



## **Consultation on the Fifth Money Laundering Directive and Trust Registration Service**

### **Response from the Association of Charitable Foundations (ACF), National Council for Voluntary Organisations (NCVO) Charity Finance Group (CFG), and Bond**

**February 2020**

#### **Summary**

**This consultation response is jointly submitted by ACF, NCVO, CFG and Bond, representing charitable trusts that make grants to achieve public benefit. We fully support the government's proposal that charitable trusts are not in scope to register with the Trust Registration Service (TRS) as they are well regulated and deemed to be low risk by government.**

#### **About ACF**

The Association of Charitable Foundations (ACF) is the membership body for UK foundations and grant-making charities. Driven by a belief that foundations are a vital source for social good, its mission is to support them to be ambitious and effective in the way that they use their resources. Its 380 members collectively hold assets of around £50bn and give over £2.5bn annually.

#### **About NCVO**

The National Council for Voluntary Organisations (NCVO) champions the voluntary sector and volunteering because they're essential for a better society. It has a diverse community of over 14,000 member organisations. It helps them thrive by providing expert support and advice, by saving them time and money, and by keeping them up to date with the news that affects them.

#### **About CFG**

Charity Finance Group (CFG) inspires a financially confident, dynamic and trustworthy charity sector. It does this by championing best practice, nurturing leadership and influencing policy makers. Over 1,400 UK charities turn to CFG to develop their finance management knowledge and skills. Collectively, these charities manage £22bn of funds – a third of the charity sector's income.

#### **About Bond**

Bond is the UK network for organisations working in international development. It has over 400 members, ranging from small specialist charities to large international nongovernmental organisations with a worldwide presence. It unites the development and humanitarian sector to drive global change through connecting people in the sector, influencing governments and policy makers, and strengthening organisations to be more impactful and sustainable.

**To support the proposal that charitable trusts fall out of scope of the Trust Registration Service (TRS), we make the following points:**

**1. Charity regulation in the UK is broad and robust**

- Charities are regulated by dedicated regulators in the UK's jurisdictions with substantial powers
- Depending on their activities, charities are also regulated by other bodies including Companies House, HMRC and the Information Commissioner's Office
- Smaller charities (with income under £5,000) in England and Wales that are not registered with the regulators are still subject to law and regulation
- Exempt charities are generally regulated by government departments or other regulators
- It is hard to draw parallels with other countries where 'trusts' as such do not exist and the charity legal and regulatory environments are different

**2. The risk that charitable trusts may be used for money laundering is low**

- This is supported by the government's 2017 National Risk Assessment
- The Financial Action Task Force (FATF) amended its recommendations to reflect that non-profit organisations are not particularly vulnerable to abuse
- An evaluation of the UK under FATF praised the work of the charity regulators in mitigating risk
- There are additional measures in place for charities working in high-risk jurisdictions

**3. There are various measures in place that require or encourage charitable trusts to be transparent**

- Information is shared publicly and on request under charity regulation
- There are a number of efforts within the charity sector to share and promote best practice in transparency, including those led by NCVO and ACF

**4. There are unique considerations for charitable trusts to be taken into account**

- Identifying beneficial owners may be complex for charitable trusts, and such information is already available publicly via the register of charities
- The information required by the TRS is already largely available on the charity regulators' registers, which is proportionate to the circumstances of charitable trusts
- The administrative burden of the TRS means that charitable resources are diverted away from grant-making and the trust's core functions, and towards administration costs

**Thank you for the opportunity to respond to this consultation as the proposals are being developed. If you would like to discuss anything in this response in further detail, please email [policy@acf.org.uk](mailto:policy@acf.org.uk)**

## 1. Charity regulation in the UK is broad and robust

Charitable trusts are subject to broad, robust and overlapping regulatory regimes, many of which go far beyond the requirements of the Trust Registration Service (TRS) in ensuring legal compliance, transparency, and appropriate use of the trust for charitable purposes. Below we demonstrate the regulatory environment for charitable trusts as charities, and explain why this is sufficient in achieving the government's aims.

Charitable trusts are established to deliver their charitable purposes for the public benefit, governed by a board of trustees. As charities, they are regulated in a number of ways, including:

- charity regulators in England and Wales<sup>1</sup>, Scotland<sup>2</sup> and Northern Ireland<sup>3</sup>
- in respect of fundraising, the Fundraising Regulator in England, Wales and Northern Ireland and the Scottish Fundraising Standards Panel in Scotland
- applying to HM Revenue and Customs to be registered as a charity for tax purposes.

Charities are also regulated by other bodies in a variety of different ways, including Companies House for charitable companies and the Information Commissioner's Office.

The Charity Commission for England and Wales, which has 168,000 charities on its register and is the UK's largest charity regulator, has a wide range of powers under charity law, including the power to:

- restrict transactions a charity may enter into
- appoint additional trustees
- 'freeze' a charity's bank account
- suspend or remove a trustee
- appoint an interim manager
- make a referral for investigation to the police and other law enforcement agencies.

The Commission has issued a toolkit specifically aimed at due diligence in receipt of donations, and the duty to consider the best interests of the charity and ensure charitable funds are only received for charitable purposes is a core feature of charity law. The Fundraising Regulator's Code of Fundraising Practice also includes specific guidance on receiving donations, which specifically references the Proceeds of Crime Act 2002. The sector's Charity Governance Code<sup>4</sup>, endorsed by the Commission, also emphasises the importance of appropriate procedures for boards in assessing risk and ensuring appropriate financial controls.

### ***Smaller charities***

All charities regardless of their size are subject to charity law and regulation, and charitable incorporated organisations (CIOs) are also required to register whatever their size. In England and Wales, unlike Scotland and Northern Ireland, charities with an annual income below £5,000 apart

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<sup>1</sup> <https://www.gov.uk/government/organisations/charity-commission>

<sup>2</sup> <https://www.oscr.org.uk/>

<sup>3</sup> <https://www.charitycommissionni.org.uk/>

<sup>4</sup> <https://www.charitygovernancecode.org/en/front-page>

from charitable incorporated organisations (CIOs) are not obliged to register with the Charity Commission (though they can apply to register in some circumstances). These are known as 'excepted' charities. But it is important to recognise that being excepted from registration does not mean that charities are exempt from charity law or regulation. Concerns can still be investigated, and the Commission retains its other powers.

NCVO's Almanac<sup>5</sup> publishes a wide range of data relating to micro-charities (with incomes under £10,000) based on a large sample, including the geographical areas charities work in. The most striking pattern is that micro-charities are the part of the sector most likely to be working locally and joint least likely to be working overseas: 6% are focused on UK and overseas work, and 4% are focused only on overseas work. The figures for largest charities, meanwhile, are 10% (UK and overseas) and 11% (overseas only) respectively.

### ***Exempt charities***

A number of charities are not regulated by the Charity Commission because they have an alternative principal regulator for the purposes of charity law. This is intended to avoid unnecessary duplication.

Only a few exempt charities do not currently have a principal regulator, but these charities are overwhelmingly domestic in focus. They tend to be charitable community benefit societies and registered friendly societies, including social housing providers, and must register with the Financial Conduct Authority, along with the Regulator of Social Housing in the relevant cases.

### **International comparators**

The UK charity regulatory regime is in many ways distinct from that in other jurisdictions. 5MLD is being implemented across Europe, although the registration requirement is taking different forms due to the various legal structures and entities in individual jurisdictions. In the UK, charitable trusts are charities registered with the relevant regulator(s), as set out above. The terms 'charitable trust' and 'charitable foundation' are often used interchangeably to refer to charities whose primary activity is making grants, often with an independent source of income derived from an endowment. Many are established as charitable trusts; many were originally established as charitable trusts but have evolved over time to take advantage of newer charitable structures, of which there are many. Charitable trusts in particular are not commonplace as a legal structure throughout Europe. Dafne (Donors and Foundations Networks in Europe) has summaries of the regimes for charitable foundations and trusts in European countries<sup>6</sup>.

## **2. The risk that charitable trusts may be used to launder money is low**

**Several government-led assessments have deemed the risk that charitable trusts may be used for money laundering is low. Below we present the evidence to support this and the measures taken to ensure the risk remains low.**

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<sup>5</sup> <https://data.ncvo.org.uk/>

<sup>6</sup> <https://dafne-online.eu/country-profiles/>

In 2017, HM Treasury and the Home Office's National Risk Assessment of Money Laundering and Terrorist Financing downgraded the risk for charities from medium-high to low. It was deemed that the use of non-profit organisations was not an attractive means to launder money. The 2017 NRA summarises the risk as follows:

*"In comparison to the overall size of the UK charity sector, the amount of known abuse for terrorist financing is very low. It is unlikely that charities have been set up for the purpose of funding terrorism. As such, we now assess the risk of abuse of NPOs altogether for terrorist financing as low."*<sup>7</sup>

This is in part due to an increased emphasis on understanding and mitigating against financial crime within the sector. This has seen notable improvements in charities' understanding of these issues, including the creation of a Charities Fraud Awareness Hub<sup>8</sup>, and the Charity Commission producing detailed guidance that is frequently updated.

In 2016 there was an important change to the Financial Action Task Force (FATF) policy regarding non-profit organisations, when it amended 'Recommendation 8' meaning it deemed non-profit organisations not being considered 'particularly' vulnerable to financial fraud. It now states that countries should employ a risk-based approach:

*"In its mutual evaluation of the UK, the Financial Action Task Force (FATF) observed that the UK had a good understanding of the terrorist financing and money laundering risks associated with charities and applied a targeted risk-based approach to mitigating these risks. It also praised the role of the charity regulators in facilitating compliance, highlighting practical examples of the UK's in helping to protect the sector from abuse, and is consistent with the overall risk profile of charities.*

...

*Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse."*<sup>9</sup>

The majority of unregistered charities are local charities, which FATF identifies as low risk. FATF identifies that the Charity Commission's wider activities have "largely mitigated" the "minor" risk associated with charities with incomes under £5,000<sup>10</sup>.

Furthermore, even though charities might not be registered, the Charity Commission still has jurisdiction over them, as mentioned earlier, and FATF points to good examples of co-operation between the regulator and the National Terrorist Financial Investigation Unit (NTFIU) to detect and prevent terrorist financing.<sup>11</sup> They state *"The close relationship between the CCEW and counter-*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655198/National\\_risk\\_assessment\\_of\\_money\\_laundering\\_and\\_terrorist\\_financing\\_2017\\_pdf\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf)

<sup>8</sup> <https://www.gov.uk/guidance/protect-your-charity-from-fraud#charity-fraud-awareness-hub>

<sup>9</sup> <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>

<sup>10</sup> Ibid

<sup>11</sup> Ibid p102

*terrorism agencies, including the NTFIU, also ensures that any information and intelligence on unregistered and informal charities is shared to ensure oversight of the sector.”<sup>12</sup>*

### **Additional checks for charities working in high-risk jurisdictions**

There are already robust procedures and checks in place for charities working in higher risks jurisdictions. For those areas which have been deemed to be higher risk (primarily charities working in high-risk jurisdictions such as Syria and Iraq) the government has created a Tri-sector Working Group on the Operation of International NGOs in High-Risk Jurisdictions, chaired by the Home Office and in operation since November 2017. The group has participants from multiple parts of government, including OFSI, the Home Office, Foreign Office and DfID, alongside representatives from the financial services industry and international non-government organisations. Part of the group’s work is to provide a mutual understanding of risks and a collaborative approach to risk management, and to ensure the compliance requirements placed on civil society are proportionate, while also meeting the needs of government and financial institutions.

In addition, the Charity Commission has an effective programme focusing on charities which are deemed higher risk for terrorist financing purposes. It also produces guidance and regulatory alerts to these charities advising them on the risks, helping to protect them from abuse.

### **3. Considerations for charitable trusts**

**There are some unique considerations for charitable trusts in how the Trust Registration Service may affect their work and operations. Below we present reasons why the government’s proposal that charitable trusts are not within scope of the TRS is responsible and proportionate.**

There are complexities for charitable trusts in interpreting beneficial ownership. The beneficial owner could refer to: the settlor, the trustees, the protector (if any), the beneficiaries or class of persons in whose interest the trust operates, and any other natural person exercising ultimate control. The term ‘beneficial owner’ is itself problematic for charitable trusts, where the benefit is to the public and there is less often a sense of ‘ownership’ that is comparable to private trusts. Where the beneficial owner is a class of persons, it is challenging to understand the requirements; the vast majority of that particular class may have no knowledge of the trust’s existence. The charitable trust’s beneficiary groups are listed on the public charity register, as per charity regulation set out above.

Where the beneficial owners are the trustees, having to disclose details beyond what is required on the regulators’ register is disproportionate, and may pose additional concerns to trustees where third parties are able to request the data. At present, the Charity Commission for England and Wales requires trustees to submit their name, address, contact details, date of birth and date they started as a trustee. The TRS would additionally require passport or National Insurance number, which is disproportionate given the low risk nature of charitable trusts as set out above. Furthermore, making that information available to third parties under request may place trustees in harm’s way,

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<sup>12</sup> Ibid

where the charitable trust may carry out vital work that is deemed controversial in other jurisdictions, or where trustees themselves have particular vulnerabilities.

Trustees play an essential role in civil society, but it can be difficult for charities to recruit new trustees. Charities are making efforts to recruit openly and from diverse networks, but there are barriers to trusteeship. A large number of trustee positions are thought to be unfilled, which indicates the need to encourage trusteeship and break down barriers that prevent people participating. In response to these concerns, there are significant efforts across to bring more trustees into the charity sector, representing a range of demographics, views and experiences. These include ACF's own report *Diversity, equity and inclusion: the pillars of stronger foundation practice*<sup>13</sup>, which has direct relevance to charitable trusts. These efforts are trying to break down the barriers to trusteeship, some of which relate to the onerous and complex legal commitments trustees undertake and the high level of public scrutiny. For example, a charitable trust working on criminal justice issues may seek people who have experienced the system to join their board, and individuals may be disincentivised by the level of publicity and obligation trustees can be subjected to. The TRS would add significantly to these commitments and may deter much needed volunteers from becoming trustees.

A further concern is the administrative burden posed by the TRS. While we recognise that all trusts under the TRS's scope would feel some burden of additional requirements, it is particularly acute for charitable trusts whose resources are dedicated to charitable purposes. Resources spent on professional advice or disproportionate bureaucracy are diverted away from the charitable trust's core purposes.

#### **4. Transparency of charitable trusts**

**A high level of information is available publicly and on request about charitable trusts, including most of the information sought by the TRS and much more beyond. Where this information is not shared, it is with good reason to protect trustees from harm. Below we summarise the ways in which charitable trusts are transparent both in terms of regulation and in terms of practice within the charity sector.**

The Charity Commission requires registered charities to submit an annual return. Charities with incomes under £10,000 must report their income and spending, while charities above £10,000 must answer questions about their work in an annual return. Once the threshold of £25,000 is crossed, charities must have their accounts checked and reviewed by an independent examiner's report. They also need a full audit if they have either income over £1 million or gross assets over £3.26 million and income over £250,000. CIOs must answer questions in their annual return and include PDF copies of their accounts, whatever their size.

All charities with incomes over £25,000 have to provide PDFs of their trustees' annual report. These are published, and most charities make these available on their websites, as well as being accessible

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<sup>13</sup> [https://www.acf.org.uk/downloads/ACF\\_DEI\\_Thepillarsofstrongerfoundationpractice\\_final.pdf](https://www.acf.org.uk/downloads/ACF_DEI_Thepillarsofstrongerfoundationpractice_final.pdf)

through the Charity Commission's register. This gives a significant amount of information about, and explanation of, charities' income, spending and activities.

Trustee names are listed on the Commission's public register, and it is indicated where an individual also serves as trustee of another charity. Charity Commission requirements cover a great deal of the information which would be required for the TRS, including name, address, contact details and date of birth, as well as a lot of additional financial information about charitable trusts. Given the inherent complexities of the idea of beneficial ownership in a charitable context, the data held on the regulators' registers is sufficient and proportionate in achieving the TRS's aims.

It is worth noting that annual return questions include overseas income and spending. The answers to these specific questions are not published, but that would also be true of the TRS. Most answers are published, along with accounts. Overall, significantly more information is made available to the public via the annual return than would be made available via the TRS.

The extensive regulatory regime for charities in the UK means that the basic threshold for trust transparency is high, as set out above. In addition to mandated transparency, the direction of travel among charitable trusts is towards greater levels of transparency beyond legal compliance. Openness is one of NCVO's core charity ethical principles<sup>14</sup>, and sector bodies have supported charities to be more transparent – and provided advice on how to do so – for some time.

Charitable trusts are also looking at how to open their decision-making processes, devolving greater power to beneficiaries, and publishing data on grants and investments made by the trust. ACF is currently running a multiyear initiative, Stronger Foundations<sup>15</sup>, that aims to identify and help charitable trusts and foundations pursue excellent practice, and transparency is a specific area of inquiry. Emerging from this initiative is a strong desire to go beyond legal compliance and make the trust and foundation sector more open and transparent. This direction of travel, led by trusts and foundations themselves and motivated by a desire to be more ambitious and effective, could lead to a standard of transparent practice that goes far beyond what is legally mandated.

## Conclusion

**We are grateful for this opportunity to comment on the Trust Registration Service. We support the government's proposal that charitable trusts are not within scope of the TRS based on robust evidence that charitable trusts are already well regulated, already sharing the required information, and deemed to be low-risk by the government. We would be happy to discuss any of the points made in this response; please email [policy@acf.org.uk](mailto:policy@acf.org.uk)**

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<sup>14</sup> <https://www.ncvo.org.uk/policy-and-research/ethics/ethical-principles>

<sup>15</sup> <https://www.acf.org.uk/policy-practice/stronger-foundations/>