

Governance of Charities Consultation
Consultative Panel on Governance of Charitable Organisations
The Charities Regulator
3 George's Dock
IFSC
Dublin 1

5th December 2017

Re: Governance of charities in Ireland

The Institute of Directors in Ireland (IoD) welcomes the opportunity to submit our views to the Consultative Panel on Governance of Charitable Organisations on how registered charities in Ireland should be governed. We also wish to acknowledge the magnitude of the task assigned to the Consultative Panel to create a governance framework for charities registered in Ireland, given that charities are not a homogenous group and there are currently immense disparities within the sector in terms of scale and resources.

About the Institute of Directors in Ireland

The Institute of Directors in Ireland (IoD) is a dynamic network of over 2,700 directors and senior executives within the private, public and not-for-profit sectors. As the leading voice in the debate on improving corporate governance standards, the Institute of Directors is dedicated to developing and improving the effectiveness and performance of directors and boards throughout Ireland.

Response to consultation

In consideration of the invitation for submissions on how charities should be governed, this consultation response focuses specifically on issues relating to good governance under the following themes:

- Existing governance framework in the charity sector
- Addressing inadequacies in governance
- Board members - accountability, transparency and appointments

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It is informed by the discussion outcomes of a working group, attended by a number of IoD members who are directors or CEOs of charities registered in Ireland. Please note that this submission does not comment on every survey question within the consultation.

Initial remarks

The IoD is proposing that there should be a mandatory governance code for registered charities in Ireland. This code should be both enforced and periodically reviewed to ensure that it continues to be fit for purpose.

Governance is concerned with the systems by which organisations are run, directed and controlled; it is about developing and implementing the appropriate structures and processes to ensure that an organisation is run effectively. The onus for sound oversight and good practice lies within the board itself. The absence of any mandatory governance code for boards of registered charities in Ireland increases the risk for charity donors and/or service recipients, and all other stakeholders. It increases the possibility of poor governance and bad practice which ultimately undermines the sector and creates the potential for serious reputational damage for charities themselves and for the sector.

In 2014, the IoD conducted research with 229 of our members with board experience in the charity and not-for-profit sector in Ireland. The resultant report is entitled, *Governance in the Charity and Not-For-Profit Sectors in Ireland*. This research clearly showed at that time, that not-for-profit board members themselves saw a real need for change in how the sector was governed and indicated that they would welcome a more formal framework in which to operate.

Good governance in all areas of a charity's work should be a requirement. The IoD believes that a mandatory governance code provides the best framework for the sector.

[Existing governance framework in the charity sector](#)

The purpose of this section is to outline the current, principal aspects of governance within the charities sector.

(1.) Is there a requirement for a mandatory governance code?

Yes. As the Charities Regulator is tasked with encouraging and facilitating the governance of charities, the IoD believes that there is a fundamental requirement for a mandatory code for all registered Irish charities.

(1.1) Why is there a requirement for a governance code?

Currently, there is a voluntary code of practice for good governance of community, voluntary and charity (CVC) organisations in Ireland. Due to the voluntary nature of this code devised by the sector itself, notwithstanding its benefits, it can be disregarded and contravened without any ensuing consequences.

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Some organisations may comply with this code and others may not, which puts the credibility and reputation of the sector in jeopardy. The voluntary nature of this code also puts charity funders (both public and private) and service-users at risk.

A mandatory code would be fully enforceable within the sector. Recognising that not one size of governance fits all, proportionality should be a key consideration in the design of the code. The Regulator would be the regulating body for the sector ensuring enforcement, compliance and proportionality.

(2) If yes, should the code be issued by representatives of the sector and approved by the Charities Regulator or issued by the Charities Regulator and approved/endorsed by the sector?

The IoD recommends that this mandatory governance code should be issued by the Charities Regulator and endorsed by the sector. The governance requirements contained within the code should be proportionate to a charity's structure and size to avoid unnecessary burdens.

(3) The Governance Code for Community and Voluntary and Charitable Organisations, published in March 2012, is a voluntary code for the sector. Which aspects of the code have been successful and which aspects have been unsuccessful?

The successful elements of the code are as follows:

- The existing code was developed and designed by the sector and thus has been both endorsed and recognised by the sector.
- The code recognises the diversity of the sector and focuses on proportionality. The IoD holds a strong view that proportionality is key to the effectiveness of any code.

The unsuccessful elements of the code are as follows:

- The existing code is voluntary, thus charities are not required to comply with it. We propose that this code, with some modifications, should become mandatory for all registered charities in Ireland.
- The existing code is not mandatory and therefore, it cannot be enforced. The necessary resources and authority are not in place to enforce this code.

(4) Currently, which area(s) of the governance of charities require(s) the most guidance?

Directors/trustees must have, at a minimum, a basic level of understanding of the key legal and fiduciary responsibilities of the role. However, this may not always be the case. There may also be a perception that the use of different terms such as director and/or trustee creates further confusion in respect of the roles and responsibilities, and a perception that the legal responsibilities of both the director and trustee differ. Indeed, the variety of terms used within the charity sector to describe the same role or structure may be a factor in contributing to confusion. We suggest that a

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review might consider standardising a variety of terms (eg director/trustee, charity/not-for-profit, board/council) in order to alleviate confusion.

There also appears to be a perception within the sector, that there is a difference between the role and responsibilities of directors in the sector who are not remunerated and those in other sectors where directors are remunerated. The legal position is that all directors have the same legal and fiduciary duties. Guidance is needed to remove any ambiguity around this matter in order to ensure that there a clear understanding of directors' duties at the most basic level.

Addressing inadequacies in governance

Governance in the charity sector refers to the systems and processes for managing the overall direction, effectiveness, supervision and accountability of an organisation. This section considers governance shortfalls within the sector and potential actions to address these inadequacies within the code.

(5) Are you aware of any practices of corporate governance used in the private sector that could be applied to the charities sector?

Understanding of the roles and responsibilities

- It is imperative that an individual who is considering joining a charity board, has a clear understanding of their role and responsibilities and that they are knowledgeable about the board they will be joining.
- There should be absolute clarity about the onerous role that the director will assume and clarity about the expectation of time commitment required to fulfil the role adequately. This should be clearly outlined to potential candidates when they are being approached by either the nominations committee or the board.
- Both parties - the board and potential candidates - should conduct due diligence on each other to ensure that both parties are fully satisfied.
- Boards should have a skills matrix for board appointments which is regularly reviewed and updated.

Awareness of the importance of the director/trustee role

- Current and potential directors/trustees should have a clear understanding that board membership requires a large amount of time, participation, professionalism and commitment. There should be regular opportunities for directors to improve their knowledge and skills to meet the increasing demands of the role and regulatory requirements as they evolve.

Due diligence as a matter of course

- Due diligence on the charity board and the potential candidate should be formalised.

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Applicable training

- In some parts of the sector there may be a requirement for the executive to better understand the role and responsibilities of the board and to be cognisant of the board's responsibility to hold management to account. Executive management may not understand that the role of the board is highly important in terms of leadership and as the guardian of good governance.
- Training should be given to all board members to ensure that they are fully aware of their legal and fiduciary duties.

Sufficient flow of information

- While it is the responsibility of the non-executive directors to question executive management, boards should have processes in place to ensure that there is an adequate flow of information from the executive to the non-executive directors to allow them to make informed and timely decisions and to review strategy before it is approved.

(6) What unintended consequences could arise from the development of a mandatory governance code?

Some unintended consequences of a mandatory code may include the following:

- It could be a challenge for smaller organisations to meet the requirements of the code. This is why the requirements of the code should be designed in a proportionate manner.
- The code may lead to rationalisation within the sector, with a grouping together of similar charities.
- If the governance code is mandatory and the code is enforced, there is a risk that the numbers of potential /active directors/trustees may decline with an increased reluctance to serve on these boards.
- There is a risk that excessive focus on the code, and compliance with it, may diminish the other areas of board responsibility in the areas of providing strategic direction for the organisation.

(7) Currently, what are the main barriers to good governance in the sector?

The following are some of the perceived barriers to good governance within the charity sector and should be addressed:

- Currently there is a voluntary governance code in operation in Ireland's charity sector, and many organisations may not be complying with the code's governance principles.
- In some organisations there may be deficits in the skills and understanding of leadership, both for directors and management, of their role and responsibilities with regard to governance and the importance of same.

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- There may be reluctance by some qualified candidates to join boards in the charity sector due to reputational risk and legacy issues.
- There is a perception that there is a lack of professionalism in the sector and this perceived lack of professionalism may be a deterrent to attracting quality board candidates.
- Attracting quality directors/trustees can be difficult across the sector. Some organisations may be more attractive than others because of the sector in which they operate or their area of charitable focus.
- It can be difficult for boards/executives to provide leadership of/ manage the wide volunteer base of some organisations and to ensure that good practice is adhered to throughout the organisation. The geographical reach of some organisations can add to this challenge.
- Many charities are “grassroots” community initiatives, where there can be insufficient governance structures and a lack of understanding or knowledge about the importance of good governance.
- The ongoing uncertainties that many charities face with regard to their funding from both public and private sources, and the timing of payments, can provide challenges in terms of both planning and certainty around entering into contractual arrangements and meeting obligations. Greater certainty in this area would be helpful.

Board members – accountability, transparency and appointments

This section explores how directors/trustees on the board are managing key elements of governance inclusive of accountability transparency and appointments.

(8) Currently, how does accountability in the charity sector meet the following four principles?

Clarity of accountability (person accountable knows what they are accountable for and to whom they are accountable). Ensure that all board members are fully aware of the responsibilities associated with their role and receive adequate induction and ongoing training opportunities. It is important that, prior to recruitment/appointment, potential directors/trustees fully understand their role and responsibilities.

Sufficiency of control (person accountable has sufficient control over the outcomes for which they are responsible). Directors/trustees should be professional when carrying out their role. The role and responsibilities of each member of the board should be clear at the outset and the director and board should ensure that they have the necessary information/advice to make informed decisions.

Clarity of consequences (person accountable is aware of likely consequences). In this instance the enforcement of the governance code means that directors/trustees would be wholly accountable for breaches in compliance. There should be ongoing continuous professional development available to directors/trustees in respect of the requirements of the governance code and other relevant areas.

Sufficiency of information (to judge whether responsibilities have been performed by the person accountable). Management should recognise the board’s oversight role. It should also ensure that

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the board has the required, correct information so that it can operate effectively. Equally, members of the board should challenge and question management in order to provide oversight, and be persistent in respect of their requirement for appropriate and timely information.

(9) Currently, does the charity sector practice the appropriate levels of transparency which empower stakeholders to hold boards to account? How can this practice be enhanced?

- Firstly, the charity sector is not homogenous, and it is important to highlight that many organisations are well-governed and run effectively.
- The practice of appropriate levels of transparency can be enhanced by ensuring that a mandatory governance code is introduced and that it is effectively enforced, using the model of proportionality.
- Through its website, the Charities Regulator can also enhance transparency by providing stakeholders with access to data concerning the levels to which various charities are complying with the governance code.
- Individual charities' audited accounts must be made available to stakeholders in a timely manner. Filing abridged accounts should not be acceptable.
- Transparency can also be enhanced throughout on a sector-by-sector basis; charities themselves can become champions of transparency within each sector providing both leadership and creating peer pressure for others.

(10) Are the principles of accountability and transparency on the board effectively monitored at present? By whom?

Both accountability and transparency must improve. Formally, the principles of accountability and transparency must be monitored by the chairperson of the board and the board itself. We would suggest that regular reviews to evaluate the performance of boards and directors should be encouraged. Furthermore, best practice suggests that the board should, at least once every three years, have this review carried out externally.

(11) How can greater certainty and clarity in terms of the roles and responsibilities of charity directors/trustees, be achieved?

- It is essential that all directors/trustees on all boards are fully aware of their legal responsibilities. It is the responsibility of the director/trustee to ensure that they are familiar with their role and responsibilities. Potential and existing directors must understand that all directors, whether on private or not-for-profit boards have exactly the same legal and fiduciary responsibilities.
- The IoD suggests that the role and responsibilities of individual directors/trustees should be clearly communicated to potential directors prior to their appointment to avoid any ambiguity.

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- Letters of appointment should be issued to all directors as part of the appointment process, detailing the role and responsibilities of charity directors/trustees for the board in question.
- In respect of ensuring that the board has the necessary skills and competencies in place, we would suggest that a skills matrix is used to consider the requisite skills and expertise required by each board when making appointments. This skills matrix should be regularly reviewed and considered to ensure that it remains relevant.
- The Charity Regulator's [new e-learning](#) tool, which allows directors/trustees to learn more about their legal duties and responsibilities, is a good initiative. This tool could be developed to include an induction programme where a minimum competency level with regard to directors' fiduciary duties can be introduced for prospective board members.

(12) What are the most important factors to consider in terms of the appointment of charity directors/trustees?

- Charities should prioritise appointing candidates on the basis of quality (eg skills, expertise) and their fit with the organisation.
- Part of the recruitment process should allow for both parties to be clear about their mutual expectations of each other and for each party to clearly communicate what each can contribute.
- The identification of potential directors/trustees is the responsibility of the nominations committee in the first instance, delegated by the board, and the appointment is then finalised by the board. Nominations committees and boards should seek to appoint people who have appropriate understanding of their roles, responsibilities and all aspects of governance. They should ensure that appointees understand the amount of time, board attendance and commitment involved in board membership.
- Candidates should have a clear understanding of the time commitment that will be required before accepting the role, and should consider their capacity to meet this.
- Best practice should be considered before appointing directors/trustees in order to ensure that conflicts of interest are not an issue. It is important that the issue of what constitutes conflicts of interest is clearly detailed in letters of appointment for new directors. It is also important that every director is clear about the matter and that the chair and board remains vigilant about this.
- When recruiting/appointing directors/trustees, board diversity in its widest sense should be considered.

(13) Should there be a term limit for board members?

- There should be a finite limit to the number of years and terms a director/trustee should be able to serve on the board. It is the overarching duty of the directors/trustees to act in the best interests of the charity, and to retain independence of thought. Best practice suggests that board members should serve a maximum of three terms of three years, or nine years in

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total. A shorter maximum period may also be considered once the issue of succession planning and board coherence is not impacted.

- Using best practice as recommended in the UK Corporate Governance Code, we would also suggest that retiring CEOs/founders should not be appointed as chairpersons/members of the board on their departure. There should also be clarity with regard to the role of the charity's founder in governance terms.
- We would also suggest that a maximum number of board-level positions held by a director/trustee should be two, and no more than three. This would ensure that directors can adequately fulfil their role with regard to their availability. Limits on the number of board positions are in operation in other sectors and are tiered depending on the complexity and size of the organisation.
- Best practice recommends that board size should be no larger than nine to 11 people.

Charities Regulator: Additional governance considerations

There are other issues that the Regulator should consider as it moves to improve governance standards for the charity sector in Ireland. These considerations include the following:

- In order to ensure that various stakeholders can easily access appropriate resources, and information on governance and compliance, we suggest that a 'one-stop-shop' on the website of the Charities Regulator might be considered. This could include the following resource information:
 - Information on the legal and fiduciary duties of directors, inclusive of a competency test on these for prospective/existing directors.
 - Definition of what constitutes a conflict of interest and an exemplar conflict of interest policy for the board.
 - Information and advice on financial reporting, lists of directors, terms of office, audited accounts etc.
 - Glossary of terms – a standardisation of the sector's terminology.
 - A clear definition of the role of the board.

Conclusion

The IoD is firmly of the view that, apart from the legal requirements that board members of charity organisations should comply with, it is now an opportune time to move to a mandatory code for the sector. The IoD recognises that the sector is diverse and suggests that proportionality should be a consideration in determining the relevant governance structures within the code. Good governance is in the best interests of the entire sector and its various stakeholders. Despite a number of well-publicised governance failures in the sector, there are many organisations who are well governed by hard-working board members and leadership teams. Failures within the sector do a huge disservice to these organisations and undermine public confidence in the sector as a whole.

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We believe that the introduction of a mandatory code of governance, which is appropriately supported and resourced in order to ensure that it can be enforced, is the way forward. We would also suggest that there would be a commitment to periodically review this code with an external consultation process to ensure that it remains fit for purpose.

We appreciate the opportunity to present our views and would be delighted to discuss the issues raised in greater detail or to make any further contributions as necessary.

Yours sincerely



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