

Decision Notice

**Lady Elizabeth Hastings' Estate Charity
Lady Elizabeth Hastings' Educational Foundation
Lady Elizabeth Hastings' Non-Educational Charity**

(all registered under charity number 224098)

The decision at issue

The Commission's decision to make a new Scheme, on the application of the trustees, for these charities.

Decision

The Commission's decision to make a Scheme for the above charities, further to sections 13 and 16 of the Charities Act 1993, was correct.

(For ease of reference, all statutory references in this Decision Notice are to the law as it existed prior to the coming into force of the Charities Act 2011)

There has been consideration of the decision under the Commission's decision review process (*Dissatisfied with one of the Commission's decisions: how can we help you?*), which may be found [here](#). More detail from the Commission's guidance on dealing with representations on Schemes in particular, is set out fully at Annex 1.

You may be able to challenge the decision in the First-tier Tribunal (Charity) if you are a person entitled to appeal and the decision falls within the schedule of decisions that can be challenged in that way. If you wish to appeal against our decision you may find it helpful to visit the Tribunal's website for more information about time limits, form of notice of appeal and how to make an application:

<http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/appeals.htm>

Your application to the Tribunal should be made within 42 days of the date on which the notice of our decision was sent to you. If you are not the subject of the decision you have 42 days from the date when the decision was published. In both cases weekends and bank holidays are included in the 42 days.

Summary of rationale

I have considered the merits of the Scheme *as a whole*. The advantages to the charities are set out fully later; overall the Scheme is expedient in the interests of the charities. Legally there is no reason for me to recommend the abandonment of the Scheme.

In fact generally the objections to the Scheme relate to issues concerning the charities' governance, or to matters which are actually outside the scope of the Scheme itself. These important associated matters in my view should be addressed by the trustees outside the Scheme process.

These points are considered in more detail below.

Background

The charities are currently governed by a Charity Commission Scheme dated 26 March 1986, as amended by Schemes dated 6 February 2001 and 14 July 2008.

The trustees wrote to the Commission on 4 August 2010 outlining proposals for a new fully regulating Scheme, that is to say a Scheme which will replace the earlier Schemes and become the new governing document for the charities. It was stated that the proposals would have the effect of modernising the governing documents in a number of ways, and would be in the interests of the charities. The Commission agreed with that analysis.

The purpose of the Scheme is to modernise the three charities by altering their administrative arrangements and, in the case of the Educational Foundation and the Non-Educational Charity, their objects.

Because it is mainly an administrative Scheme, it is being made under section 16 of the Charities Act 1993. It is also being made under section 13 because the charities' objects are being altered cy-pres (in other words to update them to reflect as closely as possible the original purposes).

In particular the effect of the changes would be as follows:

- **A new consolidated governing document for all three charities** – these retain their identity as separate charities however.
- **A corporate trustee to replace individual trustees** - Having a corporate trustee (which is a non-charitable non-profit making company) would mean that there would be limited liability protection for those responsible for administering the charity. Having limited liability protection might be a key factor in enabling the charity to attract persons with appropriate skills and experience to administer it, particularly in the context of a charity holding land and investments.
- **Modernised objects (1)** - The current governing documents of the Educational Foundation and Non-Educational Charity require the trustees to make specific annual payments to various individuals and institutions. This is no longer a suitable or effective method of applying the charities' income because the amounts stated quickly fall below a useful level over time. In the proposed Scheme the amounts stated have been doubled, while a provision has been included giving the trustee power to increase (but not decrease) the amounts at its discretion. This means that the intentions of the founder are still

reflected and account has been taken of the current social and economic circumstances.

- **Modernised objects (2)** - The current governing document of the Non-Educational Charity makes provision for the relief of “wives”, “separated wives”, “divorced wives” and “widows” of clergymen who are in need. This class of persons is outdated and no longer suitable given that many members of the clergy are now women. In the proposed Scheme the new class is “spouses”, “separated spouses”, “divorced spouses”, “widows” and “widowers”. It is considered that this reflects the spirit of the gift but also takes account of the current social and economic circumstances.
- **Vesting of charity land** - the land currently held by the Estate Charity is vested in the new company (as trustee only).

Publication of the draft Scheme

As it was clear that there were contentious aspects of the Scheme, the Commission advised that the draft should be published, which it was on 28 October 2011 in the Yorkshire Post and the Church Times. The publication period – providing the opportunity for interested parties to comment – is normally one month, but in this case the period was extended to 5 December 2011. Various representations were made, as discussed below.

Representations

18 representations on the draft Scheme were made.

The trustees had already set out the rationale for the Scheme in their application, and in addition they commented on a number of representations they had seen.

The Commission received 18 written representations in response to the publication of the draft Scheme, all of which were opposed to the Scheme. Two people who made written representation took up the opportunity to clarify their comments orally to the reviewer.

In the main the representations objected to the removal of Leeds City Council’s nomination rights. Concerns were also expressed about the way the investment property is being managed and that the removal of the Council’s nomination rights would undermine the public accountability of the charities.

In addition there were a number of key points from the oral representations, as follows:

- Lack of openness and transparency of the charities about their activities and decisions
- Lack of responsiveness of the trustees, and the need to go to them through a property agent, where there was a perception of a conflict of

interest, the agent acting as such but also having an interest in the sale of charities' property

- Lack of democracy in the proposed new structure – the charities' interests would be better served by having local representation
- Breaking of links with particular schools if in due course the charities do not have representation from Church of England vicars associated with particular schools

Leeds City Council made the following points in its representations:

- It has an interest in the charities as a major education provider
- It is concerned that the removal of the nominating right will lead to a failure to draw on the expertise of education partners
- It says that no good reason has been advanced to remove the nomination rights
- There would be a benefit to the charities and the Council to be mutually aware of land management proposals which may arise from time to time
- The corporate structure does not allow representation by other organisations
- It has a general statutory duty in connection with economic and social well-being

Turning to the main points of contention in more detail:

The issue of the withdrawal of the nomination rights of Leeds City Council

This was the principal objection, and came from not only the Council itself, but also from various interested parties including other local authorities and councillors. However it is important to note that even if such nomination rights were to continue, those rights would not be written into the Scheme itself, but would appear, if at all, in the articles of the trustee company. Of course one of the *effects* of the Scheme is to remove those rights, as they are no longer stipulated in the Scheme itself. Any nomination rights, and the appointment of directors of the (non-charitable) trustee company, would in future be the province of that company. This is a consequence of the appointment of such a company as trustee, which was considered to be in the best interests of the charities overall.

However, even given this legal position, it is not the case that these historic rights are of no consequence. This was a matter which, it appears, could have been more effectively addressed by the trustees, particularly as it became evident that there were objections to the proposal to remove the nomination rights of the Council.

I note that there have been apparent attempts to have meetings between the trustees and other parties to discuss this matter, but for whatever reason these did not take place. As recently as 2 February the trustees wrote to a Councillor (as far as I am aware the Council's nominee) saying that a meeting was not appropriate "at this stage".

If nominating bodies are uninterested in continuing to have a role in a charity, it would still be a courtesy for the trustees to notify them of the intention to remove those rights. But where they actively object, in the interests of fairness it would have been useful to have had a proper dialogue with nominating bodies about the rationale and impact of any proposed changes. It might be that the Council's concerns and interests (as noted above) could be dealt with in that way, even if not necessarily within the proposed new governance structure.

The corollary of the legal position set out above, that the nominating bodies are no longer noted on the face of the Scheme, is that even at this stage there could be discussion about the composition of the directors of this non-charitable trustee company. The articles of the company seem flexible in this respect. As noted, this matter is outside the scope of the Scheme and is one for the trustees. The Commission would not seek to be further involved in this, except to comment that it would seem to be beneficial to resolve the issue sensibly in the best interests of the charities.

Openness and transparency

Whilst these issues are actually outside the scope of the Scheme, in my view the trustees should consider all the representations above, including those concerning openness and transparency, and consider how these issues should be addressed. They should pay particular attention to our publication [The Hallmarks of an effective charity](#) (CC10), especially the hallmark noted in Annex 2.

We would be concerned that if these issues are not properly addressed, there is a danger that the charities may be storing up problems for the future. The charity seems to be viewed as being remote, and the trustees should consider whether there are more effective ways of engaging and communicating with the community generally. But again these are matters for the trustees to take forward as appropriate.

Other issues

There are a number of other noteworthy issues which arose in the Commission's consideration, as follows:

- The Scheme achieves a number of objectives, including amending the objects and changing some of the administrative provisions. However it should be noted that trustees of unincorporated charities have powers under section 74D of the Charities Act (introduced by the Charities Act 2006) to change some administrative provisions, without the need for a Scheme. However a Scheme is being made here because some changes would have been outside the power of the trustees (e.g. changing the objects). The relevant guidance is [here](#) (also attached as Annex 3).

- The proposed trustee company will be a (non-charitable) not-for-profit company and no profits will be generated. There is therefore no suggestion of any private benefit.
- The charities have argued that one of the reasons for removing nomination rights is that having such rights severely hampers the opportunity to recruit on a skills and experience basis – that point is noted, but if there were, say, only one such nomination, that would not appear to be much of an issue where there may be as many as nine directors in the new trustee company.
- However, it should be stressed that whether trustees are nominated or not, they all have a fundamental duty to act without any personal interest and in the best interests of the charities. As has been stated in correspondence, trustees nominated by external bodies do **not** represent those external bodies. In the present case directors of the trustee company have fiduciary responsibilities towards the charities only. (The appointment of a company as trustee of a charity is in fact not at all uncommon.)
- It has been noted that the other nominating body that will lose nomination rights (the Archbishop of York) as a result of the proposals has no objections.
- The point has been made by many people that the new governance structure is not democratic. It is worth noting that many charities, particularly trusts, operate legally and effectively without necessarily having a democratic structure.
- There has been concern about a change in the charities' "charitable status", but this remains unchanged.

There is no reason now why the Scheme cannot be made. The trustees are respectfully asked to consider those matters which fall outside the Scheme as noted above.

Chris Cassin
 Charity Commission
 12 March 2012

Annex 1 – extract from the Commission’s Operational Guidance - OG500 Schemes

B9 Dealing with representations

Section 20 of the Act states that we must take into account any representations made to us in relation to a draft Scheme and, having done this, we may proceed to make the Scheme with or without modification (without giving further notice). It follows that, having considered representations, we may decide not to make the Scheme at all.

B9.1 Procedure for dealing with representations

Scheme representations are dealt with by the Litigation and Review Team (LRT) in accordance with the procedures set out in the LRT Desk Guidance on handling representations. Broadly, the guidance states that, where a caseworker receives representations about a Scheme they should:

- immediately inform LRT that a review case will shortly be passed to them, and specify the date on which the representation period is due to end
- open a new CRM case, logging each representation received
- log the names and addresses of objectors to facilitate a mail merge (a template is available to do this)
- acknowledge receipt of the representations using the standard letter provided
- prepare a background note giving details of the case. (The LRT guidance sets out the information that should be included in the background note.)

LRT will then manage the representation consideration process. If we decide to make the Scheme, with or without modifications, the reviewer will refer this back to the original caseworker to process the making of the Scheme. Once the Scheme is made, this will be referred back to LRT to issue and to respond to the people who made representations.

B9.2 Considering representations

The person appointed to review the representations must be careful to form an objective view of the case in support of the Scheme as well as the representations against it. When considering representations we must ensure that the representation is relevant to the proposed Scheme and received within the time limit set out in the notice. (Although we can decide to take into account representations received after the deadline, and before we make the Scheme, if the information contained might affect the making of the Scheme).

A representation does not need to be based on a point of law nor need it be supported by evidence or argument.

Generally we should consider the representations based on:

- the interests of the charity
- whether or not we are exercising our jurisdiction in a valid way, taking into account relevant information and ignoring irrelevant information
- the technical sufficiency of the Scheme.

When considering representations we should not feel any loyalty to what we have already agreed with the trustees, we should review the draft Scheme with an open mind.

After considering the representations:

- if the representations suggest that making the Scheme is no longer justifiable, we should discuss the representations with the trustees.
- if the representations suggest modifications to the Scheme that we have already considered, but the case put supporting the modification is new, we should consider the proposed modifications again, in the light of the new case made. Having done this, we might decide to discuss the modifications with the trustees.
- if the representations suggest modifications that we have not considered, and if we feel that the proposed modifications might be worthwhile, we should discuss these with the trustees.

Before making a decision based on the representations the reviewer might think it necessary to refer the case back to the caseworking team for further work before a decision can be made.

B9.3 Our action after considering representations

Once we have considered the representations, and discussed any proposed modifications with the trustees, we must decide how to proceed.

Once we are in a position to consider the representations fully, taking into account any additional information that might have arisen, we must make our decision.

We might decide to:

- reject the representations and make the Scheme as drafted. In this case the reviewer must prepare a decision document setting out the reasons for rejecting the representations. This will be issued by LRT.
- accept the suggestions put forward as representations and amend the Scheme accordingly. In this case the reviewer must decide if a further period of public notice is needed. This would normally only be the case where the changes are substantial. If there is any doubt about whether or not additional public notice is required, the reviewer should consult a Commission lawyer.

- terminate the Scheme making process. In this case the reviewer must set out the reasons for making this decision and refer the case back to the originating caseworking division to take the case forward.

Annex 2 Extract from *Hallmarks of an effective charity* (CC10)

An effective charity is accountable to the public and others with an interest in the charity (stakeholders) in a way that is transparent and understandable.

In order to demonstrate this, the charity:

- complies with its legal obligations (and best practice), as set out in the Statement of Recommended Practice (SORP), to produce annual accounts and a report which includes an explanation of what the charity has done for the public benefit during the year;
- explains in its Annual Report the extent to which it has achieved its charitable purposes in a way that people with an interest in the charity can understand;
- has well-publicised, effective and timely procedures for dealing with complaints about the charity and its activities. These should explain how complaints and appeals can be made, and give details of the process and likely timescales;
- can show how it involves beneficiaries and service users in the development and improvement of its services; the contribution may have been by way of the appointment of beneficiaries as trustees or their involvement through discussion, consultation or user group input;
- has a communications plan which ensures that accurate and timely information is given to everyone with an interest in the work of the charity, including the media, donors and beneficiaries

Annex 3 – extract from Amending Governing Documents of Unincorporated Charities

Using the statutory power at section 74D of the Charities Act 1993

3.6 Trustees may use the statutory power to alter any of the provisions of the trusts of their charity that relate to how it is run. However the general law does impose limits on what the statutory power can be used for. It **cannot** be used to amend provisions in the governing document that include:

- the charitable purposes of the charity;
- the charitable purposes the charity's property must be used for when it dissolves;
- changing a power of amendment to include power to change parts of a governing document that the statutory power itself cannot be used to change. For example, the purposes/objects or the application of the charity's property on dissolution;
- a provision that results in a benefit to any of the trustees, including any payment, other than out of pocket expenses;
- to change the status of property owned by the charity in order to make it permanent endowment or to take away its permanent endowment status.

In addition, trustees may wish to avoid using the power to make amendments which affect third party rights such as:

- the right of third parties to appoint trustees (**unless** the third party has ceased to exist or has given consent to the change);
- the appointment of an ex-officio trustee (**unless** the office has ceased to exist or the current office holder agrees to the change where it does not prejudice the rights of future office holders);
- the requirement for consent by third parties to powers exercised by the trustees. For example, where trustees require consent to make particular investments, (**unless** the third party has ceased to exist or agrees to the change);
- custodian trustee provisions (**unless** there is agreement of the existing custodian trustee and the charity considers that section 74D can be used to make the change).

In these cases, the Commission will make a scheme to bring in the amendments if it is satisfied that they are expedient in the interests of the charity.

3.7 Trustees may amend, vary or add to any existing powers that they have under the charity's governing document or that are available to them under general law and which they believe it is in the charity's best interests to change. Examples of the sort of powers that they may want to alter are:

- the power to change the charity's name;
- the power of investment;

- the power to buy and sell land and property (but **not** where changes would be to provisions for designated land) ; or
- the power to borrow money.

3.8 The power can also be used to alter any of the parts of the charity's governing document that regulate the procedures by which the charity is administered. They may amend the existing procedures, or they may introduce new ones. The sort of procedures that the trustee may want to modify are those for:

- holding trustees' and/or members' meetings;
- the quorum needed for meetings;
- how the chair should be appointed;
- whether the chair can use a second or casting vote when the votes on a resolution are equal;
- how the trustees' officers, such as the secretary or treasurer should be appointed; or
- accepting people into membership of the charity.

3.9 Using the statutory power, the change can be made by a resolution of the trustees passed either:

- at a properly constituted meeting. If the governing document sets a quorum for trustees' meetings then at least that number of trustees must be present at the meeting; or
- in such other way as the charity's governing document allows for their proposals to be voted on, for example postal votes.

3.10 If the charity has a membership that is separate to the trustees (which is most likely to occur if the charity is an unincorporated association governed by rules or a constitution), the resolution must also be approved by the membership by a further resolution passed at a general meeting either:

- by a majority of not less than two-thirds of the members entitled to attend and vote at the meeting and who vote on the resolution; or
- by a decision taken at a meeting without a vote and without any disagreement with the resolution being expressed at that meeting.

3.11 We strongly recommend that the wording of the resolution states that it has been passed using the power provided by section 74D of the Charities Act 1993, so that the charity's records clearly show that the statutory power has been used.

3.12 The resolution should state the date on which it comes into effect. If the decision to make the change only has to be made by the trustees, we expect that the date will usually be the date on which the resolution is passed unless a later date is specified in the resolution. If the charity has a membership that is separate to the trustee body, the resolution will come into effect either on the date on which the resolution is approved by them, or a later date that is specified in the resolution.