

Mission Money & Models Symposium
New approaches to financial sustainability in the cultural sector

Improving Organisational Capability

Organisational Capacity sub-group – Governance Strand

***A position of trust, a duty of care:
Governance in the not-for-profit cultural sector***

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Introduction & Summary

Why think about governance in the not-for-profit cultural sector? At the fundamental level the governors of an organisation, whether they go by the name of trustees, directors or non-executive directors, are placed in a position of trust. They have an overriding duty towards the objectives of the organisation and its provision of public benefit. They also have duties of care to donors, funders from the Arts Council, National Lottery to Trusts or even shareholders and the employees of a firm. They are placed in a position of the highest responsibility, setting the long-term goals of an organisation and for setting the strategy to get there. But perhaps the most concrete and practical job is the hiring (and sometimes firing) of the Chief Executive who is responsible for the day-to-day running of the organisation. In many organisations, governors are also increasingly responsible for raising funds.

Ultimately organisations operate effectively when boards do, and fail when there is a breakdown between what board and executive do. Of course, there will always be failures: risk and reward dictate that some will fall along the way. But we have a duty to ensure that where organisations fail, it is as a result of misfortune, not bad management.

Our starting question was to ask how can we encourage members of boards to be more engaged and interested in their organisation? We had a preconception that many arts organisations suffer from unengaged boards. How can we try and ensure that the effective communicative and collegiate approach to problems by the executive and the board, that is such a strong characteristic of good organisations, is replicated throughout the arts sector?

Whilst there are many organisations with happy and effective trustees there are many without – especially where the board member views their appointment as a title for the CV rather than a position of responsibility. The good Chairman and Chief Executive know that through the strength of their common endeavour they can achieve more than either can alone. But this happy relationship seems to be rarer than a happy marriage; recent travails at the Design Museum and Royal Academy of Art are but two examples among many.

Our research shows that there has been no strategic investment in governance of the charitable arts sector and in some cases, this has trickled down to organisational level. All too often we view the good board as a happy

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happenstance rather than the result of good planning. We believe that such an approach to governance of the not-for-profit arts sector should no longer be tolerated. For good governance we need good guidance – and above all governors and executives have to commit to a hard long and (sometimes) boring slog to work out how their own organisation should be governed. One of our most important conclusions is that this is an investment that ALL cultural organisations must undertake; not, as often happens, in response to a crisis but as part of ongoing organisational “housekeeping” and development to ensure that a strong framework exists if and when the crisis comes. It is acknowledged that the abundance of guidance available from a variety of sources can be bewildering, particularly for organisations with limited resources. This is a general issue we hope to address.

Our paper considers two aspects of governance: the role and responsibilities of boards and the organisational forms available to not-for-profits in the cultural sector. We suggest that – just as the quoted for-profit sector has established a Combined Code (which also now incorporates much of the Higgs Report on Governance), our sector too would benefit from such a Code, and we take some first steps in suggesting what might be included in it.

We go on to consider how we might ensure that a code lives, breaths and is utilised. How can we encourage and motivate Boards to work with it’s principles to develop good governance? We look at compliance and regulation. There is no shortage of guidance available at present, but words must be translated into deeds to prevent them becoming merely good intentions and unused guidance sheets gathering dust.

Why a Code of Conduct?

The sector has not strategically invested in this area and governance remains patchy, differing widely from one organisation to another. It is acknowledged that there is not always clarity, agreement or ready available information as to what constitutes effective governance. Pressure to examine this issue comes from a variety of areas:

- **internal pressures** - within the not-for-profit arts sector – there is an emerging debate as to whether current, uncoordinated governance advice and information meet the needs of arts organisations, in particular whether the sector is able to recruit and train appropriate

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trustees, how effectively boards and staff work together and whether charities could be more accountable;

- **comparison with the private sector**, where the recent Cadbury review and Higgs review have led to the publication in 2003 of a revised Combined Code on corporate governance;
- **succession planning** – all too often within the not-for-profit cultural sector (and the not-for-profit sector as a whole) organisations rely on the drive and energy of one or two individuals. This can often be lost with a change of management or board and a succession crisis can lead to a sudden call for better governance;
- **government** – the increasing emphasis on voluntary organisations delivering public services has led government to take a greater interest in the sector's governance structures and accountability mechanisms;
- **donations** – we know that trust is an important factor in encouraging both individual giving and grants from trusts and determining to which organisation donors will give.

A code of governance for the cultural not-for-profit sector should:

- give the sector the public opportunity to **underline the essential need** for good governance;
- **strengthen governance systems** through the code and new, associated rolled out activity such as training, awards, newsletters and practical support;
- help to **clarify the purpose of governance** in the not-for-profit arts sector;
- establish a number of **underlying principles** that the sector as a whole felt able to support;
- outline some broad **approaches to best practice** in governance that all organisations should aim for.

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Why look at structural form?

The vast majority of cultural organisations are Companies Limited by Guarantee with charitable status – but some have other structures (they might be trusts or in some cases set up by Royal Charter). Whilst the Company Limited by Guarantee model may often be the most appropriate structure for not-for-profit cultural organisations, and its prevalence suggests it is, this does not mean it *always* is. The not-for-profit Company Limited by Guarantee structure has two major drawbacks. It is relatively unaccountable and, with associated charitable status, relatively inflexible (for example when undertaking commercial activities). The accountability problem is of particular concern and is common to most charities. They suffer in comparison with for-profit organizations in not having the impetus towards good governance provided by shareholders (at least in theory). Usually either shareholders (or members in the case of mutuals) hold the board to account and drive the organisation forward. In an area with only limited competition and a weak regulator, charitable cultural not-for-profit organisations are left without the usual strong disciplines associated with successful systems. In contrast, Charities are responsible to concepts: for example “present and future visitors to the arts venue”; but such a concept is not going to ask demanding questions (although it is acknowledged that visitors and audiences can vote with their feet). It follows, therefore, that boards must themselves establish their own checks and balances.

A second reason to consider structure now is more practical. The current draft Charities Bill proposes two new legal forms, one of which is designed to replace the company limited by guarantee model for charities. We consider the pros and cons of different legal forms in the structure section of this paper. However, as a general principle we believe that the sector should and would benefit from more innovation and experimentation in legal form. DCMS in partnership with the Home Office should take the lead here.

The wider Not-for-Profit sector and the Code

We recognise that our work comes at a time when more attention is being devoted to governance in the not-for-profit sector as a whole. In our opinion this is a long overdue development. Whilst our Code has been developed with the cultural sector specifically in mind we cannot see why it could not apply to the wider not-for-profit sector. We are aware that the National Council for Voluntary Organisations is currently developing a Code for the not-for-profit

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sector. In the past, the cultural sector and the wider not-for-profit have failed to engage as well as they should; particularly at the strategic, national, level. We believe that this must change. The relevant bodies: Arts & Business, Arts Council England, NCVO, the Home Office, Governance Works and the Charity Commission should work together to develop a Combined Code for the not-for-profit sector as a whole.

If such a Code is to have a real impact the Charity Commission must adopt the Code as best practice and require Charities to comply or explain their conduct in relation to the Code in their Annual Returns.

Just as shareholder pressure has led corporate governance, the major institutional funders in the UK have a fundamental leadership role to play. With respect to the cultural sector: DCMS; Arts Council England; the Lottery funding bodies; English Heritage; the major trusts and foundations, corporate sponsors and individual donors should demand adherence to the Code as a condition of funding.

Sins of Omission

Given the time and resources available there are gaps, omissions and areas that we have not covered. Elections to boards, resignations and remuneration of trustees have not been covered. There are other areas, such as liability that we have not developed far enough. When examining organisational structure, we have confined ourselves to a review of the advantages and disadvantages of different organisational forms as we see them rather than offering examples of where current organisations would benefit from change.

There will inevitably be other omissions and errors. But we hope that this paper and discussion will form the beginning of a conversation rather than the end.

Sparking Debate, Moving Forward

Even we didn't manage to agree on every point. We have included points on which we did not all agree in the belief that the important thing for us to do was to stimulate debate, spark controversy and raise the question of governance in this sector. Like Sir Derek Higgs, to whom our work owes a tremendous debt of gratitude, our belief is:

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“But there is much more that can be done. Costly boardroom failures, resulting in great loss of value and jobs, provide ready grounds for humility. Moreover, whatever lead the UK may have had in this area has not been used to full advantage. Too often the governance discussion has been shrill and narrowly focused... with insufficient attention to the real drivers of... success. It would represent progress if this [Code] were to open a richer seam of discussion, one with board performance and effectiveness at the core.” (Higgs 2003: 1.9)

In the rich vein of all those who propose regulatory intervention it is our belief that the Code should be “light touch”. Regulatory intervention in the not-for-profit sector should be considered even more carefully than in the public or private sectors. Apart from the largest organisations, not-for-profits rarely have the capacity to deal with red-tape. However, on balance, the benefits of the Code should outweigh the drawbacks. We need to be particularly wary of a “one size fits all” code. It is not even the case that all arts organisations have a paid executive: many rely entirely on members of the board and other volunteers to do everything. We therefore need to be very careful not to be too prescriptive. Under the principle of “comply or explain” the smallest organisations can opt-out. Capacity building organisations should help their smaller members to comply.

Ultimately being a trustee should be a rewarding and, even, fun pursuit. Trustees are volunteers who freely give up their time to help, are a major resource for organisations and make a significant and positive contribution to public life. They should be warmly welcomed.

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Recommendations & Strategic Issues

Recommendations

Self-Regulation

- That a working party be established to take forward the Code presented here with other key stakeholders, in particular the NCVO and the Governance Works Agency
- That a Code of practice for all not-for-profit organisations be adopted by the Charity Commission as best practice on a comply or explain basis
- That adherence to and/or divergences from the Code should be reported in charities' annual returns to the Commission
- That major funders should insist on compliance with the Code (Arts Co, DCMS etc).

Information, Education and Advice

- A code should carry with it an appendix in the form of a 'toolkit', signposting users to the many available, supplementary governance based publications, manuals, checklists, training opportunities, advice and support, websites, examples of best practice, papers.
- Establish Awards and best practice marks (like the Investors in People mark)
- Establish trustee networking and discussion events
- Quarterly information sheet on effective Governance of Arts Organisations be produced by ACE or Arts and Business
- Roll out A&B's Board development training programme to many more organisations
- Provide a governance advice-line for the not-for-profit cultural sector
- Improve induction of new trustees using David Carrington's 'Buddy system'
- Twinning - larger organisations should be encouraged to twin with smaller organisations
- Produce easy-read, non weighty good governance tools such as credit card sized 'quick reference' kits
- The Arts Council should consider an increased number of relationship training courses on the relationship between the Chair and CE
- Commission a good governance video training pack

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Strategic issues

- There is a need for much more joined-up thinking between the arts sector and the voluntary sector as a whole.
- Undertake a wide review into the issues of governance within the not-for-profit arts sector.
- Examine what could be measures of success – “what makes a successful board / trustee”.
- In order to keep a code of conduct continually relevant and flexible, it will need to be updated at regular intervals. We should ensure that an organisation takes responsibility for doing so.
- Any Code should be light-touch and flexible.

With the above in mind we have drawn up the first draft of items that we believe should be included in a code for the not-for-profit sector and this is set out on the following pages.

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The Code¹

1.1 In regard to this Code, the principle of “comply or explain” is recommended

2.0 The Board

- 2.1 The Board is collectively responsible for the success of the organisation, for setting strategic aims, ensuring necessary resources are in place to meet its objectives and monitoring performance
- 2.2 The Board sets the organisation’s values and standards (the “v and s”). This is different to the vision – i.e. the artistic driver - which in most cases is the responsibility of the Chief Executive. The extent of this division will depend on the organisation
- 2.3 Each organization will decide where the boundaries should lie between the board and the executive – who is responsible for what – and should make that clear in their annual report.
- 2.4 Greater understanding of how the board operates is likely to increase confidence internally and externally. The Annual Accounts should include a statement to this effect including number of meetings, membership of committees, composition, terms of reference and attendance by individual trustees etc.
- 2.5 Smaller boards are recommended (as a comparison the average company is 7 with the average FTSE 100 being 12). There needs to be a balance between having the necessary skills represented and achieving proper engagement by the board.
- 2.6 To encourage transparency, annual accounts/reports should be made accessible e.g via websites
- 2.7 A planned programme of recruitment and retirement of board members is highly desirable
- 2.8 The board should have a variety of skills, including risk management. They need to know enough to know how little they know (and will therefore defer to specialists on the board and in the executive about artistic issues)
- 2.9 Boards should consider conference calls and other modern methods so that busy highfliers/international members can contribute to the meetings
- 2.10 After Strategy and Policy has been agreed, the Board will defer responsibility for artistic matters to the executive and assume a monitoring, support role (subject to there being an executive in place)

¹We use Chairman as a noun rather than gender specific role.

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- 2.11 Board members must accept that there will be difficult decisions, sometimes affecting a member/chairman personally, which have to be taken for the good of the organisation (governance rules apply to everyone; they are a fact not a principal)
- 2.12 Boards must be up to date on wider developments including but not limited to marketing, ICTs, funding. The executive must work to help keep their board up-to-date.

3.0 The Chairman

- 3.1 Provides leadership of the Board
- 3.2 Ensures provision of accurate, timely and clear information to trustees
- 3.3 Chairman has key responsibility to ensure individual trustee and board effectiveness
- 3.4 Relationship between the chief executive and Chair is key. Both parties should remember that their common endeavour is the organisation's strength.
- 3.5 The division of responsibilities between the chairman and chief executive should be set out in writing and agreed by the board. This should not be detailed if the implementation of activity has been devolved to the chief executive (see below)
- 3.6 Responsible for ensuring efficient use of board time by concentrating on strategy rather than approving proposals which should be decided by management
- 3.7 It is the Chairman's responsibility to ensure that Trustees are given sufficient time to consider critical issues and given realistic deadlines for decision-making
- 3.8 The chief executive should be consulted during the appointment of a new Chair

4.0 Trustees

- 4.1 Should meet as a group at least once a year without the executive present (8.8) and should consider meeting without the chairman when they consider matters pertaining directly to the chairman such as succession planning or appraisal.
- 4.2 Prior to appointment, potential new Trustees should carry out due diligence on the board and on the organisation to satisfy themselves that they have the knowledge, skills, experience and time to make a positive contribution to the board (Higgs Annex G)
- 4.3 The role of the trustee is:-

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- a) to constructively challenge and contribute to development of strategy
- b) scrutinise performance of management in meeting agreed goals and objectives and monitor the reporting of performance
- c) should be satisfied that financial information is accurate and that controls and systems of risk management are robust and defensible
- d) to contribute to fundraising both financially (no matter how small) and through funder/donor cultivation
- e) to be an active advocate for the organisation
- f) to support the chief executive
- g) to provide practical help when required
- h) actively engage with the output and staff of the organisation

5.0 Deputy Chairman or nominated trustee

- 5.1 Part of the responsibility of this role would be to annually review the Chairman's performance and to be independent counsel to individual trustees if required
- 5.2 Leads on the appointment of the new Chairman (this should not be done by the incumbent Chairman)

6.0 Independence

- 6.1 All Trustees should take decisions objectively in the interests of the organisation
- 6.2 Trustees should on no account be influenced by any self-interest or by the views or opinions of the body and/or person responsible for their appointment. They should always be alert to potential conflicts of interest and should establish policies and procedures to deal with such situations.
- 6.3 Once appointed a trustee should act in the interests of the organisation's objectives and, ultimately, be guided by the higher public interest therein.

7.0 Recruitment and appointment

- 7.1 Trusteeships should not be seen as an extension of the honours system
- 7.2 Membership of a board requires commitment and activity
- 7.3 They should be viewed as high level volunteers and as such the motivation/expectation will be different from executive. Must define role/motivation to align with the needs and vision of the organisation
- 7.4 There should be a Nominations Committee
- 7.5 It should be chaired by a trustee other than the Chairman

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- 7.6 In the case of a new Chairman, the exiting Chair should not be involved in the recruitment process except in an advisory role. The Deputy Chairman or senior director should lead on this or the Chair of the Nominations Committee
- 7.7 The Nominations Committee should include the Chief Executive or equivalent
- 7.8 The composition, terms of reference, activities and appointment process of the Nominations Committee should be included as a statement in the Annual Accounts
- 7.9 The Nominations Committee should organise an evaluation of current skills, knowledge and experience and in the light of this prepare description of role and capabilities required for a particular appointment
- 7.10 On appointment, trustees should receive a letter setting out what is expected of them in regard to time commitment, committee membership and involvement outside Board meetings
- 7.11 Organisations should encourage their staff to be trained and become trustees on non-competitive boards (transparency/extending the future pool)
- 7.12 The Board appointment pool should be actively expanded as an open, fair and a rigorous appointment process is essential to a successful board
- 7.13 Trusteeships should be publicised.
- 7.14 Arts Professionals should be actively encouraged to put themselves forward.
- 7.15 The composition of the board sends important signals about the values of the organisation. Commitment to equal opportunities (of motivational as well as reputational importance) is undermined if the board does not follow the same guiding principles as the organisation itself
- 7.16 International trustees should be encouraged where the organisation operates in an international context
- 7.17 Assessment of need and requirements should be reviewed regularly in order to respond to the changing needs of the organisation

8.0 Induction and Development

- 8.1 The Chairman is responsible for ensuring that there is a comprehensive induction programme for all new Trustees, supported by the chief executive and Company Secretary (11.4)
- 8.2 The Chairman should address the development needs of the board as a whole with a view to enhancing its effectiveness (11.14)

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- 8.3 The performance of the Board, its committees and individual members, including the Chairman, should be evaluated at least once a year. This process should be included in the annual report
- 8.4 The company secretary should be accountable to the board through the Chairman on all governance matters
- 8.5 Board development should include regular revision sessions on subjects such as legal status and responsibilities. There should be time to meet as a group outside usual board meetings to discuss broader issues and to go back to the fundamental questions of the objectives of an organisation. Such "Awaydays" should happen at least once a year and should include the senior management team/staff – and in smaller organisations all the staff
- 8.6 All trustees who resign should have a recorded Exit Interview. This should be conducted by the Deputy Chairman, senior director or nominations committee chair

9.0 Tenure and time commitment

- 9.1 Trustees should serve no more than nine years. Longer terms are acceptable only in extraordinary circumstances (comply or explain)
- 9.2 On appointment, the new Trustee should undertake that they will have sufficient time to meet the institution's expectations, considering other commitments
- 9.3 A Trustee should inform the Chairman should they be offered appointments elsewhere before accepting them
- 9.4 The Nominations Committee should assess annually the time required of Trustees. The performance evaluation should assess whether Trustees are devoting enough time to fulfil their duties
- 9.5 The Trustees/Chairman should ensure that they can commit sufficient time and energy to the organisations they represent, their responsibilities should be considered as part of the appraisal process

10.0 Audit

- 9.1 The organisation should have an Audit Committee. The chairman should be someone other than the chairman of the board.

11.0 Liability

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- 11.1 Company law allows a company to insure its directors against actions by the company or by third parties. Many Charities are structured as companies.
- 11.2 Trustee Liability Indemnity insurance should be considered, both by charities which are companies and those which are trusts/unincorporated associations (see the Charity Commission web-site for its streamlined procedures to authorise charities to take out such policies).
- 11.3 Enterprise creates prosperity but involves risk. Arts Boards must accept this and be less conservative in their outlook. Rigorous Board and Executive appointment and development systems will reduce the risk.
- 11.4 In cases where a vote is necessary, individual voting for and against should be minuted.

Future drafts of the Code and suggested Appendices

Any future development of the draft should also take into account the following documents which replicate our intentions:

- *Code of Conduct for the Voluntary and Community Sector* (NCVO – to be launched early 05)
- *The good governance standard for public services* (Draft for consultation, September 2004)
- *Corporate Governance in the Charity Sector – Top Ten Principles* (Foundation for Good Governance)

The Code of Conduct should remain broad and flexible in order to maintain relevance across the sector's varying shapes and sizes of cultural organisations. However, it should also contain a regularly updated document – 'a toolkit' - signposting users to the many available governance based publications, manuals, checklists, training opportunities, advice and support, websites, examples of best practice, papers. Arts Council England and the Charity Commission do not currently provide a comprehensive list of this information. For cultural organisations Arts Council England, in partnership with the Charity Commission, should develop a single practical toolkit to simplify the current situation.

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Organisational Structure

Charities/social enterprises

Apart from any privately owned organisations, most arts organisations will be established either as “charities” or as not-for-profit “social enterprises”. These are the descriptions of an organisation’s status and not of its organisational form.

Both charities and social enterprises exist in order to provide public benefit, in the case of arts organisations generally through educational work and the promotion of artistic/cultural activities.

The essential difference between them lies in the breadth of their work, with charities needing to be limited to areas recognised as providing sufficient public benefit to qualify for charitable status; in contrast, social enterprises may have wider areas of work beyond what is traditionally recognised as being charitable.

The underlying legal structures which both types of organisation may adopt are broadly similar, but with some essential differences.

Charities

Charitable status confers significant tax exemptions on an organisation. Charitable status also confers certain restrictions on organisations, including on non-charitable trading. Most charities need to be registered with and regulated by the Charity Commission, although some charities, known as exempt charities and excepted charities, are not currently regulated by the Commission, primarily because they are regulated by another regulator (e.g. some major arts organisations are regulated by DCMS). You do not have to be a charity to receive donations. The main legal formats used by charities are:

- **Companies limited by guarantee**
These are the most common structure for charities and their major advantage is that their corporate structure provides the protection of limited liability to their trustees (who are the directors of the company in company law terms). They provide a format which is generally familiar to trustees and to third parties dealing with them. Assets are held in the name

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of the company and contracts are entered into in its name, rather than that of the trustees. Disadvantages include the requirement to comply both with company law and charity law and the corresponding need to comply with both Companies House and Charity Commission regulation. There are no shareholders in such a company, instead the members of such companies guarantee its debts (up to a prescribed maximum level which is generally set at a nominal level of, say, £1).

- **Trusts and unincorporated associations**
These are now less common structures for charities to adopt. They are both unincorporated structures run by trustees with, additionally, a membership in the case of unincorporated associations. They are relatively straightforward to administer but have the disadvantage that they do not give protection to their trustees who are therefore exposed to the risk of unlimited personal liability. Assets are generally held in the names of individual trustees which leads to complications when trustees change.
- **Others, including Royal Charter Companies**
There are a range of other legal structures under which charities can be formed but these are generally case-specific.

In addition, the Charities Bill which is currently before Parliament proposes the creation of a new, tailor-made legal vehicle for charities:

- **Charitable Incorporated Organisation (“CIO”)**
This is to be a new legal corporate form, designed specifically for charities, with straightforward statutory procedures to assist existing charities to transfer across into such a structure. Whilst they will be companies, with therefore all the advantages of companies limited by guarantee, they will only be regulated by the Charity Commission and not by Companies House. They may well become in future the only structure for charities.

Social Enterprises

Legal structures for social enterprise organisations are many and various but are primarily:

- **Companies limited by guarantee (“CLG”)**
These have all the advantages of charitable companies limited by guarantee but their major disadvantage when used for non-charitable, social enterprises is that the company’s not-for-profit nature cannot strictly

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be entrenched. There is therefore still the possibility that the members of such a company could (at least in theory) alter its nature. In order to address this disadvantage, a new corporate vehicle is proposed to be established through current draft Companies legislation:

- **Community Interest Companies (“CICs”)**

The format of such companies will be designed to “lock” its assets against distribution to members and shareholders. There will be an ability to choose either limited by guarantee or shares format, enabling some access to equity finance. They will have an increased requirement of transparency and accountability beyond that of PLCs and CLGs. It will be a requirement to have a constitution that sets out the mission of a company and a check that the organisation is in the public interest. They will have a specific regulator.

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Ensuring the Code of Conduct lives and breathes

Who is it for?

We would hope that, ultimately, the Code will be used by:

- **Not-for-profit arts organisations that appoint trustees**, to serve as a basis for the induction of new members;
- **trustees and Chief Executives** themselves, to ensure they receive the guidance and support they need to perform well in complex and demanding roles;
- those who set up **new not-for-profit arts organisations** and design their governance arrangements, to lay the foundations of good governance;
- **governing bodies (such as the Arts Council & Arts and Business)** to review their own effectiveness and to use as a basis for public reporting on their performance against the main principles of good governance;
- members of **the public**, to understand the purpose of governance, to assess its effectiveness and to demand improvement if necessary.

Awareness and Availability

The Code could be:

- publicly launched in local, regional and national arts & relevant voluntary sector publications;
- sent to a) all funded Arts Council clients (Regularly Funded Organisations and others) and/or b) all arts organisations registered with the Charity Commission, and/or c) A&B clients and d) then sent out as a procedural matter of course to *new* Arts Council clients, A&B clients and registered arts charities;
- a free download version made available on websites; Arts Council, Charity Commission, A&B, Voluntary Arts Network, DCMS *et al.*

Compliance or Regulation?

We can create a code and make it widely available, but how can we best ensure it is used and taken seriously? Good governance guidelines,

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publications and training have been available for a number of years (though arguably only to those who search), but anecdotal and publicised evidence suggests that a significant number of not-for-profit arts organisations do not engage in board development or adhere to many of the basic 'good governance' principles.

There is a wide spectrum of debate in this area ranging from those who want a code of conduct entrenched in law against which an organisation is judged fit for continued or new funding and / or charitable status, through to a more light-touch recommended practice to Trustees. What are the views from the voluntary, public and private sectors?

- **Voluntary sector:** The National Council for Voluntary Organisations' forthcoming code of governance will have no legal force; that is, there will be no legal requirement for any organisation to adopt it and therefore no sanction if they choose not to. However, the code could be an important tool in promoting effective governance and best practice across the sector. Voluntary & Community Organisations could be *expected* (though not enforced) therefore to indicate in their annual report (and/or other promotional literature, for example on their website) that they operate in accordance with the sector's code of governance.
- **Corporate sector:** the Higgs Code of Conduct takes a slightly more robust view, stating 'listed companies *have to* report on how they apply the Code's principles and to state whether they comply with the detailed provision and, if not, why not. The Financial Reporting Council now has responsibility for overseeing the Code'.
- **Public Sector:** the draft paper for good governance in the public sector (Joseph Rowntree, CIPFA & OPM) states that 'Organisations that live up to the standard (note: no enforcement) should apply the six core principles in the way set out in the 'application' section of each supporting principle (i.e. define measurables, seek feedback annually etc). Organisations providing public services vary enormously in size and purpose. All types will be encouraged to apply these principles in a

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way that is appropriate and proportionate. The commission proposes that governing bodies should report publicly on the extent to which they live up to the finalised standard and explain why and how they have adapted any of the principles to suit their type of organisation. It also proposes that they should highlight key areas in which improvements are planned.’

Noting that the Higgs Review and the subsequent Combined Code of Conduct for the corporate sector have been adopted by regulatory and governing bodies, we believe that it is likely that any arts sector Code will not be utilised effectively unless it is recognised and ideally ‘adopted’ by governing bodies such as the Arts Council, Arts and Business, the DCMS, the Charity Commission, the Foundation for Good Governance and the National Council for Voluntary Organisations, amongst others.

It is our recommendation that the Code is adopted on a “comply or explain” basis by the Charity Commission and that it should be a code for all not-for-profit organizations and compliance or explanation is fundamental to their continuation of charitable status. This we believe is the only way that such a Code will be taken seriously throughout the industry. In addition it should be promoted by Arts Council England, English Heritage, Lottery funding bodies, NCVO, trusts and foundations, corporate sponsors and individual donors. However the **primary** lever is likely to be charity registration.

The role of the Regulators

The predominant funding and/or regulatory bodies for the not-for-profit arts sector are the Arts Council and the Charity Commission.

The Commission's role

The Charity Commission is established by law as the regulator and registrar for charities in England and Wales. Their approach is to regulate with the object of promoting compliance with charity law and equipping charities to work more efficiently and effectively. Their regulation is intended to enable charities to maximise their potential and enhance their accountability. They fulfil their role as regulator by:

- securing compliance with charity law, and dealing with abuse and poor practice;

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- enabling charities to work better within an effective legal, accounting and governance framework, keeping pace with developments in society, the economy and the law; and
- promoting sound governance and accountability.

They require the following from a charity in order that it satisfies their role as regulator:

- a completed Annual Return Form
- a Trustee Update Form
- set of audited accounts
- Trustees annual report

None of the above requires evidence that a Board is annually engaged with self-review, appraisal or adhering to best practice. When pressed on this matter, an advisor said ‘those are internal issues that are specific to each Board and we don’t believe we should get involved unless we are asked to... trustees have to be allowed their own discretion and set up their own internal controls... internal controls are not connected to the Charities Act, therefore they are beyond our remit though we are happy to point people in the direction of best practice. We are mainly concerned with misappropriation of funds and evidence of financial controls.’ It is our opinion that this is no longer sufficient.

The Commission’s website makes available a wide variety of information sheets that give guidance on internal controls and best practice. Form CC60 ‘The Hallmarks of an Effective Charity’ which advocates (amongst many other things) that a Charity sets up a trustee body that takes responsibility for evaluating its own performance and for identifying and addressing the individual training needs of trustees. However, CC60 states that its hallmarks ‘describe an overarching principle and **not** a legal requirement’.

To allow flexibility the Code should not become law but should be adopted on the “comply or explain” principle.

The Arts Council’s role

The Arts Council currently provide basic advice and sign-posting around Governance and ask Regularly Funded Organisations to undertake a risk assessment process which flags up how much support they might need around Governance. They are observers on all the Boards of their Regularly

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Funded Organisations which gives them a good insight into governance procedures and issues.

The Arts Council see themselves as partners not regulators but they are reviewing their governance role and how it feeds into their funding agreements. They have developed some ideas around strengthening Governance in the sector and these will be publicly available in mid Spring 2005. They are keen to work more in partnership with the wider sector and with the work of Arts & Business and are interested in the idea of a Code and see the sense of developing a toolkit. They are wary of going too far down the regulatory road, especially in the light of their work into 21st Century organisations where a 'light-touch' is the preferred option. We therefore conclude that Arts Council England should in common with all donors ask searching questions about governance; but the main onus on supervising this area should lie with the Charity Commission.

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Further ideas to motivate compliance and effective governance

The following are additional ideas that could encourage Trustees to truly engage with the principles of a COC and more effective governance in general:

- Effective Governance of Arts Organisations Annual **Awards and best practice marks**
- **Trustee networking and discussion events**
- **Quarterly info sheet** on effective Governance of Arts Organisations sent to Trustees and CEO's of all arts org's in receipt of Arts Council funding and/or with charitable status.
- Roll out A&B's Board development **training** programme to many more organisations (at a subsidised price), using the COC as a tool for learning.
- Provide a governance **advice-line** for the not-for-profit arts sector - or is there one in existence for the entire voluntary sector that could engage with the arts sector more effectively?
- **Improve induction of new trustees** using David Carrington's 'Buddy system' idea and A&B's Board Bank induction training
- **Twinning**, larger organisations should be encouraged to twin with smaller organisations to provide, help, advice and support.
- Think outside of the box when creating more sheets of paper that may never be picked up. Produce some **credit card sized 'quick reference' good governance tools**. i.e. Sir Nigel Mobbs' 'An Effective Board Member' and 'An Effective Chair' bullet point lists could be printed into small cards that fit in a wallet and serve as a good reminder of what is expected. Perhaps these, along with an induction information pack could be made freely available (plus training opportunities) to all new trustees.
- David Carrington refers to the essential 'dance' of a **relationship between the Chair and CE** – if this breaks down, the governance and management of any organisation will suffer. The Arts Council should consider relationship training courses.
- Commission a good governance **video training pack** that can be watched in twenty minute bursts over the course of several meetings by a whole board or in training sessions.

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Strategic issues and ideas

- There is a need for much more **joined up thinking** between the arts sector and the voluntary sector as a whole.
- Undertake a **review** into the issues of governance within the not-for-profit arts sector.
- **Measures of success** – ‘what makes a successful board / trustee’, which should also feed into general developmental thinking.
- How to **‘sex up’ board membership!** The voluntary sector in partnership with the Home Office’ Active Community Unit (desire to increase voluntary activity) are looking at how the profile and status of being a Trustee can be improved (active citizens etc). The arts sector should keep abreast of these developments, which may include tax breaks (against volunteer time given), expenses, accreditation etc.
- In order to keep a **code of conduct continually relevant and flexible**, it will need to be updated at regular intervals. We should ensure that an organisation takes responsibility for doing so.
- **Light-touch verses increasing accountability.** We should look very carefully at how a code of conduct can work without it adding immense pressure on already over-stretched organisations and volunteers.

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Further information

The following list pulls together useful signposting information concerned with governance.

Specific to Arts Organisations:

- Arts & Business Board Bank Handbook and induction training for all new Board Members recruited by A&B
- A&B Board Development Training Programme
- 'Care Diligence and Skill': A corporate governance handbook for arts organisations (Scottish Arts Council)
- New, acclaimed book by David Fishel (who has predominantly worked in the arts), 'Boards That Work: A Guide for Charity Trustees'

Not specific to Arts Organisations:

- Charity Commission has numerous publications setting out both the legal responsibilities of Charity Trustees and suggestions for best practice
- John Carver, 'Boards that Make a Difference'
- C Cornforth & C Edwards, 'Good Governance: Developing Effective Board-Management Relations in Public and Voluntary Organisations'
- Rodney Hedley and Colin Rochester, 'Volunteers on Management Committees: A Good Practice Guide'
- Corporate Governance in the Charity Sector – Top Ten Principles (Foundation for Good Governance)
- Code of Conduct for the Voluntary and Community Sector (NCVO – to be launched early 05)
- Chris Comforth, 'Recent Trends in Charity Governance and Trusteeship' & 'The Governance of Public and Non-Profit Organisations: What do boards do?'
- National Housing Federation, 'Approaches to Appraisal – a Handbook for the Effective Board'
- Charity Trustee's Handbook, Mike Eastwood
- The Good Governance Action Plan for Voluntary Organisations, Sandy Adirondack
- The Good Governance Action Plan for medium and large voluntary organisations, Sandy Adirondack

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- Involving Young People: Guide to Board Development, Tesse Akpeki
- Inducting and Supporting Trustees, Tesse Akpeki
- Developing Trustee Boards, Tesse Akpeki
- Numerous independent best practice & example sheets such as Christopher's Trustee meeting agenda framework and SAM's books 'Effective Board Checklist'
- www.companies-house.gov.uk
- www.charitycommission.gov.uk
- www.ncvo-vol.org.uk/tgt
- www.governance-works.org.uk
- www.aandb.org.uk
- www.dsc.org.uk