



LawWorks Consultation response DCMS Civil Society Strategy

Introduction

LawWorks welcomes the opportunity to respond to the Department for Digital, Culture, Media and Sport (DCMS) Civil Society Strategy consultation. LawWorks is the operating name for the Pro Bono Solicitors Group, and is supported by the Law Society. Our mission is to improve access to justice for individuals and organisations unable to afford or access legal help (commercially or through legal aid), primarily by encouraging, developing and supporting legal pro bono work. We therefore have a strong interest in civil society issues. Our work includes:

1. Supporting a network of over 230 independent legal advice clinics - hosted through law schools, advice agencies and other non-profit partnerships - across England and Wales;
2. Brokering pro bono legal advice for small not-for-profit organisations
3. Running “secondary specialisation” bespoke pro bono casework and representation projects;
4. Providing training and resources for individuals, firms and in-house teams undertaking pro bono, and celebrating excellence in pro bono through our annual Awards;
5. Collaborating with others in the legal support sector, engaging across the legal profession and providing a “policy voice” for pro bono.

Our work therefore provides us with an important insight into civil society and the charities sector, especially through our Not-For-Profits Programme. The programme brokers free legal advice for small not-for-profits working with individuals in need in England and Wales. As the programme only helps small not-for-profits, the vast majority have annual incomes below £500,000. Last year, the main areas of law advised on under the programme were property, commercial, and employment law, as well as ‘corporate’ matters (such as constitutions and transfers of assets), with volunteer lawyers taking on 238 matters in 2017.

We hope that the Strategy can provide a basis for encouraging, rewarding and celebrating all forms of civic participation, including pro bono, and create a more favourable policy environment for civil society in all its forms. In this response we emphasise the particular role of legal pro bono, enabling charity and business/professional communities to work together, leveraging resources from the private sector to assist civil society organisations and their beneficiaries, and promoting the rule of law more widely so that injustice can be challenged both through legal process and the strengthening of civil society’s policy voice. Pro bono works best though where there is an infrastructure, including a strong foundation of local community based advice organisations and networks with which to partner.

We are limiting our response to the issues and questions in the 'Our Civil Society' section of the consultation, though we hope that our response will be relevant to the consultation as a whole.



Definition, understanding and interpretation of “civil society”

The consultation offers a description of ‘civil society’ as “*inclusive of all those outside of the public sector, who share the mission of building a stronger society and improving lives, regardless of traditional sector boundaries such as charity or private and for profit or not.*”

This is a somewhat broader interpretation than traditional definitions (based on community activities, voluntarism and bodies that sit somewhere between the ‘state’ and ‘market’, with a non-profit focus). It appears to be intended to capture social enterprise and corporate social responsibility (CSR), extending the scope of civil society far beyond the charities sector, and to move away from the lack of clarity about the composition of the “third sector” (a term which DCMS policy makers no longer use).

The proposed description certainly fits well for legal pro bono which is welcome, and the significant contribution of the legal profession’s pro bono work should be acknowledged in the framework of civil society.

However, there is a risk that the description becomes too wide and nebulous and fails to reference or frame core values, thus making a meaningful policy agenda more difficult. Moreover, the specific emphasis of ‘outside the public sector’ is curious given the number of statutory bodies that have charitable status, and the fact that many public services are delivered through, or in partnership with, charities. There are also other ways that the public sector may engage in civil society including, for example, public bodies’ legal in-house teams doing pro bono work.

What are the strengths of civil society today?

A key strength of civil society, and the charities sector in particular, has been its resilience in an immensely challenging world. This can be seen whether in “filling gaps” and responding to needs where local public services have withdrawn; bringing communities together to achieve social cohesion; embracing technology to extend reach and delivery; and providing a check on national and local Government policy where necessary. However, as the New Philanthropy Capital’s (NCP) ‘State of the Sector’ report makes clear, charities continuously trying to do more with less is leading to severe strategic risks and challenges, including managing expectations and maintaining public trust.¹ The impact of public sector cuts should not be under-estimated, both on charitable organisations and their beneficiaries.

Taking a case study from our sector, for example, of extending the reach of pro bono advice; this cannot replace what cuts to Legal Aid have removed, and there are still significant and growing barriers to overcome for some of the most vulnerable in our communities in accessing justice. However, by harnessing the contribution of pro bono, we have found ways to use and scale the expertise of legal professionals and law students to help address legal exclusion in communities and to effect positive change through legal support.

Another key strength is the sector’s overall breadth, reach and diversity. As the House of Lords Charities Select Committee’s Report ‘*Stronger charities for a stronger society*’ says: “Charities are the eyes, ears and conscience of society. They mobilise, they provide, they inspire, they advocate and they unite. From small local organisations run entirely by

¹ <https://www.thinknpc.org/publications/charities-taking-charge/>

volunteers to major global organisations with turnover in the hundreds of millions, their work touches almost every facet of British civic.”² Innovation remains one of the sector’s key strengths in finding new ways to meet needs.

However to sustain their operations many charities face difficult choices, risk assessment and prioritisation, and this is certainly our experience from working with smaller charities, for example on our Not-For-Profits Programme we are often asked to review governing documents with reference to the focusing of charitable objectives. As the NCP report says “prioritisation is not easy, because there is an inherent risk: in focusing your activities on where you can create the greatest impact, you may leave some people behind, or miss out activities that are important to achieving mission.”³ Effective prioritisation is best based on robust evaluation and evidence about “what works,” but many charities do not have sufficient resource and infrastructure to engage in meaningful evaluation work.

How can government help to increase the impact of civil society?

We hope that this Strategy can serve as a framework for developing civil society-friendly policies to increase the sector’s impact. This needs to be done in partnership with the sector (eg., a co-production approach), recognising that charities (including the contribution of CSR and pro bono) can help government to build a strong strategy for civil society that commands support across communities and across political divides. It is also important that this Strategy embraces and influences the whole of government – from foreign policy to the justice system, consumer issues, education, health and social policy, so that the sector can play a full part as a vital part of British society and economy.

As part of the Strategy we would like to see Government and charities develop a shared policy agenda to tackle common challenges across the sector that can otherwise inhibit its impact and innovation, or capacity to serve its beneficiaries. We would suggest, from the basis of our engagement in the sector and especially the issues raised by applicants to our Not-For-Profits Programme, that the following might be areas to look at in developing that agenda. We recognise though that other respondees will be raising other important priority areas, so what follows is not intended to be an exhaustive list of the policy and legal challenges that can inhibit impact. We focus on the following:-

- Regulation;
- Property and premises;
- Intellectual property;
- Employment law and human resources;
- Grants versus contracts;
- User involvement and big data.

Regulation:

It is important that the sector is well regulated. Effective regulation can support the achievement of collective goals, promote good governance and protect beneficiaries. However, excessive regulation can undermine innovation, especially where charities have to

² <https://publications.parliament.uk/pa/ld201617/ldselect/ldchar/133/133.pdf>

³ www.thinknpc.org/publications/charities-taking-charge/

deal with the intersection of multiple regulators and regulatory regimes, sometimes combined with expensive licensing costs from regulators (the advice sector is a good example – e.g. if an agency is providing a mix of legal, debt, and immigration advice). Whilst we do not advocate further reform of current charity law (since the Charities Act 2011), it is important that working with the Charity Commission Government should keep the regulatory framework under review, consider the recent recommendations from the Law Commission,⁴ and in particular look to continuously improve the quality and user-friendliness of regulatory guidance, including the information on <https://www.gov.uk/topic/running-charity>. Common issues raised by small groups through our Not-For-Profits Programme include:-

Issues around choosing and setting up the most appropriate charity and not-for-profit structures (incorporated/unincorporated/CICs, CIOs, co-operative etc), the registration process, liaising with regulators, and amending governing documents etc;

Issues relating to assets disposal or transfers in relation to mergers, winding up or insolvency situations.

Property and premises:

In our experience small charities are being severely squeezed on property and premises costs – to the point where not-for-profits providing vital local services are being pushed out of their long-term premises by sudden hikes in rent; many are unable to afford to continue operating and cease their services to beneficiaries. Local Authorities in particular, which have often provided community centre premises for local charities to use at peppercorn rents, are now less inclined to do so, and more inclined to charge higher commercial rents. One function of the Strategy could be initiatives across government to encourage greater use of empty or redundant public sector premises as ‘community hubs’ or for social enterprise, and breathe new life into disused civic buildings such as old schools, courthouses, libraries, police stations and cottage hospitals.

The recent Charity Property Matters Survey has suggested that nearly half of property-owning charities are concerned about the risks of property management.⁵ Where charities own/and or mortgage land or property, there are quite complex regulations to negotiate over disposals, for example under Part 7 of the Charities Act 2011 and the Charities Act (Qualified Surveyors Report) Regulations 1992, including requirements on Trustees to obtain detailed and costly surveyors’ expert advice and reports in all cases regardless of the size or type of land/property asset. There may be a case to look at the level of specialist advice needed so that the requirements could be applied more flexibly in practice on a bespoke basis, and the Law Commission has already made recommendations to make the process less prescriptive.⁶

Intellectual Property

Another set of issues which commonly present through the Not-for-Profits programme, are legal questions or problems in respect of intellectual property (IP), including the protection of charities intangible resources, various issues concerning brands/logos/trademarks and copyright, and using intellectual property assets in trading activity. This is an especially

⁴ www.lawcom.gov.uk/charities-need-right-rules-to-run-effectively-report/

⁵ www.ethicalproperty.org.uk/content.aspx?CategoryID=550

⁶ www.lawcom.gov.uk/charities-need-right-rules-to-run-effectively-report/

complex area of law for charities to understand and negotiate, from even knowing what qualifies as IP to self-identifying the IP assets that charities hold, to taking appropriate protective action. Processing fees (Patent Office and Trade Marks Registry) can also be an issue for very small charities. The Strategy may want to consider what kind of guidance and support might be helpful.

Employment law and human resources:

This area of policy is currently under review by the Department for Business, Energy and Industrial Strategy (BEIS) (including following the recommendations made by the “Taylor Review”). The charities sector in particular could benefit from greater clarity about (or guidance around) distinctions between volunteer, employee/worker, consultant etc (bearing in mind the importance of volunteers/volunteering in the sector). Only larger charities tend to be able to operate with a dedicated HR team or resource. The development of reforms from the Taylor Review should take into account the specific needs of the sector, and the work of the Strategy should be joined up with the ongoing work at BEIS looking at employment law and “gig economy” issues.⁷

Grants v. contracts balance

Accountability in delivering services supported from public funds is important. However, we note and welcome the recent comments from Ministers that the balance may have swung too far in favour of complex commercial contracts and away from more straightforward grants or service level agreements⁸. Current models of commissioning can create complex chains of contractual risk and liabilities that require significant and costly legal expertise to unravel, and driving smaller charities out of the public services procurement market altogether. The change of emphasis suggested by Ministers is welcome including, for example, “place-based” approaches that can bring a range of different collaborations in partnership with local authorities.

In any discussion about funding models the watchword should be “outcomes” as it needs to be recognised that charities are primarily mission focused, and so will look to the freedom to innovate to fulfil their mission. Perhaps unsurprisingly then research by nfpSynergy found that the average charity would trade in a ‘restricted’ funding source to get half as much ‘unrestricted’ income, especially given the importance of covering core running costs.⁹ As the House of Lords Select Committee report concludes: “Charities cannot operate unless their core costs are met. We recommend that public sector commissioners should be expected to have regard for the sustainability of the organisations which they commission to deliver services. This should include an expectation that realistic and justifiable core costs are included in contracts.”¹⁰ Finally, the Strategy should also focus on ensuring that the principles of the Social Value Act 2011 are built into all public procurement processes. When procuring services from the legal sector for example, public bodies could be encouraged to look favourably on suppliers/contractors that engage in civil society and have strong CSR policies. We understand that the Welsh Government is looking at this approach in respect of legal services procurement and pro bono.

⁷ See LawWorks submission to Taylor Review www.lawworks.org.uk/solicitors-and-volunteers/resources/taylor-review-modern-employment-practices

⁸ www.gov.uk/government/speeches/matt-hancock-speaking-on-civil-society-in-the-21st-century

⁹ <https://nfpsynergy.net/restricted-vs-unrestricted-income-survey>

¹⁰ <https://publications.parliament.uk/pa/ld201617/ldselect/ldchar/133/133.pdf>

User involvement and big data:

Reflecting the welcome move towards “co-production” approaches in the sector, the Strategy should put the concept of ‘user voice’ at the heart of its policy and approach. User involvement, feedback, evaluation and effective use of data in the sector are all key to achieving this. Starting with the challenge of data, better access to government data sources would provide an invaluable information resource and help charities to use data more effectively; and Government should also make its own administrative data more user-friendly. A good example is the Ministry of Justice’s Datalab which gives organisations working with offenders full access to re-offending data;¹¹ however the data around other parts of the justice system (ie family, civil and administrative justice) is much poorer including data gaps on litigants in person and wider outcomes for those with civil justice issues. We hope that the Strategy can provide the basis for a constructive conversation about the ways that data can be used, consistent with new data laws, working also with the Information Commissioner’s Office (ICO) to reduce risk aversion amongst charities.

The Strategy should also recognise that users and beneficiaries can become involved in the sector as volunteers or in other peer group support schemes, such as time-banking. Given the well evidenced wellbeing merits of volunteering, including pathways to employability, it is regrettable that there are frequent reports that local Job Centre Plus discourage volunteering – this is perhaps an issue for the Strategy to pick up. We would also argue that both Government and business have a hugely important role to play to make it easier for employed people to volunteer, including high skilled professionals.

Tax and fundraising

Some of the proposals suggested by the Charities Finance Group involving small changes to the tax treatment of charities, such as reducing irrecoverable VAT through a more consistent rebate policy, could significantly help the sector.¹² The Strategy should also develop the work already going on in Government looking at Dormant Assets as potential funding sources, for example the Treasury rules on use of ‘Bona Vacantia’ estates; the Low Commission and others have made recommendations on this.¹³

How can public trust in civil society be built and maintained?

The challenge of public trust is writ large not only for charities, but also for the professions, democratic and government institutions, large corporations and the post Leveson-media. The problem, however, can also be overstated as some surveys indicate that trust levels remain comparably high in charities.¹⁴ A good starting point though would be for this Strategy to promote the sector’s critical role, showcasing positive outcomes and emphasising core values. Pro bono is a good example; the legal profession in the UK has a long tradition of providing pro bono services voluntarily, but really embedding a culture of pro bono as part of a demonstrable commitment to access to justice would go a long way to improving public confidence in the legal profession as an engaged agent of civil society.

¹¹ www.thinknpc.org/our-work/projects/data-labs/justice-data-lab/

¹² www.civilsociety.co.uk/news/cfg-reform-tax-system-to-save-charities-2bn.html

¹³ www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf

¹⁴ www.edelman.co.uk/magazine/posts/edelman-trust-barometer-2018/

Secondly an important way for charities to rebuild trust is to demonstrate their impact on society – the Strategy should consider how the sector’s working relationship with Government and the regulator could support better demonstration of impact. We have mentioned the role of regulation above, regulation should not only focus on governance standards and financial stability, but should also encourage a greater focus on the impact and value delivered to beneficiaries. Consistent with our previous answers though, charities need tools, infrastructure and access to data to do this well.

How can civil society be supported to have a stronger role in shaping government policy now and/or in the future?

A starting point is that Government needs to scrupulously avoid any attempt to bend civil society to meet its own policy objectives. The value of the sector’s role in informing and shaping government policy is its independence and its focus on beneficiaries, including giving beneficiaries a voice through advocacy. There have been concerns in recent years that measures such as Part Two of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Act 2014, and the introduction of so-called “no advocacy” clauses in public services contracts, have failed to fully respect or understand these boundaries and the sector’s core values. Charities were already subject to charity law and must not be party-political, and this should be sufficient to mitigate any abuses. Evidence based advocacy should be positively welcomed, and can provide valuable insight for Government into the experiences of vulnerable, excluded or ‘hard to reach’ groups.

Past approaches that have proven effective have included the “Compact” between government and voluntary sector,¹⁵ and having the Office for Civil Society based in the Cabinet Office at the heart of the Government policy-making structure. However, the Strategy should not be trying to emulate past approaches but should be looking for new ones. It is entirely within the gift of Government to establish consultative fora, working groups and panels thereby drawing in specialist expertise and knowledge from the sector; LawWorks, for example, is represented on the consultative groups working with the Ministry of Justice’s post-implementation review of LASPO (Legal Aid, Sentencing and Punishment of Offenders Act 2012). We would like a relationship to evolve in which the sector is involved in the early stages of the policy-making cycle, adding value through expertise and understanding of potential impacts of proposed policy on beneficiaries. Within the legal sector for example there is a significant appetite amongst lawyers to develop their pro bono work by using their expertise to help inform policy-making.

¹⁵ www.gov.uk/government/news/government-and-voluntary-sector-agree-new-compact