charities fail to identify breaches of their client's reports and accounts. In a similar way, recent research has shown that almost 96 per cent of declarations by small charities that their accounts are 'qualified' by their independent examiner or auditor are erroneous.⁴³⁴

7.3 The prevalence of the Governance Code

There has been little in the way of published research to measure the take up of the Governance Code so far. No peer reviewed research was found in literature searches. One small industry study has been published, by auditor RSM.⁴³⁵ It sampled 85 registered charities with annual incomes in excess of £5m. Since these large charities make up less than two per cent of the total number of registered charities,⁴³⁶ and larger charities are obliged to engage with auditors to assist with their reporting, it is perhaps unwise to extrapolate RSM's findings to the whole of the sector. Their report shows that approximately 44% of the charities analysed acknowledged the Governance Code in their annual reports. They also found that 30% of the annual reports failed to outline their review processes for executive appointments; 20% of charities had board members with unexplained tenures of over nine years; 11% did not disclose senior staff remuneration levels, and 78% did not have a diversity statement on their websites.⁴³⁷ RSM categorises as these failures as being breaches of the Governance Code.

⁴³³ *ibid* 2.

⁴³⁴ Juliet Kemp and Gareth Morgan, 'Incidence and perceptions of "qualified" accounts filed by small charities' (2019) 43(1) Accounting Forum 62.

⁴³⁵ RSM, *Decoding The Charity Governance Code* (March 2019).

⁴³⁶ *Recent charity register statistics* (n 429).

⁴³⁷ *Decoding The Charity Governance Code* (n 435) 12.

Compliance with professional codes of practice, trade associations rules and voluntary codes can be indicated to the public by a badge or logo. The Solicitors Regulatory Authority, for example, have mandated the use of a digital badge on all regulated firms' websites from November 2019.⁴³⁸ Similarly, the Fundraising Regulator allows those who register with the Regulator (as opposed to those who comply with the Fundraising Code) to use the fundraising badge to use on websites and fundraising material.⁴³⁹ However, use of the fundraising badge is not compulsory, with a 2017 study reporting only 18 of the largest 100 charities displaying the badge on their charity's website's homepage.⁴⁴⁰ A 2019 survey of the public found that only seven per cent of those surveyed were aware of the Fundraising Regulator.⁴⁴¹ If the Governance Code is to become publicly recognised as a tool for good governance, then it too needs greater sector support and a way of quickly and easily identifying which charities have adopted it.

Given the relatively low compliance rates with the Commission's benchmarks by charity auditors and external examiners, there is a risk that the reputation of the sector is damaged if Governance Code adoption rates are low, or if those charities who adopt the Governance Code report a high failure rate to follow its suggested protocols and procedures, or those who audit compliance are not sufficiently skilled in governance mechanisms to tell whether or not the Governance Code has been breached.

⁴³⁸ 'Clickable logo' (*Solicitors Regulation Authority*, undated) <www.sra.org.uk/solicitors/resources/transparency/digital-badge> accessed 09 September 2019.

⁴³⁹ 'Registration' (*Fundraising Regulator*, undated) <www.fundraisingregulator.org.uk/registration> accessed 09 September 2019.

⁴⁴⁰ Hugh Radojev, 'Just 49 of top 100 charities display Fundraising Regulator logo on website' (*Civil Society*, 5 July 2017) <www.civilsociety.co.uk/news/18-of-top-100-fundraising-charities-displaying-fundraising-regulator-logo-on-homepage.html> accessed 09 September 2019.

⁴⁴¹ Neil Caffery, 'The role of the Fundraising Regulator: public awareness, trust and expectations' (*Fundraising Regulator* 2019) <www.fundraisingregulator.org.uk/sites/default/files/2019-07/The%20role%20of%20the%20Fundraising%20Regulator%20public%20awareness,%20trust%20and%20expectations%202019.pdf> accessed 30 September 2019.

7.4 The Governance Code and ethics

In the Commission's most recent report on public trust in charities,⁴⁴² it concludes that charities are trusted less than the average person in the street. The Commission reiterates obligations to act 'to a high standard of compliant and ethical behaviour that that the public expects'.⁴⁴³ Of the factors that make charities trusted, its research shows that the most important qualities (in decreasing proportions) are low management charges, making a difference, honest and ethical fundraising, being well managed and being independent.⁴⁴⁴ Although it could be argued that if a charity is well managed, then it will have reasonable management expenses and make a positive difference, the research confirms that factors which make a charity trusted by the public include⁴⁴⁵ transparency (mean score 8.8) (which could be argued to be an element of good governance) and being well governed (mean score 8.3).

The Commission's focus on ethical behaviour is shared by NCVO which published a Code of Ethics to complement the Governance Code.⁴⁴⁶ The scope of the Ethics Code includes enabling charities '...to be a safe place for anyone who comes into contact with them'.⁴⁴⁷ Safety is an ethical concern and a moral good, but to what extent a code of ethics can practically enable safety is doubtful, which the Code itself acknowledges in stating that 'It does not provide a set of rules that prescribe how to act in all situations'.⁴⁴⁸

The Ethics Code sets out four principles, and each is briefly described in terms of what the charity 'should' achieve by following each principle. Further explanation is then provided by a set of operational statements that suggest how charities should uphold each principle.

⁴⁴² Trust in Charities (n 4).

⁴⁴³ *ibid* 2.

⁴⁴⁴ *ibid* 7.

⁴⁴⁵ *ibid* 8.

⁴⁴⁶ 'Charity Code of Ethics' (NCVO, 2019) <www.ncvo.org.uk/2-content/2314-charity-code-of-ethics> accessed 30 September 2019.

⁴⁴⁷ *ibid* 2.

⁴⁴⁸ *ibid*.

Given Principle 3 of the 2017 Code requires trustees to act with integrity and be aware of the importance of the public's trust in the sector, the need for a separate ethics code may be in doubt. There is a risk that, if there are too many codes, both trustees in particular and the public in general may become less willing to recognise the worth of code compliance.

7.5 The Governance Code and the digital age

In November 2018 a separate Charity Digital Code of Practice was published⁴⁴⁹ with the aim to 'help charities increase impact, develop skills and improve sustainability'. The Digital Code was created in response to an expressed wish for charities to increase their digital skills, and to foster a 'digital first culture where they can raise funds, awareness and connections online for the greatest impact'.⁴⁵⁰ It is designed to complement the Governance Code. It sets out seven principles for consideration if a charity wishes to develop its digital activity, the first of which, leadership, includes best practice statements for small and large charities for governance. Those statements reiterate the need for a board to have the relevant skills to understand digital resources, and the risks and costs associated with them.

The Digital Code is therefore more a framework for delivery of digital services and activities. It assumes that a charity complies with legal obligations such as data protection legislation, rather than creating a framework for observance. By separating digital delivery from more traditional methods, the Digital Code may assist a board to identify new opportunities and threats, but there is a risk, especially for smaller charities, that a focus on digital policies will divert the board away from considering charity wide risks.

⁴⁴⁹ 'The Charity Digital Code of Practice' (*DO-IT*, November 2018) <www.doit.life/charity-digital-code accessed> 08 September 2019.

⁴⁵⁰ Joe Lepper, 'Charity digital code of practice launches' (*Charity Digital*, 15 November 2018) <www.charitydigitalnews.co.uk/2018/11/15/charity-digital-code-of-practice-launches/> accessed 08 September 2019.

7.6 Beneficiaries and the Governance Code

The Governance Code was designed for use by charity trustees. As noted above, voting members of charities may also have a governance role,⁴⁵¹ but the Governance Code does not address that role.

Some charities, including the Terrence Higgins Trust, are considering whether governance should also extend to their beneficiaries and how to increase beneficiaries' involvement in the charity's activities.⁴⁵² The Governance Code assumes that all duties are owed to the beneficiaries, not owed by them. This is in contrast to the Cadbury Report, which acknowledges that shareholders have a governance role in appointing directors and auditors.⁴⁵³

7.7 Areas for development of the Governance Code

Those responsible for the Governance Code have announced that a consultation on potential changes to the Governance Code will take place in the autumn of 2019.⁴⁵⁴ Their stated areas for change include aligning its provisions with the revised Fundraising Code and revised SORP requirements. The review may also consider the benefits of considering elements of the Ethics Code referred to above,⁴⁵⁵ especially in light of updated workplace practices following the success of the Me Too movement, the recognition of the risk of bullying in the workplace, and the public's increased awareness

⁴⁵¹ Para 3.2 on page 32 and para 5.6 on page 80.

⁴⁵² Kate Plummer, 'Terrence Higgins Trust begins project to up beneficiary involvement in charities' (*Civil Society*, 9 January 2019) <www.civilsociety.co.uk/news/terrence-higgins-trust-unveils-project-to-make-charities-beneficiary-led.html> accessed 09 January 2019.

⁴⁵³ *Cadbury Report* (n 10).

⁴⁵⁴ Rosie Chapman, 'Some light refreshment' (*Rosie Chapman Ltd*, 7 August 2019) <<http://rosiechapmanltd.co.uk/some-light-refreshment/>> accessed 08 September 2019.

⁴⁵⁵ *Charity Code of Ethics* (n 446).

of the source of charitable funding, especially in relation to pharmaceuticals⁴⁵⁶ and climate change.⁴⁵⁷

7.8 Should the Code be mandatory?

Another large accountancy practice, Mazars, describes the rate of update for any type of volunteer code in any sector as ‘alarmingly low’⁴⁵⁸ but believes that:

Mandatory application would create a level playing field, making it possible to compare one organisation with another. In this new reality of ongoing scrutiny, it is vital, - not just for individual organisations but for the sector as a whole – to embrace that scrutiny... Mandatory codes, rules and regulations are the hallmarks of any regulated industry.⁴⁵⁹

It is possible to make the Governance Code mandatory, in the same way that compliance with the SORP is mandatory, and for the Commission to use its benchmarking expertise to report on the health of the sector going forward, if there were sufficient impetus either within the Government or the Commission.

7.9 Funders and the Code

As noted above,⁴⁶⁰ any organisation seeking public funding for sport and physical activity must demonstrate compliance with UK Sport’s Code⁴⁶¹ mandatory for funded organisations. Other funders seem to rely on the terms and conditions of their grant agreements to place specific or bespoke governance conditions on funded charities, rather than publish a pre-condition of governance compliance. This piecemeal approach

⁴⁵⁶ For example, the Sackler Trust: Frances Perraudin and Rupert Neate, ‘Sackler Trust halts new philanthropic giving due to opioid lawsuits’ *The Guardian* (London, 25 March 2019) <www.theguardian.com/uk-news/2019/mar/25/sackler-trust-halts-new-philanthropic-giving-due-to-opioid-crisis-lawsuits> accessed 30 September 2019.

⁴⁵⁷ For example, Shell: Nazia Parveen, ‘National Theatre to end Shell membership from next year’ *The Guardian* (London, 4 October 2019) <www.theguardian.com/stage/2019/oct/04/national-theatre-to-end-shell-sponsorship-deal-from-next-year> accessed 04 October 2019.

⁴⁵⁸ Aedin Morkan of Mazars Ireland, ‘Is it time to make existing Voluntary Codes Mandatory’ (2016) Vol 36 No 5 *Accountancy Ireland*, 55.

⁴⁵⁹ *ibid.*

⁴⁶⁰ Para 2.6.

⁴⁶¹ *A Code for Sports Governance* (n 81).

is likely to increase compliance costs for charities, who may have to report to different funders with different compliance requirements. A governance industry standard may therefore reduce governance costs overall.

7.10 Conclusion

The impact of the Governance Codes on the sector has yet to be measured comprehensively, and until a benchmark is achieved, it is difficult to identify whether it is of use to trustees and their charities. New schemes have been introduced to address perceived shortcomings in the Governance Code, and there is a risk that too many codes of practice may reduce the future impact of the Code.

With public perception of the charity sector in constant flux, it is necessary to find a way of expressing a governance code of practice that is sufficiently robust, but flexible.

Having reviewed the impact of the Governance Codes on the law and on the sector, the final chapter reviews the scale of the impact of the Governance Codes to date.

CHAPTER 8 CONCLUSION

The Governance Codes have been published for nearly 15 years, which could be said to be too short a period to see a large impact on charity law. However, this research has found no reference to the Governance Code in statute or case law.

The slow response could in part be due to the lack of a bedrock: there remains no universal definition of 'governance' or 'trustee duties'. This, in turn may be a function of a lack of a defined stakeholder for charities; the absence of a profit driven desire of shareholders of commercial companies, or an ambivalence as to whether codification of those trustees duties will make a practical difference.

Over the 15 year period, the focus for good governance has changed, with different codes of practice being issued and updated by different authors. That may be evidence of a flexible approach to governance, a lack of understanding of its remit, a lack of maturity in consideration of how to express governance, or even competition between would be market leaders in governance regulation or advice. It leaves the charity trustee with a choice of codes of differing length and detail, none of which purport to set out a comprehensive framework that will fulfil the relevant legal duties and obligations.

No charity law statute to date refers to charity governance, or the Governance Codes. It could be argued that the statutory position has become less clear during that period with the introduction of a new undefined statutory duty for CIO members to act in the best interests of their charity. No charity law court case refers to the Governance Code, despite other cases making reference to other obligatory and voluntary codes of practice.

The Commission, as the main regulator for the sector has withdrawn its own governance code of practice, and has failed to explain any link between its regulatory work and the Governance Code. It, in common with the other charity regulators, evidence an inconsistent publication of governance related case reports, inquiries and warnings that does little to promote good governance in general or the Governance Code in particular. Similarly, funders to the sector have no standard approach to governance, with only a

very small number promoting good governance by making funding requirements to comply with governance codes of conduct.

Reform in the future, and the adoption of the Governance Code by legislators, regulators and practitioners may be harder to achieve with no one body championing it. There is no easy way to measure a trustee's compliance with fiduciary duties over time against any of the published charity codes of practice. If anything, adoption and measurement is harder now, with the 2017 Code being expressed as an aspirational target, rather than a recognised achievable benchmark for the sector. There is no code of practice that addressed the potential duties of charity members or the possible involvement of charity beneficiaries in good governance practices.

Until such time that a sector wide benchmark is set, it seems unlikely that there will be any mandate to make compliance with the Governance Code mandatory.

It therefore seems reasonable to conclude that the Governance Code has made very little measurable impact on charity law, and that there are no codes of practice that set out a comprehensive framework to assist charity trustees to comply with their legal duties and obligations.

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APPENDIX A ABBREVIATIONS

1993 Act - Charities Act 1993

2005 Code - *Good Governance: A code for the voluntary and community sector* by ACEVO, Charity Trustee Networks, ICSA, and NCVO on behalf of The National Hub of Expertise in Governance (2005)

2006 Act - Charities Act 2006

2010 Code - *Good Governance: A Code for the Voluntary and Community Sector* (2nd edn, NCVO 2010)

2011 Act - Charities Act 2011

2016 Act - Charities (Protection and Social Investment) Act 2016

2017 Code - *Charity Governance Code* (3rd edn, NCVO 2017)

ACEVO - Association of Chief Executives of Voluntary Organisations

Cadbury Report - The Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on The Financial Aspects of Corporate Governance* (Gee 1992)

CIO - Charitable Incorporated Organisation

Commission - The Charity Commission for England and Wales, formerly the Charity Commissioners for England and Wales

FRSB - Fundraising Standards Board

Fundraising Code - The Code of Fundraising Practice originally published by the Institute of Fundraising and now published by the Fundraising Regulator

Governance Codes - The 2005 Code, the 2010 Code and the 2017 Code

Hallmarks - *The Hallmarks of an Effective charity* originally published by The Commission in April 2004

ICO - The Information Commissioner or the Information Commissioner's Office

ICSA - Institute of Chartered Secretaries and Administrators

NCVO - National Council for Voluntary Organisations

NOS - National Occupational Standard

PACAC - The Public Administration and Constitutional Affairs Committee

PASC - The Public Administration Select Committee

SORP - Statements of Recommended Practices

APPENDIX B LIST OF CONSULTED LITERATURE

Books, journals, articles, reports and online publications

-- *Halsbury's Laws* (5th edn, 2015) Vol 8

-- *On Trust: Increasing the Effectiveness of Charity Trustees and Management Committees* (NCVO 1992)

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Earl of Chester's Fund (14 February 2017)

Fresh Start Housing Ltd: (19 July 2017)

Giraffe Conservation Foundation (2 February 2017)

Imamia Mission London (UK) (5 September 2018)

Legatum Institute Foundation (1 June 2018)

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National Hereditary Breast Cancer Helpline (3 July 2017)

Oldham Owls Disability Sports Club (7 February 2017)

Our Brave Heroes (16 March 2017)

Oxfam (19 December 2017)

Plymouth Brethren Gospel Hall Trusts: group case report (29 August 2017)

Politics and Economics Research Trust: (9 February 2017)

Presidents Club Charitable Trust (12 July 2018)

Preston Down Trust (15 February 2016)

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RSPCA Tunbridge Wells and Maidstone Branch (5 July 2018)

Shoebboxes For Our Heroes (unregistered organisation) (19 October 2017)

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The Friends of Blencathra Ltd (13 March 2018)

Yorkshire Mesmac (24 August 2018)

APPENDIX E CHARITY COMMISSION INQUIRY CASE REPORTS

1st Knight Military Charity (4 September 2018)

Action Aid for Animals (30 April 2019)

Afghan Orphans (22 May 2017)

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Aid and Peace Trust (30 September 2019)

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Anatolia People's Cultural Centre (1 March 2018)

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Birmingham Diocesan Trust (3 September 2019)

Blunderbus Theatre Company (24 May 2017)

Bristol Sheltered Accommodation & Support Limited (25 September 2019)

Bunyan Playgroup (10 July 2017)

Busoga Association (UK) (14 June 2019)

Chesed Leyisrael Trust (3 May 2017)

Chesed Leyisrael Trust (20 June 2019)

Cylch Meithrin Trelai (18 April 2017)

Cymmer Workmen's Hall and Institute (18 July 2019)

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Essex Islamic Academy (6 September 2019)

Families for Survival UK & Save the Age Ltd (19 July 2018)

Fatimiyya Trust (1 August 2019)

Fazal Ellahi Charitable Trust (3 May 2019)

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Global Welfare Project (14 September 2018)

GO TV (26 January 2017)

Grangewood Educational Association (15 August 2019)

Great Yarmouth Schools and Business Partnership Ltd (19 May 2017)

Grove Mountain (20 September 2019)

Helping Hands for the Needy (13 February 2019)

Human Aid UK (3 March 2017)

Inquiry into a grant making charity (20 February 2018)

Ipswich Kurdish Islamic Cultural Centre (23 March 2017)

Islamic Global Trust (4 June 2019)

Islamic Trust (Maidenhead) (9 February 2018)

Keren Shmuel (11 May 2017)

Khalsa Missionary Society (24 March 2017)

Khatme Nubuwwat Centre (21 March 2019)

Kids Integrated Cancer Treatment (15 March 2017)

M B Foundation (8 February 2017)

MA 1985 (6 December 2018)

Maidenhall Community Pre-School (30 June 2017)

Manchester New Moston Congregation of Jehovah's Witnesses (26 July 2017)

Masoom (13 January 2017)

Meole Brace School Fund (1 February 2017)

Mesifita Talmudical College: 2017 Inquiry report (3 February 2017)

Nottinghamshire Miners Home (17 May 2019)

One Nation (8 March 2019)

Oxfam GB (11 June 2019)

Peacetrail (29 January 2018)

Rabia Educational Trust (23 June 2017)

Reagill Village Hall (31 January 2017)

Relief for Distressed Children and Young People (29 March 2019)

Royal Air Force mess charities (27 June 2019)

Save the Needy Worldwide (21 February 2019)

Syria Aid (3 May 2019)

Team Syria (13 September 2019)

The Apostolic Faith Mission International Ministries UK: 2017 Inquiry report (23 January 2017)

The Catalyst Trust (16 June 2017)

The Cup Trust: Charity Commission inquiry results (18 January 2019)

The Grail Trust (28 March 2017)

The Great Generation (7 December 2018)

The Islamic Educational Society of Blackburn (4 July 2019)

The Light (1 August 2019)

The Reb Moishe Foundation (27 February 2018)

The Rugby League Foundation (23 May 2017)

The Spiritualist Association of Great Britain (formerly The Marylebone Spiritualist Association) Ltd (30 March 2017)

The Suyuti Institute (19 March 2019)

The Veterans Charity (10 September 2018)

Urban Relief (31 January 2017)

Viva Palestina (6 June 2019)

VIZ-A-VIZ (27 June 2017)

West Monmouth School (24 July 2017)

Wolsey Charitable Trust (20 February 2017)

Worldwide Ummah Aid (16 April 2019)

APPENDIX F FUNDRAISING REGULATOR INVESTIGATION REPORTS

Brain Tumour Research (12 July 2018)

International Liberty Association (7 February 2019)

Neet Feet Ltd and Eight charities (24 November 2016)

The President's Club Charitable Trust (13 July 2018)

APPENDIX G FUNDRAISING REGULATOR INVESTIGATION SUMMARIES

Alzheimer's Society and REAL Fundraising (18 September 2019)

Associated Country Women of the World (18 September 2019)

East London Textiles, Leukaemia Care and Bliss (18 September 2019)

JustGiving (18 September 2019)

Macmillan Cancer Support (18 September 2019)

National Deaf Children's Society and Personal Fundraising Services (18 September 2019)

NSPCC and Clothes Aid (18 September 2019)

NSPCC and Clothes Aid (18 September 2019)

The Salvation Army (18 September 2019)

Transformation for Veterans and ECS Textiles (18 September 2019)

APPENDIX H STATUTES AND STATUTORY INSTRUMENTS

British Museum Act 1963

Charitable Trusts Act 1853

Charities Act 1992

Charities Act 1993

Charities Act 2006

Charities Act 2011

Charities Procedure Act 1812

Charities (Protection and Social Investment) Act 2016

Companies Act 2006

Data Protection Act 2018

Equality Act 2006

Equality Act 2010

Finance Act 2010

Freedom of Information Act 2000

Housing Association Act 1985

Law Commissions Act 1965

Mental Capacity Act 2005

Mental Health Act 1983

Trustee Act 2000

The Charities (Protection and Social Investment) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2016