

A large, leafy tree stands in the center of a field of tall, green grass. The sun is setting behind the tree, creating a bright, golden glow that silhouettes the tree and illuminates the sky. The foreground is filled with tall, green grass, some with small yellow flowers. The overall scene is peaceful and natural.

**2015 The Year of Consecrated Life**  
**Embracing change**

“Be the change that you  
wish to see in the world.”  
Mahatma Gandhi

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## FOREWORD

In an article for the Argentine weekly “Viva” in late July 2014, Pope Francis was asked for his top 10 recipes for bringing joy to one’s life. As ever with Pope Francis, all are apposite to the human condition but two in particular struck me as relevant to this Handbook about the options for renewal of our mission as religious in England and Wales, issued to coincide with the forthcoming Year of Consecrated Life. They are, to *“be giving of yourself to others”* and to *“proceed calmly”*.

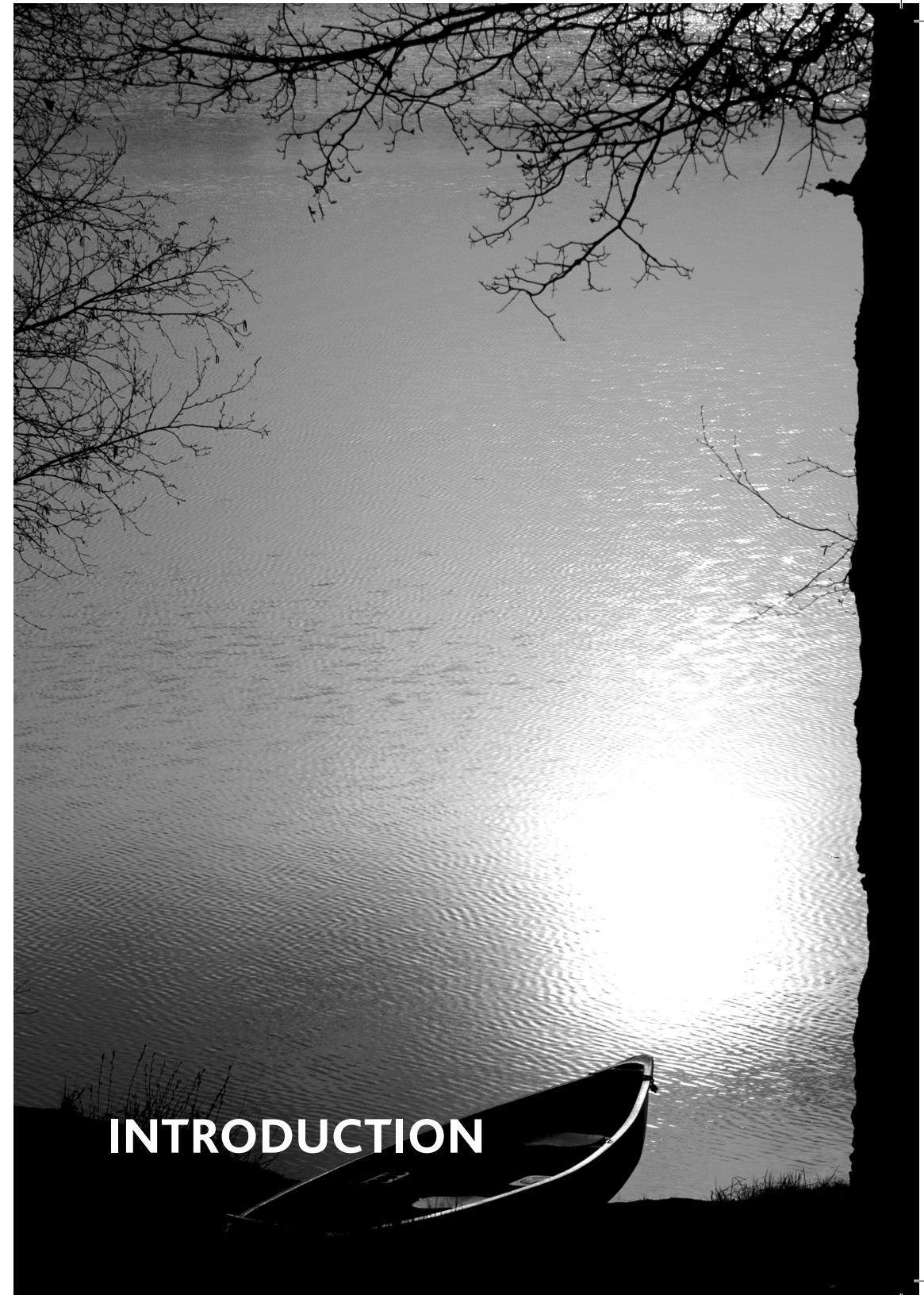
It is central to our mission as religious, both individually and collectively, that we wish to *“be giving of ourselves to others”* in as radical a way as possible in order to share in the self-giving of Christ our Lord and in His mission. That sharing in His mission takes a different form at different stages of our own individual lives – we are reminded of His words to Peter in John 21:18 – *“when you were young you put on your own belt and walked where you liked; but when you grow old you will stretch out your hands, and somebody else will put a belt around you and take you where you would rather not go”*. Thus it should come as no surprise to us that it will also take a different form in the various stages of the lives of our congregations. Our religious life is lived in the real world and the real world is changing – sometimes faster than we would like or want to admit.

In such circumstances the Pope’s advice to *“proceed calmly”* is very timely. This Handbook produced by Tim Rutherford, Michael King and Amanda Francis carries forward and updates the themes that have been developed in the previous Guidance Notes prepared by Amanda Francis and Michael King over the past fifteen years. The Handbook is a most helpful aid to *“proceeding calmly”* amid the myriad issues that require the attention of those tasked with the governance and future planning - financial and otherwise – of religious life in England and Wales, and specifically with ensuring that we remain *“fit for purpose”* under civil law for the continuation of our fundamental mission to preach the Good News, in season and out of season, increasingly in collaboration with lay colleagues.

As one who has herself benefited from the earlier guidance issued by Buzzacott and Stone King, I would like, on behalf of all those who have benefited from that guidance, to thank Amanda Francis and Michael King for all their efforts on our behalf over the years, and for the very real collaboration between religious and laity that it symbolises. Never has *“better together”* seemed a more appropriate phrase.

In the forthcoming year dedicated to consecrated life we are invited to rejoice in our religious life and in our mission. That joy does not preclude – indeed it should include – a sound understanding of the realities of the world in which we live out our vocations. In this Handbook we have a very significant contribution to that sound understanding. I recommend it wholeheartedly to anyone concerned with incarnating the principles and values of religious life in today's world and with discerning the future of their congregation amidst the realities of the 21st century in England and Wales.

Jane Livesey CJ  
General Superior – Congregation of Jesus  
*Rome, August 2014*



## INTRODUCTION

**In this note, for ease of reference, we use various terms as shorthand:**

**Charity** means the charity established under Civil law in England and Wales for the purposes of holding the assets of the Institute and carrying out its charitable purposes.

**Charity Constitution** means the constitutional document of the Charity (i.e. articles of association of a limited company, charitable trust deed or constitution of a charitable incorporated organisation).

**Charity Trustees** means the individuals appointed to manage and control the Charity (which may, or may not, be the same as the Council).

**Constitutions** means the canonical statutes and rules of the Institute.

**Council** means the council responsible for assisting the Superior with the operation of the Institute under Canon law.<sup>1</sup>

**Institute** means any Congregation, Society, Institute, Order or other juridic person governed by the Canon law of the Catholic Church.

**Religious** means professed or aspirant members of the Institute.

**Superior** means Superior General, Provincial Superior, Abbot or other similar office-holder of the Institute.

<sup>1</sup> Established under Canon 627 §1.

## INTRODUCTION

Over the years our respective firms have provided four Guidance Notes<sup>2</sup> and other briefings and support to Institutes going through change, whether self-motivated or forced through circumstances. It has rarely been the case that Religious were not experiencing challenge and life changing times; sometimes in history they have themselves challenged society, sometimes society has challenged them, but perhaps the pace of change these days has quickened.

Inevitably, the Year for Consecrated Life which begins in November 2014 will see Religious take stock of what has gone before and consider how their overall mission as part of the Church needs to change to meet the needs of the world today and in the future. The purpose of this booklet is to provide you with the basic guidance and support to consider the difficult issues that you and your Institute may be faced with. It is not intended to impose any suggestions or framework for the future, it is about providing you with the catalyst for a discussion as to what may or may not be right for your Institute's particular circumstances.

This is clearly a very personal issue and a matter for discernment within your Institute. Change tends to be organic and evolve over time, there is no right or wrong time to consider the issues raised in this Handbook.

Some Institutes have already started to make some of the changes we refer to below or have encountered some of these issues. We believe that every opportunity should be taken to discuss these issues and share experiences for the common good.

We hope that you will find this Handbook a helpful tool to give you ideas as to how to develop your organisation (and in particular its Charity) to ensure that it remains "fit for purpose" as the needs of your Ministry change.

This Handbook is intended only to provide general guidance, and is not intended to constitute legal advice (either civil law or Canon law) or accountancy or financial advice.

<sup>2</sup> No 1: Financial Arrangements for a member leaving a Religious Order (September 2000);  
No 2: Consequences of Declining Numbers in Religious Orders (September 2006);  
No 3: Care of your Aged Members (October 2008); and  
No 4: Incorporation of Catholic Religious Orders (October 2012).




**FINANCIAL ISSUES**

## FINANCIAL ISSUES


### 1. Financial planning for the future

We all live in a changing and uncertain world and we might be forgiven for thinking on occasions that life does not get any simpler – the path seems to become ever more difficult and rocky. Over the next few years, many Institutes will face challenges caused partly by the age profile of members and the lack of new vocations and partly because of changing demands and the economy generally. It is all too easy when faced with such a situation to put one's head in the sand and pretend that the issues that exist will go away. However, they rarely do – instead the mole hill becomes the mountain. Often it is better to face things and plan rather than react. As tempting as it is, you can no longer wait for the next Council to address the issues – the time to act is now. During his first election campaign, Barack Obama famously said *"Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek."* The same is true for current Religious.



"Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek."

Whilst the decline in members is not what may have been wished for, like any change it brings with it new opportunities for Religious to work in closer partnership with lay people using their financial and administrative skills while those in religious life re-assess how to best pursue the missions to which they have committed.



There are no magic answers to the questions Religious need to be asking at the present time – the solutions will be different for each Institute. However, one of the most fundamental questions

for each Institute to ask is **"Where do we want to be in five to ten years' time? Where is our medium term destination?"** These questions can only be answered by each Institute through careful discernment and communication. Ultimately, there is a need to formulate the Institute's strategy for the next three to six years and beyond. The tools that will help achieve that strategy are financial planning and good governance. This Chapter and Chapter 3 of the Handbook look at each of these areas in turn.

The key to good forward financial planning is to have a clear view of the Institute's circumstances, its needs, its wants, and the priorities it attaches to each of those objectives. This will give a framework on which to base decisions, both in the short term and in the long term, and so enable the Institute to achieve its mission. In order to build up a meaningful financial plan it is necessary to work through the following stages:

- Identify and prioritise the Institute's objectives i.e. its future ministry;
- Assess what resources the Institute has available to commit towards achieving those objectives; and
- Consider the factors that will influence how the Institute meets those objectives.

Financial planning is a tool – it must not become the "tail that wags the dog".

### Considering the future ministry

First of all – ministry – what form will this take over the next decade and what are the implications in respect to one of the Institute's most important assets – its properties? It is also important to think about planning for the "legacy" your Institute wishes to leave in this country – how it wishes to be remembered and how it wishes its work to go forward in to the long term. (See Chapter 4).

These points will impact on those who are chosen to be members of the Institute's Provincial Council and/or the Charity Trustees in the years ahead, whether there is a need to change the Charity's Constitution (i.e. its governing document, often its trust deed) or indeed to change from being a charitable trust to a charitable company or Charitable Incorporated Organisation (CIO) and the relationship the Province may have with the Institute's Generalate. (See Chapters 3 and 5).

It is important to think about where the Institute wants to get to, then to put in place the safeguards to ensure that it can get there and finally to ensure that it has the financial resources to sustain it.

### When considering the ministry of the Institute in the years ahead there are a number of considerations to bear in mind:

- Many Institutes in the UK operate through Charities and as such have to continue to demonstrate that their aims and work are for the public benefit. This should not be a problem for the vast majority. Case law has

established that the Institute's own members are bona fide beneficiaries of the Charity and hence in caring for them the Institute is providing a form of public benefit. Public benefit will also be demonstrated through members of the Institute continuing to provide social and pastoral work within local communities and through the provision of charitable donations – either to the Institute's missions overseas, including its Generalate, or to other charitable organisations.


- Traditionally, Institutes have been responsible for some very important charitable works or missions such as schools, hospitals and homes. Many have already given consideration to the future of these institutions and will have made decisions and taken action regarding them already. They are often the works that will form part of the Institute's lasting legacy, and so in many cases their future will need to be safeguarded and the Institute may retain some involvement even if only at a governance level. (See Chapter 5).
- Having thought about the future of traditional major works, it is important also to give consideration to the future work of the members of the Institute. In most cases this will be some form of what might generally be described as social and pastoral work. What type of work members are going to become involved in the future is important as this may impact on training requirements and determine where the member needs to be located and, hence, will have implications for the Institute's future property needs.
- Inevitably, some members of the Institute will need care as they grow older and this is likely to have significant implications for the Institute's finances going forward. Decisions such as, how you intend to care for your elderly and where, need forward planning and different options may need to be investigated with a view to deciding on what is best for the individual concerned and the Institute. For example, care might be provided in the Institute's own communities, in care homes (managed by the Institute, lay people or specialist charities that take responsibility for managing care homes in return for a management fee) or in homes operated by other organisations (including Religious).
- All of these options have different implications for staffing, housing needs and ultimately the Institute's finances. The cost should not be underestimated! (See later in this Chapter).
- Some Institutes in the years ahead will be in the fortunate position of having excess funds as properties are sold. One of the decisions that needs to be taken is whether those funds are to be donated to other organisations such as other charities or to the Institute's own work overseas. There are both governance and financial implications to these two options. (See Chapters 3 and 4). It may be that there is no desire to give funds to other bodies but that

instead the Institute and its Charity wish to use the funds in another way – perhaps through grant making. (See Chapter 4).


- A detailed checklist of questions that religious Institutes should be asking themselves when carrying out any form of financial planning exercise, particularly long term financial planning, is contained in Appendix 1 to this Handbook.

## 2. The cost of care

We live in an increasingly secular society in this country, with the traditional Christian religion being perceived to have less influence over our way of life. National and individual wealth has increased, bringing with it significant changes to the way we all live. Women's lives, in particular, have changed beyond recognition over the past five decades and with them family life and traditions. These changes may in part be responsible for the fall in the number of new vocations to religious Institutes in this country and the rest of the western world. Whatever the reason, what is clear is that most religious Institutes in Great Britain are faced with the problem that their members are becoming increasingly older and few new vocations are arising.



In the past, there was a general acceptance that care would be provided by younger members of the Institute.



As people become older, they increasingly need more care and assistance, both in helping them with general domestic chores that they would previously have carried out themselves and (in some cases) in the provision of nursing and intensive medical care. In the past, there was a general acceptance that care would be provided by younger members of the Institute and would, in the main, be available without the need for the aged member to move to a residential or care establishment. Unfortunately, the age profile of most Institutes means that this traditional pattern is now almost impossible and religious Institutes have to employ help, "buying in" care, developing their own specialist care units, or (reluctantly) seeking places for members in care homes operated by other charities, companies or the state.


### Caring for older members

This part of this booklet deals with the financial implications associated with caring for aged members. However, there are important emotional issues that





must inform any decision and other related considerations that should not be forgotten such as:


The impact of the changes referred to above has been significant. The cost of care for the aged and frail is extremely expensive (particularly if nursing or specialist dementia care is needed) and considerable resources are needed if it is to be provided to an appropriate level and quality. Such resources can come from the Institute itself, the state or a mixture of the two. However, it is essential that proper financial planning has been done so that when the time comes and additional help is needed by members of Institutes, those charged with the stewardship of the Institutes are aware fully of how this is to be provided and financed.


- Where do members wish to live in their later years?
  - How do members want to be cared for?
  - If members wish to be cared for by the Institute, is this possible in all situations? For example, does the Institute have the facilities and the personnel/ staff to enable this? Will care within the Institute be possible if dementia care is needed and issues such as security, stress on carers, safety considerations, specialist care, etc are required?
  - Has each member of the Institute signed a Will?
  - Have relatives and friends been consulted as to a member's care needs, his/her wishes on death, and so on?
  - Is it clear what will happen to any property or other assets being administered by the Institute on behalf of a member in the case of serious illness and/or death?
- 


**A few statistics help to illustrate the issues faced by Institutes in Great Britain in respect to caring for older members:**


 **75-85** The age profile of members has risen with the average age now often between 75 and 85 depending on the Institute.


 **Average life** The average life expectancy of a female born in 2012 is 82.6 years compared to 78.7 years for UK males. By 2025 it is expected that these ages will have risen by as much as a further ten years. The figures contrast with 49 years and 45 years for women and men respectively in 1901.

 **over 75** A notable percentage of those over the age of 75 need long term care of some sort.

 **Costs** Care and nursing costs have risen greatly in the past two decades at amounts over and above the rise in the Retail Prices Index.

 **Pension** Some older members of religious Institutes have had no National Insurance contributions made on their behalf and as such they are not entitled to a full, or any, state pension.

 **£110.15** The basic state pension for 2013/14 is £110.15 per week or £5,728 per annum.

 **State pension** The funding for state or public healthcare provision is inadequate and disjointed with different decisions being made in different parts of the country and with different rules in England, Wales and Scotland. The recommendations of the Dilnot Commission's report on sustainable funding for social care, published in 2011, are still being considered by Government and it is unlikely that we will see significant change in the remainder of this decade. The Dilnot

Commission's recommendations whilst addressing the future funding of care have been severely questioned by those working in the care industry, many of whom have concerns as to whether they will result in a general lowering of standards.



£15-25k

The average cost of looking after a member of a religious Institute who is fit and healthy is between £15,000 per year and £25,000 per year depending on circumstances.



Up to  
£75k

The average cost of providing care in a residential home now exceeds £35,000 per year and nursing care homes now typically charge in excess of £50,000 per year with costs rising still further for specialist dementia care – in some cases in London and the South East costs can be as high as £75,000 plus.



£20k  
per yr

To provide £20,000 per annum for a sister of 70 years for the rest of her anticipated life requires a typical investment of approximately £250,000. Hence, to provide for 25 such sisters would require a typical investment of £6.25 million.



£50k  
per yr

To provide income of £50,000 per annum for a sister of 78 for the rest of her life requires a typical investment of approximately £457,000. Hence, to provide for 10 such sisters would require a typical investment of £4.57 million.

The above statistics serve only to emphasise the importance of financial planning referred to in Section 1 of this Chapter. **The following action plan is recommended when planning the costs of caring for older members:**

- Complete the checklist contained within Appendix 1 of this Handbook;
- Carry out a detailed review of the Institute's property portfolio and access future needs and their financial implications;

- Prepare a projection of salary and pension income taking into account known retirements and projected death rates;
- Give serious consideration to "earmarking" or designating resources in a retirement fund to provide for future needs.

### 3. Safeguarding the Institute's finances

As has been stated already, many Institutes will have established a Charity to hold their assets and through which to carry out their charitable activities. The Charity Trustees are the people who are ultimately responsible for the Charity – including its strategy, its policies, its activities and achievements. They are the individuals charged with the overall stewardship of the Charity's assets and resources.

The resources that Charity Trustees are asked to steward are not their individual personal assets, they are the assets of their Institutes. They have been accumulated by current and past generations to enable the Institute to discharge its apostolate. The function of a Charity Trustee is one of stewardship and by that stewardship they will enable their Institute to carry on its mission not just today but also into the future. Within that role the Charity Trustees have a duty to utilise whatever facilities are available to them to ensure that those resources are protected or even enhanced, not for their own sake but for the use to which they will ultimately be put.

#### The risk of fraud

One of the key tools for protecting the Institute's finances is through good budgets and, perhaps more importantly, the preparation of long term financial plans as discussed above. However, it is also about being aware of attempts by others to manipulate the Institute's resources and assets for their own benefit, i.e. fraud.

One of the easiest means of prevention is by implementing good internal and management controls.

It is a sad fact of life that fraud has increased over recent years. Religious Institutes have tended traditionally to think of themselves as exempt from the risk of fraud and other related error. Recent cases have proven that this is not the case. A significant proportion of fraud on charities is perpetrated by people known by the charity such as employees or volunteers. One of the frequent aspects of fraud is that its perpetrators are often people who

are generally regarded as honest. Most such fraud is opportunistic. The person sees a weakness in the system and takes advantage of it. It is often committed because the individual concerned is under some outside pressure.

One of the easiest means of prevention is by implementing good internal and management controls. This all sounds very grand but it is really no more than applying basic common sense.

Appendix 2 to this Handbook sets out some of the basic controls that Institutes should be looking at both to prevent fraud and to ensure the risk of innocent error which might lead to the loss of funds is avoided also. There are four areas which provide ample opportunity for the operation of simple controls. They are banking arrangements (including payment) by cheque, payroll, IT and overseas payments, each covered by the Appendix.

A further means of ensuring the protection of the resources and assets of the Institute is to be very disciplined about keeping meaningful minutes of the meetings of the Charity Trustees. Such minutes serve also to protect the Charity Trustees and provide essential future reference. One of the items that should be minuted is the annual review of the Charity's risks. It is important that Charity Trustees give thought – at least annually – to the things that are likely to go wrong, the impact they may have on the Charity and the Institute, the controls that should be put in place to minimise those risks and what is being done to ensure that not only are those controls implemented but that they operate also. Technological and other “advances” mean that risks change – what was a relatively low risk yesterday may be a high risk today – hence the need for review.

#### 4. Religious' Personal Assets

Some Institutes' Constitutions permit Religious to retain personal assets which are then held by the Institute and, in those cases, when a Religious departs those assets will be returned in full on the basis that the Religious has effectively retained ownership of the assets and has merely provided the assets to the Institute on a long-term loan.

Canon 668 §1 provides that *“Before first profession, members are to cede the administration of their goods to whomever they prefer and, unless the constitutions state otherwise, are to make disposition freely for their use and revenue. Moreover, at least before perpetual profession, they are to make a will which is to be valid also in civil law.”*

It is worth noting that, under Canon 668, there is no obligation for that long-term loan to have been carried out through a document that is valid at civil law. However, if the arrangements have been documented in any way, it is important to confirm that the arrangements do in fact terminate when the Religious leaves the Institute as, in some cases, the documentation may not make any provision for termination.

Some Institutes' constitutions will however require the Religious to give away their assets (normally to the Institute) upon solemn profession or after a certain period in vows. It would normally be the case that such an arrangement needs to be valid for the purposes of civil law (in particular to satisfy the requirements of HMRC).

#### 5. Departing Religious

*“To lose one parent may be counted a misfortune, to lose two looks like carelessness”* (Oscar Wilde per Lady Bracknell in the Importance of Being Ernest). The human spirit will often try to look on the bright side of life when faced with a difficult problem, even try to inject a certain humour into the worrying situation.

Sometimes the departure of a Religious will be a sudden shock, totally unexpected to all but a few, in other cases the decision to leave (or expel) will have been agonisingly slow for all concerned. Either way, the result is often deeply depressing, for as often as not the Religious leaving will be a long-standing friend and colleague of some or all of those left behind. Any sense of relief may well be tempered by a sense of failure to help the Religious to stick to his or her vows.

As a result, the canonical injunction *“to show equity and evangelical charity”* may be implemented somewhat subjectively, possibly by showing too little equity or charity, probably by showing too much.

Having worked together in several difficult “leaving” situations, we decided some 15 years ago to prepare a guidance note in the hope that it would point Charity Trustees in the right direction, while leaving ultimate discretion with them. This guidance has been updated over the years in the light of very helpful comments received from Superiors and of our own experience in advising professionally on these matters.

According to the Vatican's Statistical Yearbook, at the end of 2011 there were more than 903,300 religious priests, brothers and sisters in the world (including those with temporary vows). However, during the period 2008 to 2012 on

average about 3,000 perpetually professed religious have left each year and the trend continues.

When a Religious departs an Institute, this raises complicated issues due to the tension between civil law and Canon law. The position under Canon law is straightforward. Canon 702 provides that:

“§1 Whoever lawfully leaves a religious institute or is lawfully dismissed from one, cannot claim anything from the institute for any work done in it.

§2 The institute, however, is to show equity and evangelical charity towards the member who has separated from it.”

The notes to the English speaking edition to the Code advise: “*Such arrangements should take account of the individual’s age, health, qualifications, ability to take care of himself or herself, and the like. This is an important pastoral consideration, the neglect of which would be an indictment of the Institute’s ‘evangelical charity’*”.

### Considering a payment

Under charity law, a Charity can only make payments to individuals:

- By making a payment in accordance with the objects of the Charity;
- By making a payment pursuant to a contractual obligation;
- By making a compensation payment in settlement of a legal claim;
- By way of an ex gratia payment, where the Charity believes it is under a strong moral obligation to make a payment, but only then with the consent of the Charity Commission.<sup>3</sup>

It is unlikely that any Religious leaving an Institute will have any contractual rights to make a claim or be entitled to any form of compensation payment in respect to their past work for the Institute or in respect to assets, or earnings that have to be donated to the Institute (though civil lawyers have attempted to argue that position). It is possible to argue for Charity Commission consent to make an ex gratia payment on the basis that the Institute has a moral obligation towards the departing member. We believe that is unnecessary if the Charity Trustees are able to make a charitable gift to the departing member.

<sup>3</sup> Section 106(2)(b) Charities Act 2011

The general charitable purpose of most Institute Charities would allow a payment to be made to a departing member provided that the payment was objectively assessed to show that the departing member was in need. If the Charity Commission or HMRC were to enquire into the justification for the payment, it can be argued that:

- Religious provide their services without charge; in the absence of that altruism Institutes would not be able to function as they do. There is no objection to Institutes providing for their Religious in sickness and old age; as an extension of this, it is therefore proper that a Religious who is leaving should also be provided for by the Institute insofar as is necessary.
- That it would probably be regarded as against public policy for an Institute with sufficient financial resources, to allow one of its former Religious (whose assets would all have been given to the Institute over their working lifetime) to have to live mainly at the expense of the taxpayer.
- In any event the departing member would quite likely have little funds of their own or assets with which to establish a new life outside the Institute.

When considering a payment, either pursuant to the Charity’s objects, or on an ex-gratia basis, objective consideration needs to be given to:

- The individual’s own resources;
- The individual’s age and state of health;
- The training received by the individual;
- The length of time spent with the Institute;
- The individual’s employability: present situation and future prospects; and
- The individual’s pension prospects.

Each case will need to be considered on an individual basis, but the Charity Trustees need to bear in mind that they are not trying to replicate the lifestyle that the individual might have expected had they not joined the Institute in the first place. The Religious willingly gave up that lifestyle on entering into religious life and does not have to be compensated for that sacrifice upon departure.

In addition, the Institute has to balance the interests of the departing member against the future needs of the Institute; Canon 702 requires the Institute to show equity and evangelical charity and the equity needs to balance the needs of the departing member with the ongoing requirements of the Institute to achieve its mission. To provide financial support to one individual may be far more

expensive than providing similar support to those individuals who live in a shared community, so it is unlikely that the Institute will be able to provide the same level of support to a departing individual. There is no requirement on the Institute to compensate the departing individual for any pension rights that may have been given up (for example a substantive lump sum payment paid on retirement).

### Providing support

Support for the departing member could be in a variety of forms:

- A “pump priming” grant to help with new accommodation, rent deposit or kitchen equipment;
- Retraining for new work to allow the departing member to be self-sufficient;
- IT equipment; or
- A loan for any of the above, though bear in mind that the departing member may not be able to repay a loan and it may be more straightforward to specify a grant

It is sensible to ensure that any financial arrangement that is entered into makes it clear that this is a “clean break”. The classic phrase used in civil law is to pay a sum “in full & final settlement” but the trouble with this phrase is that a payment to a departing member is not usually settlement of a claim but is a payment of a charitable gift to someone who needs it and that need may recur. While an Institute may want to discourage a departed member from returning, one cannot forbid a request for more help. However, if this happens, the individual should be treated in the same way as any other individual who may approach the Charity for assistance and support.

It is important to check also the terms of any Deed of Covenant or Gift Aid agreement entered into by the departing member under which their income was paid to the Institute. Normally, in order to be consistent with Canon law (See Section ‘Religious’ Personal Assets’ above) the individual will have covenanted all their income present and future to the Institute. When they leave the Institute, Canon 701 provides that “*By legitimate dismissal, vows as well as rights and obligations deriving from profession, cease ipso facto*”. Therefore under Canon law the obligation to pay over income (e.g. their pension) ceases.

Normally any Deed of Covenant will be expressed to only apply “*for so long as the individual shall remain a member of the Institute*”. However, if it does not, the covenant may remain binding notwithstanding the individual’s departure from

the Institute. In that case, consent would be needed from the Charity Commission to treat the rescission of the Deed as if it were an ex-gratia payment.

In assessing the value of any discretionary payment to be made to a departing member, a number of important factors need to be considered:

### Transition to lay life:

- If a member leaves without a period of excommunication under Canon law or without resources of her/his own, a modest grant (or a loan, perhaps secured) may be needed to provide for transition to lay life.
- Depending on circumstances, some provision for retraining may be necessary.

### Provision for old age and/or ill health:

- An Institute may wish to ensure that if the member has belonged to the Institute for a considerable time, he or she will have, at pensionable age, a pension equal to the cost of housing and maintaining one of its own members. Often this will be provided from that member’s own resources, employment, or present and future pension rights.
- It should be noted that provision for a single lay person in retirement will very likely be more expensive than for several members living together in community. But again justice is a two-way affair and the Institute cannot compensate the departing member for any financial and pension provision figure forgone as a result of being a member of the Institute.
- If a member leaves at a later age and no pension contributions have been made, the Institute may provide a capital sum (for the purchase of an annuity), which in some cases has had to be quite large. Annuity premiums have been very low for a number of years.
- A clear financial break between the member and the Institute is important, and this gives a better chance of good relations between the Institute and the departing member in future.
- That having been said, members who have long since departed do sometimes return to ask for more especially in the current climate with the ever increasing costs of care, as referred to above; if they do, the same objective assessment needs to be made, having in mind the circumstances in which the original financial provision was assessed. It is sensible, therefore, to record and retain the basis of that assessment.

### **Entry in late life:**

- There are increasing numbers of late entrants into religious life. It may well be that a mature entrant will bring some financial provision, particularly a future pension scheme, into the Institute.
- The Institute needs to make clear to mature entrants that they should not expect to be provided for (particularly in supplementing a pension) should they leave.

Appendix 3 to this Handbook contains a questionnaire which we would encourage Institutes to use in making the necessary objective assessments of a departing member's needs. The questionnaire is not in a form prescribed by Canon law or Civil law. Nevertheless, the questionnaire (or something similar to it) should be used and assessed in an objective manner. It is normally sensible to take professional advice, especially if you are dealing with this issue for the first time or if the sum being considered is significant.

## **6. Pensions**

### **For those under retirement age:**

- There is sometimes confusion in some religious Institutes regarding the payment of National Insurance contributions by members. Where a member is employed by a charity or company (other than the Institute itself) the payment of Class 1 National Insurance contributions should have been deducted and paid by the employer on behalf of the employee. Class 1 contributions provide the entitlement to the full range of contribution based benefits available from the state. If for some reason the work that the member undertakes is not paid, then an alternative form of National Insurance contribution is provided by the purchase of a Class 3 voluntary contribution. This leads to the entitlement to a state retirement pension.
- It is essential to realise that full benefits are only acquired after the requisite number of years of contributions have been made. Details on this can be obtained from the Department of Work and Pensions or from any JobCentre Plus office.
- If no contributions have been paid, or inadequate amounts have been paid, state pensions may be unavailable to the individual or a reduced pension may be paid on reaching retirement age. Entitlement to other state benefits may also be impacted.

- Where members of Institutes are in salaried employment such as teaching or nursing it is likely that they will be acquiring rights to an occupational pension also. Typically in such cases, therefore, a member will be entitled to both a state pension and an occupational pension on retirement. The occupational pension may provide a lump sum payment also.

### **Over 80 non-contributory pension:**

- On reaching the age of 80 any person who is not entitled to a retirement pension based on National Insurance contributions, or whose pension is lower than the over 80 non-contributory pension, may apply for an "over 80 pension". This is relatively small and certain residency requirements will have to have been met by the applicant.

### **Provision made by the Institute:**

- The increasing age profile of religious Institutes means that there is a need to set aside money in order to provide for the maintenance of members in their retirement. As can be seen from the figures quoted under "A few statistics" above, the basic state pension cannot be relied upon to maintain members fully. Additional resources will be required. Some of these may or may not be available from the state depending on the individual member's circumstances.
- However, if possible, a Institute would be wise to calculate the amount of money it would need to set aside should other sources of income not be available.
- The amount of any "retirement reserve" should be carefully calculated using reasonable assumptions (which should be periodically reviewed) in order that it can be justified should any questions be asked.
- The first task in doing this is to ascertain the cost of maintaining a member of the Institute at current day prices. When doing this, the calculation should take account not only of general living and personal expenses, but also the cost of maintaining premises in which the members live, possible nursing home costs, increased medical costs etc. The final per capita cost for a fit and healthy member, as indicated earlier, will probably be £15,000 to £25,000 per annum.
- Having calculated the cost per member, it is necessary to calculate the "guaranteed" income per member. In the main such income will comprise (salaries and) pensions. This needs to be subtracted from the total cost figure to give the extra income that needs to be generated per member.

- Once this has been calculated, expected life tables can be used to calculate, using a net present value calculation, the amount of money that needs to be set aside to provide for each member for the remainder of his/her life. As indicated earlier also, the resultant figure may be very large and may put the Institute's resources into some sort of context!
- It should be stressed that this is a method to simply enable Institutes to calculate the resources needed to look after their members. It should not be regarded by anyone as a provision for individuals. They have no entitlement whatsoever to the fund as it is simply a designated fund of the Charity. This is a very important point to take into account when assessing whether an Institute can afford to maintain a member for the purpose of determining entitlement to state benefits.

**The following action plan is recommended in respect to pensions:**

- For all members who are in employment obtain a State Pension Forecast by completing a form available from your local JobCentre Plus or from the Department of Work and Pensions.
- For those members under retirement age but not in work, consider whether or not Class 3 National Insurance contributions are being paid for them. It is sensible to obtain a State Pension Forecast for these individuals as well, to inform the decision as to whether or not it is worth commencing payment.
- Agree for each individual the expected income from pensions from all sources.
- Ascertain the shortfall between the required income and guaranteed income. Project the resources needed to fund any shortfall.
- Assess whether the resources available to the Institute are sufficient – if they are not, the Institute will undoubtedly be dependent on state help in the future.
- Ensure proper systems are in place to ensure pensions are claimed on retirement age – whether state or occupational pensions. Also ensure that “over 80 pensions” are claimed when appropriate.



## GOVERNANCE ISSUES

### 1. The Role of Trustees

The Charity is governed and run by the Charity Trustees who, in civil law, are “*the persons having the general control and management of the administration of a charity*”<sup>4</sup>.

Depending upon how the Charity is constituted, the Charity Trustees will be either:

- The individuals appointed as the Trustees under the terms of a charitable trust deed;
- The directors of a company limited by guarantee which will either be the charity itself or will be the corporate Trustee of the existing charitable trust; or
- The Trustees of a charitable incorporated organisation.

Traditionally in most cases the Charity Trustees have been:

- The Superior (that is Superior General, Provincial Superior, Abbot, and so on); and
- The individuals who act as the Council, Chapter or Leadership team of the Institute established under Canon 627 §1 (referred to below as the Council).

Normally the Charity Trustees’ terms of office have been concurrent with their term of office as Superior/member of Council and often this is the simplest way of ensuring that the decision makers of the Institute are the decision makers of the Charity. This dual authority does sometimes lead to an unfortunate merging of identity between the Charity and the Institute, and it is important to remember that they are two separate organisations with the Charity in most cases existing to support, amongst other things, the work of the religious Institute.

Irrespective of any obligations under Canon law, the Charity Trustees are required, under civil law, to ensure that the assets of the Charity are used to further the charitable purposes of the Charity as set out in the Charity’s Constitution (referred to as the ‘Charity’s objects’).

<sup>4</sup> Section 177, Charities Act 2011

### 2. The role of the Superior

Under Canon law the Superior has overall authority in respect to the affairs of the Institute, generally in consultation with the members of the Council who are there to assist the Superior and to give advice or consent as required by Canon law or the Constitutions. Of course there can in some circumstances be several Superiors, including a superior general, a regional superior, a provincial superior or an area or local superior and the Charity’s Constitution needs to make clear which has authority in connection with the Charity.

Under civil law, the Charity Trustees all have equal authority and decisions made in relation to the Charity should be either by majority or unanimous (depending upon the terms of the Charity’s Constitution) and should be taken in the best interests of the Charity (which are not necessarily the same as the Institute). The position is normally qualified in that, in order to be consistent with Canon law, the Charity’s Constitution will normally provide that:

- The Charity Trustees can only exercise their powers with the consent of the Superior; and
- The Superior will appoint and often remove the Charity Trustees.

### 3. Conflict with the Superior and the Charity Trustees

Charity Trustees must remember that, despite the Superior’s clear authority within the Institute, the Charity Trustees are bound by their obligations under Charity law and it is they, not the Superior, who are responsible for the management of the Charity.

A conflict can arise if the Superior decides what the Charity should do on the basis of the needs of the Institute, say internationally, and expects the Charity Trustees to simply follow the Superior’s lead. Given that in most Charities the Superior has the power of appointment and removal of the Charity Trustees, there is a danger, even if it is unsaid, that the Superior could indicate that failure to follow his/her lead could result in the Charity Trustee being removed. What is best practice in this situation?

The courts and the Charity Commission are keen to highlight the independence of Charity Trustees and the Commission has concerns where it sees evidence of a ‘dominant trustee’. How far therefore should the Superior go in requiring the Charity Trustees to follow a certain line?



The Superior should avoid being a *deus ex machina*, coming in to involve themselves in the detail of governance when they want the Charity Trustees to pursue certain actions. As a matter of best practice, the Superior should ensure that when Charity Trustees are appointed they receive a list of directives (we sometimes call this a “welcome note”), underlining the key considerations which they should follow, based on the Institute’s own constitutions. This “welcome note” is even more important where the new Charity Trustees are not members of the Institute and would not be able to pick up the values or policies of the Institute “by osmosis”. The Superior’s ability to require a Charity Trustee to respect such values or policies in their decision-making, for instance in using a power to remove a Charity Trustee, should therefore depend on what the Charity Trustees have been told by the Superior when they were appointed.

As Institutes restructure and go through changes, it is important to consider the effect that this may have on the Charity and, in particular, to consider whether any amendments need to be made to the Charity’s Constitutions. Whilst a restructure of the Institute may be approved and amended in accordance with Canon law, it will not necessarily update the relevant provisions of the Charity’s Constitutions. A common issue arises if the Superior is defined as the Superior of a particular province of the Institute, for example the “English Province”. If, as part of a restructure, the English Province is amalgamated into say the “European Province” it is possible that the Superior’s role, as defined in the Charity’s Constitutions, may disappear. As a consequence:

- The Charity Trustees may no longer be required to obtain the approval of the Superior before carrying out the activities of the Charity; and
- The rights of the Superior to appoint and remove the Charity Trustees may disappear leaving the Charity Trustees to make their own appointments under statutory powers.<sup>5</sup>

#### 4. Other Conflicts of Interest

In carrying out their functions, the Charity Trustees face several potential conflicts of interest:

- The tension between the civil law requirements for the Charity and the constraints of Canon law, insofar as they may apply to the “ecclesiastical goods”<sup>6</sup> held by the Charity.

<sup>5</sup> Trustee Act 1925

- The tension between the desire of the Charity to provide and care for the Institute’s aged Religious who are no longer in active Ministry balanced against the need for the Charity to use its finite assets to carry forward the future mission of the Charity.
- The tension between the Charity Trustees’ duties to the Charity and the Charity Trustees’ own individual needs as members of the Institute for financial support (through provision of food and accommodation) and their wishes to support all the activities of the Institute.
- The tension between the role of the Superior and the role of the Charity Trustees as discussed above.

In most Charities appropriate authority has been included in the Charity’s Constitution to enable these conflicts of interest to be managed without causing any problems (i.e. by allowing the Charity Trustees, as Religious, to receive benefits as members of the Institute). The Charity Commission, whose personnel can occasionally be wholly unaware of what a religious Institute is or does, is however constantly challenging the boundaries and raising concerns about the boundaries between the activities of the Charity and the activities of the Institute.

The Charity Trustees have to be very careful to ensure that, as far as possible, the interests of the Charity remain aligned with the interests of the Institute, and this can be a very difficult balancing exercise. This exercise becomes much harder if the Charity starts to consider the need to appoint individuals as Charity Trustees who are not members of the Institute. We often term these “lay trustees” but they may be ordained or professed in another Institute.

The Charity Commission has given extensive guidance on the issue of conflicts of interest<sup>7</sup> and all Charity Trustees should read this guidance and consider whether it applies to their particular circumstances.

In most cases the interests of the Institute will be aligned with the objects of the Charity, but if these differ, then the objects of the Charity take precedence in civil law. In our experience as professionals advising religious Institutes, we have never

<sup>6</sup> Canon 635 §1 provides that “Since the temporal goods of religious institutes are ecclesiastical, they are governed by the prescripts of Book V, The Temporal Goods of the Church, unless other provision is expressly made”.

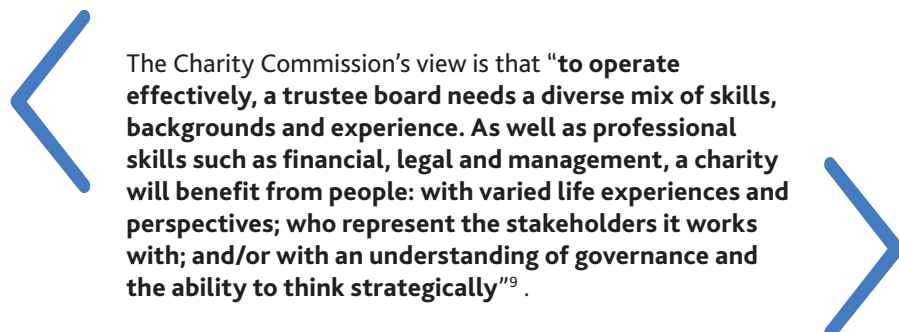
<sup>7</sup> Conflicts of Interest: a guide for charity trustees (CC29).

come across a situation in England and Wales where an Institute is faced with a choice between obeying the civil law and obeying divine law but we have in mind the imprecation "Give to Caesar what is Caesar's and give to God what is God's".

The Charity Trustees do have to consider the extent to which they receive any private benefit from the Charity. If, for example, the departing Superior and Council were suggesting a party by the Institute to thank the Superior for their term in office this may well be at the expense of the Charity. The Charity's Trustees, who would presumably attend the party, must consider whether this is consistent with the Charity's objects. It may well be a perfectly normal activity for the Institute and a proper use of the Charity's funds<sup>8</sup>, provided that the expense is proportionate, but the Charity Trustees should consider and record in minutes the decision to hold such a party and the rationale for it.

## 5. The need for non-member Trustees

As mentioned already, the last decade has seen a considerable decline in the number of Religious in active Ministry. Whilst there are signs that some Institutes are finding and encouraging new Members, this is not widespread. Institutes are therefore faced with the problem that the pool of individuals willing and able to act as Charity Trustees is declining. At the same time the Mission for which the Institute was established has very likely not gone away and the obligations and burden on the Charity Trustees is increasing as they have to be aware of and comply with ever changing and increasing regulatory requirements.



The Charity Commission's view is that **"to operate effectively, a trustee board needs a diverse mix of skills, backgrounds and experience. As well as professional skills such as financial, legal and management, a charity will benefit from people: with varied life experiences and perspectives; who represent the stakeholders it works with; and/or with an understanding of governance and the ability to think strategically"**<sup>9</sup>.

<sup>8</sup> There is precedent, from the case of *Re Coxen* (deceased) [1948] Ch 747 for the proposition that such dinners may promote attendance at Charity Trustee meetings and therefore increase the "usefulness and efficiency of the (Institute), and thus producing effects which were for the advancement of religion" but their use and frequency should be proportionate!

<sup>9</sup> RS10 - Start as you mean to go on: Trustee Recruitment and Induction (Charity Commission – July 2005).

Religious may well be qualified in all or many of these skill sets, but that is not always the case and as fewer Religious have the time or sometimes the willingness to commit to management of the Charity, the Institute may need to consider other ways to introduce the necessary diverse range of skills into the management team. The Charity Trustees have a joint responsibility to take forward the work of the Charity and they cannot therefore simply rely on one individual who has the necessary energy and enthusiasm to do all the work on their behalf.

In addition, the Charity Trustees also need to consider not just the current day demands and issues, but the longer term requirements. With every organisation there is a need to plan for the future, to plan for change, and one of the most important issues is to ensure continuity in the management of the Charity.

Charities, secular and religious, and Institutes have one key principle in common, they encapsulate the past, present and future. They are not about simply reaping the rewards of activity today, but are building upon the foundations of an organisation that will continue to carry out its purposes long after the current participants are gone. The Charity Trustees are often described as merely the stewards of the Charity's assets for a finite period of time.

Given the stewardship nature of the role, it is important that the Charity Trustees have a degree of continuity and that changes are made gradually, if possible over a long period of time.

## Thinking ahead

When appointing Charity Trustees, the Institute, through the Superior, needs to consider not just the next term of office (often four or five years) but how the Charity will continue after that date. It is important to consider whether those Charity Trustees currently serving/being appointed will be in a position to serve another term of office so as to ensure continuity. Furthermore, as Institutes consider restructure and future needs, they need to ensure that suitable individuals are on hand to implement those long-term plans.

Of course many Institutes in the UK have over the last 30 years or so transferred or "hived off" particular missions, such as their schools, hospitals and care homes to organisations largely run by Lay Trustees, but appointing lay people as trustees of the Institute itself is a rather different thing.

For each Institute the pace of change is different and a matter of personal preference and resources. The close relationship between the Charity and the Institute often means that the Charity is seen as part of the “family”. The thought of allowing “outsiders” into the management of the family is often unthinkable. However, it is important to understand the need to have a balance of appropriate skills on the trustee body.

In July 2012, the San Francisco Auxiliary Bishop Robert McElroy in discussing the issue of introducing Lay Trustees in US Catholic Schools took the view that Charity Trustees often fall into the pitfall of: *“Treating the mission as an artefact that ceases to be living and renewable. Whilst acknowledging the inheritance of great traditions, the mission cannot remain rooted in the last century.”*



A much more positive view was put forward by Mary Reynolds RSM in addressing CORI in 2005: “Religious Congregations do not envisage the handing over of trusteeship ... as a “closing down” but rather the passing on of something that they have pioneered and developed. The handing over, which is likely to be a gradual process rather than a one-off event is full of opportunity for empowerment and partnership. To engage with the future Lay Trustees in developing a theological foundation for trusteeship, to co-devise ... the canonical and legal structures that allow them to assume public trust of ... their responsibility ... is an exciting and enriching project. This is a time when congregations can be heroically generative as they transition their legacy to new forms and empower and trust others to bring it forward.”



## 6. Lay Trustees

Institutes considering introducing non-member Charity Trustees often refer to taking on “Lay Trustees” but it is important to understand, at the outset, what is meant by the term “Lay Trustees”.

Under Canon law, Canon 96 provides that *“by baptism one is incorporated into the Church of Christ and is constituted a person in it with the duties and rights which are proper to Christians in keeping with their condition”*. Canon 204 §1 goes on to provide that such individuals form the “Christian faithful” and, in accordance

with Canon 205 those who are in “full communion” with the Church are those who accept the three bonds of *“the profession of faith, the sacraments, and ecclesiastical governance”*.

The term *“lay people”* is introduced by Canon 207 §1 which provides that *“by divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons”*.

Whilst this does not provide a definition of the “laity” or “lay people”, it is clear that the term is widely understood within the Church as applying to individuals who are in full communion with the Church and, as a consequence, are bound by the provisions of Canon law insofar as these apply to the Christian faithful.

However, when we talk about Lay Trustees, we need to make it clear that we are not necessarily referring to Charity Trustees who are appointed or who are required to be appointed from amongst the laity. Whilst there will be many good reasons for appointing individuals who are, at the very least, members of the Christian faithful, they do not need to be members of the laity (as understood in Canon law).

We therefore define the term Lay Trustee as being a much wider group of individuals, in essence any individual who is not a member of the Institute associated with the Charity (i.e. outsiders to the Institute). Our definition of Lay Trustee could, therefore, actually include members of other religious Institutes and clerics as well as non-Catholics.

It has been suggested occasionally that appointing Lay Trustees to administer “ecclesiastical goods” is against Canon law; this is not correct. Canon law acknowledges that lay people may be involved in such administration and provides in Canon 1282 that *“All clerics or lay people who take part in the administration of ecclesiastical goods by a legitimate title are bound to fulfil their functions in the name of the Church according to the norm of law”*. As a result, any Lay Trustee who is appointed who is Catholic will in fact be bound by the provisions of Canon law in relation to the assets of the Charity in the same way as any Member of the Institute.

Given the nature of the Charity, and its role in furthering the Roman Catholic religion, at civil law there is also a principle that arguably requires the Charity Trustees to be members of the Roman Catholic Church<sup>10</sup>. In practice, the Charity Commission will accept a situation where a majority of the Charity Trustees (i.e. members of the Institute and Lay Trustees) are Roman Catholics<sup>11</sup>.

## 7. Appointing Lay Trustees

### ADVANTAGES of having Lay Trustees might be along these lines:

- New individuals bring with them an infusion of new ideas and constructive criticism.
- They bring with them the outsider's objective perspective on the future of the Charity.
- They can contribute a wide range of skills beyond those found within the members of the Institute (for example legal skills, accountancy and financial planning skills, management consultancy and investment skills).
- They can provide longer term continuity.

### DISADVANTAGES of having Lay Trustees:

- They may seek to overturn established Institute events, particularly making it difficult for the Institute to fund religious activities or training which they might consider peripheral to the Charity's mission.
- They may fail to understand the distinction between the Charity and the Institute and/or seek to interfere in the life of the Institute and its internal governance.
- They may have a different sense of purpose or mission to the Institute.
- They may not be sympathetic to the needs and challenges of religious life.

<sup>10</sup> See *Re Norwich Charities* (1837) 2 M & C 275 at 305; *Re Stafford Charities* (1857) 25 Beav 28 and *Baker v Lee* (1860) 8 HL Cas 495 at 513.

<sup>11</sup> i.e. as defined by Canon 205.

The reality though is that the future of the Charity may, in most cases, depend upon the successful introduction of Lay Trustees and the new skills and energy that they are able to offer.

It is therefore important to ensure that the mechanism used to appoint Lay Trustees provides for:

- The views of the Religious to be taken into account and afforded the dignity that they deserve.
- The Catholic nature and ethos of the Charity to be preserved and remain a lasting legacy.
- Changes that are consistent with the principles of Canon law.

### Considerations when appointing Lay Trustees

We have already mentioned above the idea of a "Welcome Note" in which a Superior might, in appointing a Lay Trustee, set out the values and policies of the Institute and make clear that all Charity Trustees are expected to act by such values and policies. Failing which, the Superior might have to use the power of removal of a trustee. However, there are other more practical matters that the Charity might consider and put in place:

- a. A lay person, with the best will in the world, will not understand the Institute's way of life or its motivation and vision as well as a member of the Institute. Consideration might, therefore, be given to appointing someone that has known the Institute for a period of time and shares its values – possibly an associate or similar.
- b. There is a danger that a Lay Trustee will always feel an outsider. As members of the Institute, the member Trustees will meet informally and inevitably discuss matters that may later come up at Trustee meetings. Hence the lay person will be at a disadvantage as matters may have been mulled over long before they are raised with them. Crucially there will be a need to ensure that the lay person has all the necessary information they need to enable them to carry out their responsibilities as a Trustee. They are not there simply to rubber stamp decisions already taken in principle or to make decisions based on only half the facts.
- c. There needs to be a process for keeping the Lay Trustee informed and knowing where to draw the line between what they are entitled to know because they have responsibilities as a Charity Trustee and what they need not know because the issues are in respect to the wider

Institute. Inevitably, this means that Trustee meetings have to become far more formal and agendas have to be clear about what is being discussed and what decisions are being made.

- d. One aspect that may exercise the mind of a lay person invited to become a Trustee is their liability and how they may be protected. The assets of most Institutes in the UK are held currently on charitable trusts. Because a Trust is not a corporate entity, it does not offer any protection from liability. When the assets of the Trust are insufficient to meet a liability either in part or in its entirety, creditors pursue individual trustees to make up any loss. Traditionally, this fact has not worried religious trustees who have taken a vow of poverty and who would not really be worth pursuing for debt, but it would certainly worry lay people who may have houses, businesses or other assets to lose. Any trustee liability is joint and several and so if the Trustees were sued, it is the lay person's entire assets that may be at risk. To protect them against this, it is likely the lay person would insist on trustees' indemnity insurance being taken out at the very least. This can be arranged with the Charity's insurers although there is a need to read the small print of such policies very carefully to ensure they provide the cover needed. One other option to protect the Lay Trustee would be to convert from a charitable trust to a charitable incorporated organisation or a charitable company. (See Chapter 5)
- e. Before inviting someone to become a Trustee, it might be useful to invite them along to a couple of Trustee meetings as an observer in the first instance. This gives existing Trustees the opportunity to see how they behave and react in meetings and also gives them an opportunity to decide on whether they want to take up the role as Trustee. It often pays to be cautious in this way. People are often very different in formal meetings compared to how they seem in an informal or social setting.
- f. The lay person will need two types of training. Firstly, they will need to get to know the Charity, the Institute and its work, values etc. This means that they will need to devote time to visiting, talking to members etc. Secondly, they will need to understand their legal responsibilities and so some form of trustee training may be advisable. This is always a good idea for all new trustees – whether they are lay people or Religious.
- g. It might also be a sensible idea to provide a written summary of the duties of the Charity Trustees and what is expected of them in some form of job description. This serves to remind both Religious and Lay Trustees what is expected of them.

## 8. Governance Issues and preserving the Mission / Ethos

In some cases the Charity's Constitutions will provide that all Charity Trustees must be members of the Institute. If this is the case, then it will be necessary to make the appropriate changes to the Charity's Constitutions to remove this qualification before any appointment takes place. This would not, normally, require the approval of the Charity Commission.

It will also be necessary to consider whether other administrative provisions should be added to the Charity's Constitution to preserve the link with the Institute and to ensure good governance. In particular:

- It might be appropriate to include a restriction providing that at all times a majority of the Charity Trustees must be members of the Institute. Careful thought will need to be given as to whether this restriction is appropriate, depending upon the reason for appointing Lay Trustees, because it could have the unfortunate effect of limiting the number of Lay Trustees who could actually be appointed as the number of members of the Institute diminishes or even suggest that Lay Trustees are "2<sup>nd</sup> class citizens". However, as discussed above, it will be necessary to ensure that a majority of the Charity Trustees (i.e. members of the Institute and Lay Trustees) are Roman Catholic<sup>12</sup> and so an appropriate provision may need to be included to provide for this.
- As the Lay Trustees' terms of office will not be linked to any dual role on the Council, it would be sensible to provide for the Lay Trustees to serve for a fixed term of office, e.g. three or four years. This avoids the embarrassment of the Superior having to ask the Lay Trustee to stand down after a period of time. Provision should then be made to enable them to be reappointed at the end of that term of office and, if so, thought should be given to have many continuous terms they can serve (e.g. maybe two terms followed by a fixed period of say 12 months before they can be reappointed). In order to preserve continuity, it may be appropriate to consider staggering the terms of office of any Lay Trustees so that they do not end at the same time as the terms of office of the Charity Trustees who are members of the Council.
- The quorum provisions for a Charity Trustees meeting should be reviewed and, if appropriate, include a minimum number of Charity Trustees who are members of the Institute, although again this raises the same issues as discussed above.

<sup>12</sup>i.e. as defined by Canon 205.

- Most Charities have a standing delegated authority to enable any two Trustees to execute documents on behalf of the Charity. Consideration will need to be given as to whether this authority remains appropriate or whether it should be stipulated that one of the two Charity Trustees must be a member of the Institute or the Superior.
- Given that the Lay Trustee will not always be on hand as might a member of the Institute living in or easily able to get to a community house, it may be appropriate to consider making provision for the number of Charity Trustee meetings that will be held each year and arrangements for how notice of these meetings will be given. It may also be advisable to update the Charity's Constitutions to consider making provision for meetings to be held by electronic means (conference call or audio visual) as opposed to always having to be face to face meetings.

It is also necessary for the Institute to reflect that the Lay Trustees are not part of the Institute and that the Charity Trustees are not the Council. The Institute will still need to have a properly constituted Council in accordance with Canon law and the Institute's Constitutions and the Council would need to be careful to avoid taking decisions on the Charity's behalf and expecting the Lay Trustees to follow suit.

### Induction process

It is very important to ensure that the individuals who are appointed as Lay Trustees understand the ethos and work of the Institute. We have already spoken of the value of a "Welcome Note" but they should be given a full induction by the Charity Trustees and the Superior that explains the link between the Institute and the Charity and the history of the two organisations. It is sensible that the induction makes clear to the Lay Trustees the parameters of their role as Charity Trustees and the demarcation between the Charity and the Institute. It may also be appropriate to explain that there will be a distinction between meetings of the Council to consider matters pertinent to the Institute and meetings of the Charity Trustees. Where possible these should be dealt with as separate meetings.

As part of any induction the Lay Trustees should be given:

- Copies of the Charity's Constitutions (but there is no need to provide copies of the Institute's constitutions).
- A copy of the document appointing them as a Charity Trustee.
- A note of their terms of office.

- Information about the role of a Trustee, in particular we would recommend a copy of the Charity Commission's publication "*The Essential Trustee: What you need to know*".
- Details of the Charity's insurance arrangements and, in particular, any Trustee or officer's insurance.
- A copy of the Charity's latest statutory accounts.

## 9. Alternatives to Appointing Lay Trustees

We appreciate that appointing Lay Trustees is often seen as a step of last resort, something to be avoided at all costs. We understand that view and, as we have said above, it is a very personal decision for all involved.

Depending upon the enthusiasm and vitality of the members of the Institute, it may not be necessary to consider appointment of Lay Trustees yet or at all. An alternative solution may be to find appropriate ways to reduce the burden of the Charity Trustees by involving others in the day-to-day administration of the Charity. In particular:

- The Charity might consider creating a senior management team of individuals appointed to executive positions. For example, it may be appropriate to appoint a Director of Care to oversee the operation of the Charity's care homes as opposed to requiring this activity to be handled by a Charity Trustee. The Director of Care could then report direct to the Charity Trustees.
- The Charity Trustees might draw on the expertise and strategic guidance of their professional advisors and others with relevant experience. Rather than just relying on their advisors to answer specific one-off questions, advisors could be invited to attend Charity Trustee meetings and provide strategic advice on the direction of the Charity.
- External consultants could be retained to advise on specific areas or projects where the Charity Trustees feel they are lacking in expertise (for example the appointment of a health and safety consultant to advise on preparation of appropriate policies).
- In some cases we are aware that Institutes have set up a separate branch that is a secular order for lay people. These are sometimes described as a "Third Order" or "tertiaries". The members of the Third Order live the charism of the Institute and follow a profession of promises that are appropriate for their own personal state in life.

Where such a Third Order exists, members of that Third Order would potentially be suitable candidates for appointment as Lay Trustees.

## 10. Relationship with Generalates Overseas

As we have explored above, the Charity Trustees have to ensure that they apply the assets of the Charity to further the Charity's objects. In most cases such activities will not be subject to any geographical limitation, but this should not be assumed. Before carrying out any work overseas, or transferring funds overseas for whatever reason, the Charity Trustees should ensure that their objects are not limited (e.g. "to support the charitable work of the Institute in England and Wales"). Geographical limitations such as this used to be common, but the Charity Commission has been persuaded to remove them for perhaps the majority of Institute Charities on the basis that religious institutes are by definition world-wide. If your Charity still retains objects of this nature, it would be worth considering amending them, which would require Charity Commission consent.

A practical issue of conflict can sometimes arise between the Superior of an international Institute and the Provincial Superior and/or the Charity Trustees where the Superior has decided that there is a need to fund a project of the international Institute which would, in whole or in part, be funded by the English Charity but not be run by it. The Superior might very well expect their decision to be implemented immediately; are the Charity Trustees able to accede to this request or demand for funding without further discussion?

The answer is an emphatic, but respectful "No". The Charity Trustees must first decide whether such a project is within the objects of the UK charity and then consider how much should be allocated to the project (having regard to the Charity's own commitments) and on what terms this funding should be made. It could be a loan but very likely it would be a gift. Should the payment be made to the Institute internationally or to a specific entity pursuing the project organised by an unconnected group of people? Should the funding be in one go or by instalments? What feedback do the trustees require as to progress or outcome of the project?

In particular, it is not enough for the Charity to simply just transfer funds abroad. The Charity Commission have expressed the view<sup>14</sup> that *"If trustees simply pass funds to another organisation without controlling the way funds are spent, this will not be charitable ... the trustees of the supporting charity must make the final decision about how the money will be spent"*. Controlling the way in which funds

<sup>14</sup> Charities working internationally

are spent by a Superior General in another continent may be problematic but needs to be addressed. Passing over the funds in phases may be possible and it should at least be possible to insist on a report being made about the progress and outcome of the project.

In the great majority of cases no problem arises but in all cases it is important that decisions to fund are minuted and that terms of funding are written down. There is a growing concern that HMRC will be looking at payments made abroad by UK Charities, so having available the rationale for funding and details of the payee and feedback requirements is essential should HM Revenue and Customs (HMRC) come to call. Any sense that a UK charity was simply an open and automatic conduit for transfer of funds to another organisation would not go down well with HMRC or indeed with the Commission. The section below provides added guidance on this aspect and sets out examples of the thought process and the systems that need to be put in place when considering a request from the Institute's Generalate to transfer monies overseas.

### Responding to a request by the Generalate or Institute for funding

The Trustees of the Charity have certain responsibilities and duties in respect to any request by the Institute's Generalate (or any other part of the Institute) for the transfer of monies from the English Charity to fund the Generalate or overseas projects.

One of the key aspects to remember when considering any such request is that, as described above, for the purposes of English civil law the English Charity is legally separate and distinct from the Institute. The Charity and its Trustees must comply with English charity law at all times. The law requires Charity Trustees to take responsibility for the stewardship of the Charity's assets, to protect those assets and apply them only for purposes consistent with the Charity's objectives as set out in its governing document. This responsibility is onerous and is strongly policed by both the Charity Commission and HMRC.

When taking decisions as to the application of the Charity's resources and assets (including cash and investments), the Trustees must always consider and act in a way that is in the best interests of the Charity and the fact that they have done so must be transparent. Whilst the interests of the Charity and those of the overall Institute may be consistent in most instances, this may not always be the case – the Trustees here in England may be of the view that the Charity's funds are needed for the long term security and care of the members and their work here, at least for the foreseeable future. The manner in which any transactions with the

Generalate are carried out and the control over those transactions must reside with the Charity Trustees.

Thus, while the Trustees of the English Charity may receive requests from the Institute's Generalate or other parts of the Institute to pool funds or transfer funds, ultimately the decision as to whether to accede to this request rests with the Trustees and can only be agreed to if it is in the best interests of the Charity.

Requests may be divided into those that are for relatively small amounts, possibly to cover the administrative expenses of the Generalate, and requests for larger amounts, which are often to fund projects overseas in both developed and in developing countries or, for example, to facilitate the building of novitiates in developed countries which will be used principally for the formation of members from the developing world.

Those requests for funding of the administrative expenses of the Generalate or for relatively small amounts will be easier to deal with. However, the principle of considering whether the payment is in the best interests of the Charity, recording agreement to make the transfer in the Charity's minutes, confirming how the funds will be transferred and deciding on how the use of the funds will be monitored, still apply.

### Considering requests for large or specific funding

**In considering any request for larger or specific project funding, the Trustees of the English Charity should:**

- Request a written formal request for funding from the Generalate. At the very least this should set out details of the project to be funded or the expenditure to be met from the funding. This needs to be detailed and ideally should include sufficient information to enable the Trustees to understand the scope of the project, the longer term plans and future of the project to be funded and the risks associated with it.

For example, if the monies were required for a capital project such as the building of a school, the application might include:

- Confirmation that the land on which the building is to be constructed belongs to the Institute or is subject to a long lease with details of any risks etc that may result in it being confiscated or alienated at some future date;

- Details of legal and property advice received locally;
- Detailed plans of the building;
- The costing for the building programme including any local taxes;
- The timetable for the building project;
- Who will be responsible for the building project and confirmation that the contractors and advisers are reputable and that references have been taken up;
- How the planning and construction will be project managed and controlled;
- How the use of the building will be funded in the long term i.e. will the operation of the school be financially viable – either through the payment of fees or through confirmed funding.

In addition, the request should stipulate:

- The timing of when monies will be needed;
  - How the expenditure of the monies is to be monitored and controlled;
  - How the English Charity will be kept informed of progress and be given an account of the way in which the monies have been spent.
- Meet as Trustees to consider the request and discuss the project in the light of the Charity's objects, the risks associated with the project including any potential concerns about the stability of, or the political situation in, the country that may receive the funds. The Trustees should agree on any further information they need to request before a decision can be made.

If the project is not consistent with the Charity's objects then the application must be refused. In reality this is unlikely to be the case because of the fact that most Charity's objects clauses will be widely drawn – however, this should not simply be assumed. The Trustees must consider also the current and future obligations of the Charity such as long term care for the older sisters here in the UK and the continuation of the Charity's and/or Institute's ministry in this country. At this point, it may be that the Trustees feel that the resources available to the Charity are already committed for the time being and so funds are not available and hence the request should again be refused. Alternatively, it may be that the Trustees do decide to make funds available – either in full or in part (because monies are limited) – and that funding will be made available but subject to certain conditions. This discussion needs to take place in a formal Trustees' meeting and be fully minuted.



## Communicating the decision to fund

If the Trustees do decide to fund the project – either in full or in part – they then need to consider the following and communicate it in writing to the Generalate or that part of the Institute applying for funds:

- How much funding are they prepared to give. Often it is preferable, when dealing with requests for significant funding, to agree only to make on-account payments as the project progresses – possibly to cover the following month's projected expenditure - and to make them based on progress reports and some form of account of the monies spent to date. It would not usually be in the Charity's best interest to transfer significant monies at the commencement of a project or before a project is even ready to commence. This is because the funds may not be secure and because, if the project were to be abandoned for any reason after the funds had been transferred, it may not be possible to repatriate the monies back to England.
- How the use of the funding is to be monitored i.e. what type of reports are required to satisfy the Trustees that the monies are being applied for the purpose intended and that the project is being properly managed and in accordance with a budget. Such monitoring may take the form of narrative reports, photographs, accounts or a mixture of all three. The Trustees need to make clear that where reports do not prove satisfactory, they reserve the right to decline further instalments until their concerns have been addressed.

A written offer of funding should be made to the Generalate and a request made that the Generalate formally confirm that it accepts any conditions imposed.

Thereafter the funding may be made but the terms agreed should be adhered to strictly and enforced by the Charity Trustees. Ideally minutes should record the fact and how and when the project and its funding are being monitored etc.

## Summary

In conclusion, it is essential that the Trustees of the English Charity are strong and stand up for what is right for the Charity to do otherwise may put the Charity's assets in jeopardy. If the Charity Commission, for example, were to become concerned that the Charity's assets were being used inappropriately, the Commission does have the power to appoint new Trustees or to confiscate the Charity's assets and pass them in to the hands of an Administrator or another Charity in order to safeguard them. In addition, HMRC has the right to demand details of how the Charity's funds are being applied in overseas countries and,

unless it is clear that the funds are being used for charitable purposes and their use properly monitored by the charity, HMRC has the right to restrict the Charity's tax exemptions and tax the funds transferred.



**REBIRTH OF YOUR MISSION**

## REBIRTH OF YOUR MISSION

### 1. Mission drift, charitable objectives and the rebirth of your mission

Religious have, throughout the centuries, often had to reinvent themselves and consider the changing needs of their mission which has evolved to meet the social needs of the time. The activities of Religious today are often vastly different to those carried out by their predecessors.

Most Charities will have been formed with the object of advancing the charitable works of a particular Institute. The diminishing number of Religious has led to some Institutes finding themselves with only two or three remaining members. This raises two distinct issues:

- Whether the remaining Religious are still able to carry out their charitable activities and, if not, whether the Charity lacks the necessary element of public benefit to be recognised as a charity<sup>15</sup>.
- Whether the activities carried out by the Charity have departed significantly from the original object of the Charity (known as "mission drift") and, if so, whether there is any need to change the object of the Charity.

The Charity Commission has tended, in the past, to accept that Institutes are permitted in accordance with their Charity's object, to look after their ageing Religious by providing accommodation and pensions. The Commission took the view that the Religious have given up their possessions when they joined the Institute on the expectation that their modest needs would be met in return for them carrying charitable work. It can be argued that looking after aged Religious is carried out in furtherance of the Charity's object and that any private benefit, received by the individual Religious, is incidental to the overall public benefit.

Of course, if all the members of the Institute (including the Charity Trustees) are being looked after and cared for, then there is a question as to whether the Charity is itself carrying out any charitable work. However, the position is that the Charity always remains a charity, although it may be appropriate in these circumstances for the Charity to appoint new or additional Charity Trustees who are not members of the Institute.

<sup>15</sup> i.e. Section 4(1) Charities Act 2011 provides that a purpose "must be for the public benefit is it is to be a charitable purpose".

In such circumstances, it is important that any new Charity Trustees understand:

- The basis on which the Charity continues to provide support to the members of the Institute;
- The current and future needs of the Institute in relation to care; and
- The existing charitable object of the Charity.

Any assets of the Charity must always be used to further the charitable object. If the Charity Trustees decide to embark on new charitable activities, it is important to ensure that these remain within the parameters of the Charity's object. In most cases the object will have been drafted sufficiently widely to capture any activity carried out by the Institute. However, thought will need to be given to the question of whether the object needs to be rephrased in the light of the Institute ceasing to carry out charitable work.

In the event that the Charity's object needs to be rephrased, it will be necessary to obtain the Commission's consent to any changes.

### 2. Lay Initiatives and Lay Associates

Across the broad spectrum of Institutes, there has been a differing success in attracting new members. However, despite the lack of new members, the interest in Institutes remains for a variety of reasons. As a result, many Institutes have started to consider setting up Lay Associate schemes.

In setting up such a scheme it is important to give serious consideration to what you are intending to achieve. There are a number of reasons why setting up a Lay Associate scheme can be appropriate:

- a. To assist with spreading the word about the Institute's mission;
- b. To showcase the work of the Institute and act as a catalyst to encourage new entrants into the Institute; or
- c. To foster and educate a sense of charity and the spirit of the Institute's Founder, in others.

In some cases there may be significant historical interest in the Institute's Founder or the work carried out by the Institute in relation to some particular institution. Whilst it may be appropriate for some grouping to be formed that remembers and reflects this historical fascination, this is unlikely to be a significant way in which to take forward the work of the Institute.

If such an organisation is set up, then it is sensible at the outset to consider how the organisation will be managed and, in particular, the impact it may have upon the reputation of the Charity and, above all, the reputation of the Institute.

For example, if a group is formed called the "*Institute of [x] Lay Associates*" they will be clearly identified with the Institute. To what extent does the Institute need to retain some form of control over the work of the Lay Associates?

### Considerations when controlling Lay Associates

The group could be set up as a membership organisation. If this is done with a clear set of rules this would enable those who are in charge of the grouping to take steps to remove members of the grouping who are not behaving in the right spirit.

Members of the group also need to understand what they are and are not permitted to do in terms of discussing the Institute publicly. It is important that they understand the need to maintain the reputation of the Institute at all times and how they should conduct themselves when carrying out activities in their role as Lay Associates, in particular on social media.

Thought needs to be given as to the extent to which the Lay Associates may need to be licensed to use the Institute's logo or other trademarks. It may be appropriate to allow the Lay Associates to make use of the Institute's website with their own defined section.

The role of the Institute also needs to be considered. Clearly, if the Lay Associates are intended to further the Institute's mission, the Institute needs to be involved in giving clear guidance about that mission. If the Lay Associates have a committee that is responsible for running the organisation, then the Institute should consider having representation on that committee. The Institute may wish to have rights to control who is appointed to the committee.

Depending upon what the grouping intends to do, it may be appropriate to charge membership fees or even for the organisation to be registered as a separate charity.

In order to be successful the Lay Associates group will almost certainly require resources and potentially premises.

The Institute also needs to consider the extent to which it does want to be

seen to be responsible for the Lay Associates group, potential difficult issues of vicarious liability can arise if the relationship is too close. Issues may arise if the Lay Associates are allowed to use, or fundraise under, the Charity's registered number.

Depending upon the activities being carried out by the Lay Associates, it may be appropriate for arrangements to be made for them to be covered by the Institute's insurance.

These issues should be given consideration at the outset because, once the group is up and running, it will not always be possible to go back and impose these rules retrospectively.

A more formal arrangement for Lay Associates would be the establishment of a separate secular order as a branch of the Institute. This separate order would need to have its own constitutions and, depending upon its activities, might need to be registered as a separate charity.



**RESTRUCTURING**

# RESTRUCTURING

## 1. Introduction

All organisations have to evolve over time and will experience change; we would suggest that an organisation which never accepts change has no future. Religious organisations are no different and Canon law itself makes express provision for restructuring of Institutes<sup>16</sup>. As we have already discussed, the changing age profile of Religious has inevitably led to an organic change in the day-to-day work that the Institute carries out. For example, many Institutes have already stepped back from active day-to-day involvement in education and the provision of care.

Some might think that when an Institute no longer has any members, the Institute automatically ceases to exist. This is not the case. Even with no members, the Institute will continue until either it has been inactive for 100 years<sup>17</sup> or is formally suppressed by the Apostolic See<sup>18</sup>. Therefore, thought has to be given as to how to formally wind up the Institute and, indeed, the Charity.

Restructuring is, however, often feared as being the first step to the breaking up of the Institute, or a loss of control by the Institute over its own affairs. For some, even the word “merger” is akin to one nuclear family suggesting that it might live with another. Some therefore prefer to work on the basis that the Institute should just die out over time.

However, a restructure can be carried out in a positive way, and in doing so, achieve a re-birth of the Institute’s Mission and allow its work to continue in many new and varied ways. This applies equally to restructuring of the Institute and restructuring of the Charity.

One of the challenges for an Institute in deciding how to take forward its mission into the future is to consider whether the existing structure of its Charity is one that best suits the challenges ahead. Historically, the most common structure for the Charity is an unincorporated charitable trust; this has worked very well in terms of the simplicity of the Charity’s Constitution and the fact that individual trustees, though personally liable for the Charity’s debts, had no worries on that

<sup>16</sup> Canon 581 provides for an Order to be restructured internally.

<sup>17</sup> Canon 120§1.

<sup>18</sup> Canon 584.

score as they tended to have no personal funds or assets. In the modern era this has a number of distinct drawbacks and may no longer be the most appropriate form of structure.

In this chapter we aim to explore the various options that are available in terms of a revised structure for the Charity. We have drawn upon our collective experience of working with Institutes that have sought to restructure for a variety of reasons. We have set out the framework for a number of different options. There is, however, no right answer to the appropriate structure moving forward. The important issue is to ensure that whatever structure, or combination of structures, you choose, it best suits the needs of your Institute and its associated Charity.

To be clear:

- a. There is no right or wrong way to carry out a restructure of your Charity. Any of the options below may be appropriate or, indeed, any combination of the options.
- b. There is no right or wrong time to carry out a restructure of your Charity. It is for the Institute to decide when, if at all, the time is right. All Institutes have a different path and the timeline for change is individual.
- c. There is no requirement to restructure your Charity and it may be appropriate to simply allow the Charity to be wound up when the Institute finally dwindles away over time (subject to the Canon law implications).

## 2. Charitable Trusts – The Drawback

Most Institutes have, apart from their religious constitutions, a civil law entity through which they carry out their charitable work in England and Wales or further afield (depending on the terms of the Charity’s Constitutions). This entity is usually established as a charitable trust and regulated by a trust deed.

In very simple terms, a trust is a promise to do something, usually documented in writing. In this case the Charity’s Constitutions will contain charitable objects which usually say that the Institute can do anything charitable which the Superior approves as its charitable work, such as running churches, schools, care homes, hospitals and hospices, training religious and providing counselling or pastoral care.

If the annual income of the Charity is over £5,000 and the activities are purely charitable, the Charity will also need to be registered with the Charity Commission and possibly with other regulators (for example registration with OSCR if the Institute carries out activities in, or owns property in, Scotland and/or registration with the Charity Commission Northern Ireland).

These Charities are usually run by a small group of trustees, qualifying as the Charity Trustees under civil law. They have the obligation to hold the property of the Charity and to ensure that both capital and income are used only for the Charity's charitable purposes.

A Charity which is a charitable trust is not a corporate entity and has no separate legal personality of its own. This means that assets cannot be held by the Charity, only by individuals subject to the terms of the Charity's Constitutions. The properties and investments of the Charity will usually be held in the names of the Charity Trustees. In some cases those trustees remain unchanged for years while in others the trustees are the members for the time being of, say, the Provincial Council and therefore change quite regularly. New Charity Trustees usually have to be appointed by deed in Institute to ensure that the properties are held all the time on behalf of the Charity.

Operating your Charity as a charitable trust raises a number of potential problems:

#### **Demonstrating title to the assets**

If the assets of the Charity are not properly transferred from one set of Charity Trustees to the next, the danger is that when the Institute wants to sell, mortgage or lease a property or to sell investments, it finds that the individual Charity Trustees, in whose name the property is vested, are dead, abroad or – even worse - mentally incapable. In the case of the individual having died, the Probate Registry may have to be involved while in the case of the person being mentally incapable, one may be faced with the nightmare of an application to the Court of Protection to resolve the matter. Even in simple cases, proving what has happened to a long-since retired Charity Trustee can take time and money, significantly delay a project or result in an opportunity for a transaction being lost as the purchaser cannot delay.

Issues of the question of ownership of assets can also create audit problems. If an asset is not held in the name of the individuals who are the current Charity Trustees, efforts must be made by the auditors to ensure that the asset in

question belongs to the Charity. Whilst in some cases this presents few problems, it is not ideal and may result in written representations needing to be given to the auditors by the Charity Trustees themselves. This causes delay and inefficiencies.

#### **No protection from liability/for individual Charity Trustees**

Because a trust is not a corporate entity, it does not offer any protection from liability for the individual Charity Trustees. When the assets of the Charity are insufficient to meet a liability, either in part or in its entirety, creditors can pursue the individual Charity Trustees to make up any loss.

Traditionally, this fact has not worried clerical or Religious trustees who have taken a vow of poverty and who would not really be worth pursuing for debt, but it would certainly worry lay people (and even some secular clergy) who may have houses, businesses or other assets to lose. This may be particularly relevant in the future for those Institutes that decide to involve lay people as Charity Trustees.

#### **Wishing to appoint Charity Trustees who are resident abroad**

The age profile of Religious in the United Kingdom means that rather than appointing lay people as Charity Trustees, consideration is being given by many Institutes to appointing members of the Generalate team or members of other Provinces as their Charity Trustees. This may create unintended problems for the Charity.

Where a Charity operated as a charitable trust is deemed to be based or resident is in part dependent on where the Charity Trustees live. If an Institute wishes to have its Charity Trustees wholly or mainly based in another country, this could risk making the Charity subject to the jurisdiction of that country rather than to the jurisdiction of England and Wales, which could prejudice registration with the Charity Commission and possibly some of the valuable tax reliefs available in England and Wales. Attitudes have changed in relation to this issue in recent years, especially in relation to Charity Trustees who live elsewhere in the European Union. In some cases it is possible to address this issue by incorporating a jurisdiction clause into the Charity's Constitutions, but this needs to be considered on a case by case basis and may differ depending upon which jurisdiction the Charity Trustees are located.

The drawbacks of operating your Charity through a charitable trust in modern day society means it is appropriate to look at incorporation to overcome these problems.

### 3. Incorporation

There are various options for incorporation which are set out in more detail below.

#### a. Incorporation of Charity Trustees by the Charity Commission

- The trustees of many Institutes and diocesan charities have historically enjoyed this form of incorporation under what is now Part 12 of the Charities Act 2011. This is at the Charity Commission's discretion and one can never be sure that they will agree until one asks. It is also necessary to demonstrate a sufficient volume of assets/activities for the Commission to accept the application.
- By issuing a Certificate of Incorporation the Charity Commission can establish the Charity Trustees as a corporate body with a perpetual name, for example "Trustees for the X Charity". The certificate vests all the property held by the Charity Trustees for the Charity in the corporation, although additional paperwork will need to be completed to formally transfer stocks and shares, registered land and contracts.
- The corporation operates rather like a company through its board of trustees and when the Charity Trustees have decided on a course of action it is the corporation that carries it out. It can sign or execute documents by means of a common seal, or by signature of two of the Charity Trustees.
- The corporation never dies or retires, even though the Charity Trustees who run it die or retire. An appointment of Charity Trustees is dealt with in accordance with the Charity's Constitutions and that would generally mean being recorded in the trustees' minute book or by means of a formal deed of appointment.
- However this kind of corporate body does not provide the Charity Trustees with protection from liability for the debts of the Charity or resolve the issues created by having foreign trustees. It is effectively an administrative tool to avoid having to register assets or enter into contracts in the name of each individual Charity Trustee.

#### b. Appointing a company as sole corporate trustee of the existing Charity

- The great advantage of this process is that the Charity Trustees who become directors (though usually still called 'trustees') of the trustee company, obtain the advantage of not being personally liable for the debts of the Charity. Therefore, it is very suitable if lay people are to be involved as trustees and sometimes also if the charity is to hold assets outside England

and Wales where lawyers in other jurisdictions might not be familiar with Part 12 incorporation. There are also no requirements under company law that directors have to be resident in England and Wales.

- Whilst it will be necessary to establish a new company, it is simpler to put in place, so long as the Charity's Constitutions permit this or the Charity Commission makes the appropriate Order, than a full-blown charitable company taking over the charity's operations as described below. This is because the existing charity continues with its Charity Commission registration number. All that happens legally is that a single new corporate trustee is appointed in place of the Charity Trustees.
- Unless the appointment is by the Charity Commission (which sometimes has to happen) the company will have to go through the procedure of obtaining a certificate from the Lord Chancellor to act as a trust corporation, which is advisable if it is to hold land on trust. This is a paper exercise but it can take time.
- The new trust company will be required to prepare its own set of dormant company accounts each year and submit these to Companies House as well as, complete an Annual Return for the Registrar of Companies. In practice, this will not be too onerous as the company itself will be deemed to be dormant because it will have no assets or income of its own.
- The structure can be seen as complex and can cause confusion, particularly when new trustees are appointed. There is often confusion as to who the actual trustee of the Charity is, in this case the corporate trustee company and not its individual directors. Third parties often fail to understand this distinction.

#### c. Replacing the existing charitable trust by a new charitable company

- At present most new service-providing charities are established as companies for all the reasons mentioned above. The advantage of this type of incorporation over the company being appointed as sole corporate trustee is that the Charity will be governed by the company's Articles alone and the former trust deed becomes redundant, unless specific assets have to remain subject to it. In addition, the directors of the Charity are the Charity Trustees.
- If, for any reason, the trust deed needs substantial updating, this method is possibly better than the one outlined in the 'Appointing a company as sole corporate trustee of the existing Charity' section above. The same applies when a charity is hiving-off part of its activity (say a school or hospice) to a new organisation to be run largely by lay people.



- In order to implement this structure, the new charitable company will have to be set up at Companies House and then separately registered with the Charity Commission as the new Charity and the assets, liabilities and activities of the old Charity will have to be transferred to it (see the 'Hiving-off Activity' section below). The old Charity will then usually be wound up in due course and removed from the Charity Commission's Central Register of Charities.
- Where some of the old Charity's assets are held on special or restricted trusts (i.e. trusts that are narrower than the objects in the old Charity's Constitutions), the company will have to be appointed sole corporate trustee of those special or restricted trusts, just as set out in the 'Incorporation of Charity Trustees by the Charity Commission' section above, but the bulk of the operations should still be able to go through the new company, although obviously an assessment will need to be made before choosing an appropriate route.
- In this structure the Institute would operate the Charity through the new charitable company which would have a new registration number with the Charity Commission and a company registration number with Companies House.

#### d. Replacing the existing charitable trust by a Charitable Incorporated Organisation (CIO)

- The CIO is an entirely new charitable entity designed specifically for Charities. It has all the advantages of a charitable company with the addition that there is only one registration body, the Charity Commission.
- The process is the same as for setting up as a company. The new CIO will be an entirely new charity with a new charity number.
- The CIO is a suitable alternative to the other corporate structures discussed above. However, as they are a new form of legal entity, there is no existing case law affecting CIOs and, as such, in the first few years of existence Institutes may wish to be cautious about using this method until they have been tried and tested.
- **The advantages of a CIO over a company are:**
  - i. Registration, reporting and subsequent notifications only need to be made to the Charity Commission and there is no need for duplicate filings to be made with Companies House.
  - ii. The structure is very similar, in practice, to the structure of a charitable trust (albeit with a separate corporate existence) so will

seem familiar to Institutes and not involve significant change.

- iii. CIOs have a much more restrictive statutory framework that is specifically tailored to a Charity. There is therefore no need to be conversant with the extensive body of company law which often operates in a peculiar and unintended way where Charities are concerned.
- iv. Most banks have tended to see "conversion" to a CIO as simply that, conversion, rather than creation of a new charity, so have not required new bank accounts to be opened, allowing the existing accounts (and members) to simply transfer across.

- **The drawbacks of a CIO over a company are:**

- i. There is no formal register of charges. This means that institutions lending to the CIO have less formal protection and there is less visibility of the CIO's indebtedness. This is unlikely to be a major issue for charities run by Institutes, as mortgage finance is uncommon.
- ii. Third parties (and in particular overseas third parties) are not so readily aware of the concept of a CIO as they would be with a company but over time, as the structure becomes more common, familiarity should increase and this will become less of an issue.
- iii. There is little in the way of precedent case law or guidance to answer any anomalies that may arise. However, again, this will develop over time and, we anticipate, will in fact broadly follow the established precedents and guidance for charitable companies.

#### Key issues to consider when transferring to a Charitable Company or CIO

- **Objects of the Charity:** Before considering transferring to a Charitable Company or CIO, the Charity Trustees will need to make sure that the objects of the new entity are the same as those of the existing Charity or consider whether they need updating. This gives an ideal opportunity to consider whether the existing objects are still appropriate given that the Institute's activities will have developed since the original Charity Constitutions were drafted, its people and age profile will have changed and the nature and geographical scope of its work may have altered. If there is a need to change the objects, then a parallel case may need to be made to the Charity Commission to explain this proposed change.

- **Charity's Constitution:** When deciding to refresh the Charity's constitution there are various issues to consider that may help to "future proof" the Charity:
  - i. You can cater for future changes in the geographical nature of the Province. For example, if the Superior is defined in the Charity's Constitutions as "the Superior of the English Province", a change of the English Province to being part of, say, the European Province will render the Superior ineffective. You could therefore define the Superior as "the Superior of the English Province or any province that incorporates any house or houses in England."
  - ii. You can provide for the eventual withdrawal of the Institute from England and Wales, so could provide that if there ceases to be a Provincial Superior, the Charity's Constitutions are read as if the words "Provincial Superior" referred to the Superior. This would then pass the supervisory powers of the Provincial Superior, in respect of the Charity, over to the Superior.
  - iii. You could provide for the complete extinguishment of the Institute and provide what will happen to the Charity in those circumstances. For example: If the objects are for the "advancement of the charitable work of the Institute", you could provide that if the Institute ceases to exist, the objects revert to the "advancement of the Roman Catholic religion"; If the Charity Trustees are appointed by the Superior, you could provide that all references to the Superior (including their supervisory powers) fall away and that future Charity Trustees are then appointed by the incumbent Charity Trustees on an ongoing basis. The Charity would then simply become a stand-alone charity for the advancement of the Roman Catholic religion, with the incumbent trustees appointing their successors.
  - iv. Alternatively, it would be possible to create a framework where the extinguishment of the Institute actually triggered the dissolution of the Charity and directed where the funds were to be transferred. This would, however, cause problems if the intended recipient was no longer in existence when the Charity dissolved and is probably inadvisable, unless the potential is in the near future.
- **Review of the Charity's assets and liabilities:** Charity Trustees will also need to review the assets and liabilities held by the Charity to make sure that everything is transferred over to the new entity, for example property, bank accounts, investments, shares in any trading companies, external licences,

contracts, employees, etc. In our experience the following areas will need to be reviewed, in particular:

- i. **Property:** If the freehold title is unregistered the transfer will trigger first registration with the Land Registry. For leasehold land, consent may be needed from your landlord. Whether unregistered or registered, transferring land can result in work having to be done to transfer the property from the names of previous Charity Trustees. However, this can be a useful audit of the ownership of your properties and enables you to correct problems of discord on missing Charity Trustees as part of an ordered process, as opposed to being restricted by an urgent sale process.
- ii. **Investments:** Most Charities with investment portfolios have agreed that their investments should be subject to discretionary management by professional investment managers. These managers will need to be informed of the proposed changes in advance so that, on the date of transfer, they may arrange for their records and those of their nominees or custodians to reflect the new title. New letters of engagement (or contracts for management) will need to be entered in to with the investment managers and the Charity's investment policy updated. This again presents an ideal opportunity to revisit the investment policy to ensure it still reflects the risk profile and wishes of the Charity Trustees going forward.
- iii. **Employees:** The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will apply to the transfer of any staff. Under this, there is a requirement to carry out an information (and if appropriate consultation) exercise with employee representatives, or if no employee representatives are elected, with staff directly. The consultation needs to be carried out in accordance with employment law and there are specific rules governing the timing of such consultations and the manner in which they must be done. Your lawyers or HR advisers will be able to assist with this. Although in basic terms, pension obligations will not transfer under TUPE, it is recommended that the terms of any pension funds operated are checked in good time prior to incorporation, as in some circumstances the transfer can trigger a debt (known as a "section 75 debt") in the pension scheme, which could be required to be paid off immediately. Your accountants will be able to advise on this and liaise with the pension provider concerned.

iv. **Contracts:** Some contracts have terms which can terminate the contract if there is a change of contracting entity. All major agreements (including loan documentation and grant agreements) should be reviewed.

- **Deeds of covenant or Gift Aid declarations:** The Charity will be the beneficiary under Deeds of Covenant and/or Gift Aid declarations used to ensure that the income of the members of the Institute is gifted automatically to the Charity. This reflects the requirements of Canon law<sup>19</sup> but also, crucially, means that any income earned by a member of the Institute is not subject to income tax or, if it is, such tax can be reclaimed from HMRC. Again, the process of incorporation provides an opportunity to confirm that such documents are in place for all members in the UK. The Deeds or Declarations will need to be updated at the date of transfer to reflect the name of the new Charity as it is physically a new entity. In addition, the Charity may have Gift Aid declarations in place for all future or continual donations from members of the public. These too need to be updated for any change in the name of the Charity. Whilst this may be seen as an administrative burden, it is an opportunity to make contact with donors and to encourage them to increase their donations by reminding them of the valuable work you do.
- **Wills:** As with Deeds of Covenant and Gift Aid Declarations, as the Charity changes it is advisable to also revisit the Wills executed by members of the Institute to ensure that the new Charity is named as beneficiary where relevant.
- **Bank accounts:** As the new Charity is a new legal entity, the Charity's bankers will need to be informed so that the title to the bank accounts can be changed. It is advisable to talk to the Charity's bankers very early in the process so as to ensure that any such change can be achieved with minimal disruption and that it can be achieved on the correct date. If new accounts have to be set up, it is important also that any necessary changes are made to direct debits and standing Institute instructions and that revised mandates are put in place. (In our experience, on a conversion to a CIO the banks appear to be more flexible about keeping the original accounts ongoing).
- **Statutory accounts:**
  - i. The old Charity will need to prepare a set of accounts reflecting the transfer of its assets, liabilities and activities to the new Charity. Typically, the transfer would take place at the financial year end of the old Charity although this is not essential. However,

<sup>19</sup> Canon 668

it is important to ensure that the accounting for the transaction is as neat and tidy as possible and, for this reason, it is always advisable to ensure that the transfer takes place on the last day of a month.

- ii. Ideally the transfer document needs to reflect a transfer as having taken place as close to midnight as possible. In this way, the accounts of the old Charity can be made up to the last day of the relevant month i.e. the date of the transfer and show the assets being transferred out, whereas the accounts of the new Charity can show the assets being transferred in on the first day of the following month.
  - iii. Once a final set of accounts has been prepared for the old Charity showing the transfer of all assets and liabilities to the new Charity, it would be normal for arrangements to be made to have the Trust wound up and removed from the Central Register of Charities.
  - iv. The trustees' report of the new Charity will reflect the changes in the Charity's Constitution but its format and that of the accounts will not change in any noticeable way. The accounts will need to be filed with the Charity's regulators (the Charity Commission and, if relevant, OSCR) and also in the case of a company, with Companies House. The filing deadline for Companies House is one month earlier than that for the Charity Commission so accounts will need to be filed within nine months of the financial period end. In addition, a standard Annual Return form will need to be completed each year for Companies House. This contains administrative information only and should not be seen as a major burden. If necessary, it can be completed by the charity's professional advisers. The requirements for an Annual Return to be completed for the Charity Commission and, if relevant, OSCR will remain as before.
- **Taxation:** Your accountants will assist with any tax implications of the transfer which should be minimal in most cases. It is important that your accountants and solicitors liaise closely on any transfer deed to avoid any unintended tax implications. The main considerations are as follows:
    - i. **PAYE:** HMRC will need to be informed of the change and it may be necessary for the new company to be issued with a new PAYE reference number.
    - ii. **VAT:** If the old Charity was carrying out activities that required it to be registered for VAT, the new Charity will also need to be

registered for VAT. The registration of the new Charity will need to have been completed prior to the transfer having taken place to enable it to be treated as a “transfer as a going concern”. Again in this regard, it is of paramount importance that your solicitors and accountants liaise in advance of the transfer taking place.

- iii. **Corporation tax:** As a charitable trust, the old Charity would have come under the remit of income tax and may have been required on occasions to complete a self-assessment estate and tax return. However, as a company or CIO, the new Charity will come under the remit of corporation tax and may be requested, on occasions, to complete a self-assessment corporation tax return. As with a charitable trust, provided all income is applied for purposes deemed charitable and consistent with the Charity’s objects, no charge to corporation tax should arise.
- iv. On registering the company with Companies House, HMRC will be informed automatically of its existence and will require the completion of a standard form confirming certain details and a separate form to obtain charitable status for tax purposes. Your accountants will be able to assist with the completion of these forms.

- **Other considerations:** Your professional advisers will advise you of any other administrative changes that need to be made or of issues that may be relevant to your Charity’s specific circumstances. Inevitably, there are always additional small changes that have to be made such as ensuring that the new Company Registration Number appears on letterheads, websites, publications, etc, in addition to the Charity Registration Number.

**Conclusion:** The age profile of many religious Institutes in England and Wales is such that within the next five to ten years, if not before, trustees will need to consider how their charity is to be governed going forward. Some may wish future trustees to be members of their Institute’s Generalate or members of their Institute from other Provinces. Others may consider Religious from other Institutes or lay people. Whichever of these options is chosen, it would be advisable to consider seriously changing the Charity’s Constitution to that of a company limited by guarantee or other corporate body to protect Charity Trustees from being pursued personally for the Charity’s debts and to ensure that the Charity remains resident in the UK.

**We would therefore suggest that going forward Institutes should consider incorporating their Charities, either as a CIO or a company, for the following reasons:**

- It gives clear continuity to ownership of assets as these will be registered in the name of the corporate entity; problems of deceased/incapable Charity Trustees will fall away;
- It provides limited personal liability for Charity Trustees which will be needed as Institutes look to encourage wider groups of individuals to play a role as Charity Trustees;
- It enables members of international Institutes, who are based overseas, to play a greater role in supporting the Institute by acting as Charity Trustees without fear of causing jurisdictional problems; and
- The process of incorporation enables a new constitution to be put in place that reflects the changing identity of the Institute and its relationship with the Charity. It can even provide for what will happen to the Charity in the event that the Institute ceases to exist.

As with any significant change, there are many issues to consider and any such change will take time, especially as many Institutes will need to consult their Generalate prior to any decision being taken. It is hoped that the guidance set out above will assist Institutes in understanding why this issue is important and help them to communicate some of the idiosyncrasies of English law to those who may not be familiar with it.

Whilst incorporation is important, for all the reasons set out above, it is really about planning a corporate wrapper around the existing Charity. Changes can be made during the process to the Charity’s Constitutions to provide for future changes in the Institute, or indeed, the eventual disappearance of the Institute, but it does not really cater for a dramatic change in approach.

Whilst in many cases it will be right to “preserve in aspic” the spirit of the Charity as set out in the Charity’s venerable Trust Deed, in some cases it is appropriate to consider more wide-ranging methods of restructure that will dramatically change the face of the Charity and what it does. This will allow a rebirth of the Charity and its mission. We have explored these concepts in more detail below.

#### 4. “Hiving-off” Activity

The concept of “hiving-off” is well known in commercial organisations and has become known to many Institutes who wanted particular missions to continue under fresh management. This involves the transfer of a discrete part of the organisation’s business to a third party.

Essentially:

- The organisation forms a new subsidiary company.
- A particular part of a commercial business is transferred to the new subsidiary company (this is referred to as a “hive down”).
- The new subsidiary company is then sold or transferred to a third party.

This is a process that many Institutes have already undertaken when divesting themselves of their responsibility for running schools or care homes, which have been handed over to third parties. However, there will be other areas of the Institute’s Mission that might be appropriate to hand over to a third party, for example:

- The provision of a hostel or counselling services for a particular section of the community (e.g. support for the homeless or vulnerable women);
- The provision of educational support;
- The operation of care homes (both for the general public and also for members of the Institute); and
- The operation of rental investment properties.

### Reasons for handover

As part of rationalising its activities to prioritise the use of limited resources, an Institute might consider whether there are any aspects of its Mission which it may want to consider handing on to a third party. The reasons for such a handover may be varied:

- Changing legislation may impose an excessive burden on those carrying out the activity (i.e. the Charity Trustees have responsibilities under health and safety legislation, care legislation, etc).
- The Charity Trustees may no longer have the specific expertise to carry out the activity (i.e. knowledge of particular care requirements).
- The Institute may no longer have the financial resources to support or subsidise the activity given the need to support its own members.
- The Institute may have decided to close down a particular activity as it no longer meets the needs of the Institute, but a third party may have already expressed an interest in taking over the activity. For example, the Institute may operate care homes but find it has surplus capacity for its own needs and needs to rationalise its portfolio.

- The Institute may be concerned that, if the Charity comes under the control of the International Institute in the future, the International Institute may not have the same priority, from an international perspective, to safeguard the Mission of a particular activity that is of particular significance to the domestic Institute.

If a “hive off” of activity is to be seen as a rebirth of the Institute’s Mission, it is vitally important to ensure that the new independent organisation will be both financially viable and stable. Many of the operational elements of an Institute’s Mission are, in fact, subsidised by other parts of the Charity. Given the increasing need of the Institute to set aside the Charity’s resources for the support of its elderly members, it may not be possible for the Charity to continue to provide financial support to the new organisation. It is therefore important, before embarking on any hive off, to take professional advice to ensure that the new venture will be able to support itself financially from day one.

### Reflecting the Institute’s Mission

The new organisation will be born out of the Institute and it is therefore entirely appropriate that the Institute ensures that the venture’s constitution is reflective of the Institute’s ethos and wishes. (We have assumed that the new venture will be established as a separate charity. If this is not the case, the position will be far more complex and will essentially be a “sale” at market value of the “undertaking”). The Institute should therefore consider:

- The form that the new venture should take. We would suggest that it should be a corporate entity as opposed to a charitable trust (for the reasons explored above).
- Whether the charitable objects of the new venture should make reference to the advancement of the Roman Catholic religion, or should be expressed to be non-denominational but nevertheless have a Catholic ethos. If the new venture will be reliant upon obtaining public funding (e.g. through local authority contracts or grants) it is important to consider whether being seen as a “faith” organisation will be a hindrance or an advantage. Those closely involved should be able to express a view on this.
- What should happen to the assets of the venture should it ever come to an end. Is it appropriate to provide that these should be repaid to the Charity and what should the default position be if the Charity has ceased to exist?
- Who should be the Trustees of the new venture? The identity of the Trustees

may be very important as they will be responsible for maintaining the ethos of the new venture and ensuring its direction is consistent with the Institute's Mission. There are many options:

- The first Trustees could be the same individuals as the Charity Trustees (who are then replaced by other individuals gradually) or could include a majority of the Charity Trustees, in Institute to retain control.
- The Trustees, or a majority of them, or a representative number of them, could be appointed by the Charity Trustees.
- The Trustees could be self-appointing and the Charity Trustees could merely appoint the first trustees and then leave them to appoint their replacements.
- The Charity Trustees will need to identify individuals with the appropriate skills to run the new venture. Whilst it might be considered appropriate to appoint those individuals who have been closely involved with the operation of the venture, it needs to be remembered that difficulties may arise if the Charity Trustees seek to appoint employed individuals as trustees and this will need to be dealt with carefully.
- Essentially, it is a question of achieving the right balance between ensuring that the new venture reflects the right principles and the Institute's Mission, whilst allowing the venture to flourish on its own and move forward. Whatever arrangement is put in place, we would expect the Institute to gradually withdraw its role over time, to allow the venture to stand on its own feet.
- The Charity Trustees will need consider the name of the new venture and whether it should be reflective of the Institute's history and involvement with the venture and whether the name should be permanently entrenched.

### Considering new premises

One of the most difficult issues to consider will be the basis on which the assets used by the new undertaking are transferred. When considering, for example, a School or a Care Home, the operation is clearly run from premises that are owned by the Charity. The premises are usually a substantive property that in many cases has considerable value. A newly created venture would never be able to afford to purchase the premises but, before considering a gift of the premises, the Institute needs to consider the extent to which it may need the Charity to retain any "value" in the premises to meet its future financial needs, in particular to finance the care needs of the members of the Institute.

It is also important, at this stage, to consider whether the premises are in fact

suitable for the proposed venture. For example, many premises used by the Charity for the operation of school or a Care Home may not necessarily be suitable for the future operation of such a venture. The property may have been purchased and adapted many years ago and no longer be suitable to the needs of a modern day operation. Whilst this is often not an issue whilst the operation is run by the Institute (and subsidised by the Institute) this may become a significant issue when the operation is to be run by a third party organisation that has to rely upon third parties purchasing its services, who may only expect to pay "commercial" rates for a modern outfit. It is important that any operation put in place has a chance of survival and, if the operation is likely to fail, it may be better (however difficult that might be) to actually decide to close the operation rather than pass it on to a third party to operate.

If the operation fails whilst being run by third parties this can still impact on the Institute:

- The organisation may approach the Institute to request that the Charity provides further funding, which the Charity Trustees may feel morally obliged to provide. They may even feel subject to emotional blackmail.
- The general public may not understand that the venture is no longer run by the Charity and feel that the Charity (in the guise of the Institute) is responsible for its closure. The Charity (and by implication the Institute) will become the target of public displeasure, even if the Institute had absolutely no involvement in the closure at all. (In some cases the Institute may actually be as displeased as the public, making the problem even more acute).

The main options are:

- 1. To gift the property to the new venture:** Thought needs to be given as to what would happen if the venture fails in the future and who can realise the value in the site. The Institute also needs to be satisfied that the Charity can afford to give away a substantive asset in this manner. In some cases the property may be the Charity's main asset and, in the future, may need to be realised to pay for the long-term care needs of the Institute.
- 2. To lease the property to the new venture:** The terms of the lease, and indeed any rent to be paid, would need to be negotiated with the new venture on an arm's length basis. This is normally the cheaper route for the new venture and enables the Institute to retain a degree of control over the venture and its use of the property. However, one of the key issues will be the term of the lease. If the lease is to be 100 years, what will happen if the Institute ceases to exist and the Charity is wound up before the end of the term?

**3. To allow the new venture to use the property under licence:** The difficulty with this approach is that it is unlikely to give the new venture sufficient security of tenure in the long-term which can cause difficulties for raising finance.

**4. To sell the property to the new venture:** This is the most clean-cut approach as both sides know where they stand; however, the approach has problems:

The new venture is unlikely to be able to pay market value and will seek a substantial discount (perhaps on the basis that the future use of the property is restricted to purposes connected with the Roman Catholic religion).

Financing the purchase may leave the new venture in a vulnerable financial position and increase the prospect of it failing from the outset; indeed financing the purchase often takes place through a mortgage loan to the new venture from the Institute.

The new venture has the potential to capitalise on any “uplift” in the value of the site if it were to dispose of it in the future, having acquired it at a discount. This can normally be dealt with by means of contractual provisions that enable the Institute to share in any “uplift”.

If members of the Institute are to remain living in the property following the implementation of the new arrangements, very careful thought will need to be given to the management of the relationship between the community and the new venture. If the respective rights and responsibilities are not laid down at the outset, however harmonious the relationship may be, it may well lead to a destructive relationship in the future as personnel change and tensions come to the fore.

In a commercial context the transfer of part of a business would normally see the transfer of the associated assets (often including any cash surpluses relating to the activity) and the transfer of the associated liabilities.

It should not be automatically assumed that the Charity will be required to transfer over any such assets/surpluses. The Charity Trustees will need to consider carefully what it is able to transfer and what it needs to retain for the Institute’s own needs.

Arrangements will need to be made in respect of staff, but we would normally expect all staff to transfer with the business under the TUPE regulations. If staff

are not to transfer, appropriate arrangements will need to be made.

The key issue is viability: the “child” needs to be able to grow and stand on its own feet away from the “parent”. **The Institute will need to consider the Charity’s:**

- Own needs for funding future apostolic work;
- Own needs for finding alternative premises for its community;
- Need to fund pensions or care needs of the Institute’s members;
- Capital investment needs if sufficient income is to be generated; and
- Needs of the new venture and how it will finance its ongoing operations.

There is no point starting the process if the child venture will inevitably fail shortly after being set up. It is therefore vitally important that the venture is seen as a positive step and that all those involved believe it has a future. It may be necessary for the Institute to show continued public support in the early years to ensure that the venture has the best chance of survival.

Above all, planning and communication are vital to the success of any hive off.

## 5. Sale of a Charity’s Particular Activity

Without stating the obvious, there must always be a possibility that a particular activity or institution (be it an independent school, hospital or care home) cannot continue to be financed and managed by the Institute which founded it and that there are no trustees or charitable organisations which can be found to take it on and give it the investment it requires.

In such a case there is nothing wrong with the Charity Trustees making a decision to sell the institution on the open market on the best terms that can be obtained. This will usually involve professional input in the marketing of the institution and probably its property.

Our caution is that this process, though similar in some ways to a hive-off, will end in the Institute having no further involvement or interest in the institution (unless of course there is some residual charitable activity, such as chaplaincy, to be offered by the Institute), so that the chief long term concern of the Institute would be how to use the proceeds of this open market sale for its ongoing mission.

## 6. Collaborative Working, Mergers, Amalgamations and Takeovers

The concepts of mergers, amalgamations and takeovers are all common in the commercial world. The idea of corporate raiders and hostile takeovers, are not, however, concepts that sit naturally with the visions of Charity and Institutes.

However, the concepts are powerful and provide useful opportunities for Institutes and their Charities if applied in practice.

Although we have discussed below the potential for the Charity to engage in mergers, amalgamations and takeovers, the concepts are also consistent with the provisions of Canon law insofar as the Institute is concerned. Any arrangement put in place between Institutes can be replicated with their respective Charities.

### Collaborative working

As Institutes find themselves faced with fewer willing individuals wanting to come forward and act as Charity Trustees, or missing vital skills needed to progress the Charity, the Charity may find it beneficial to consider engaging in collaborative working with another Charity, including another Institute Charity.

This can be as simple as arrangements for the borrowing or lending of resources, maybe administrative or executive support. Alternatively, the arrangements can be far more complex and lead to the two Charities almost being seamlessly integrated – without actually taking the step of a formal merger.

Whilst each Institute (and their Charity) has a distinct identity and a positive contribution to make towards society, in some cases the assets of the Charity may actually be able to be put to better use for the beneficiaries of the Charity by working together with another Institute's Charity.

For example, the two Charities could collaborate to share:

- a. Administrative functions such as finance, IT maintenance and support and payroll services;
- b. Training resources;
- c. Transport provision;
- d. Accommodation and premises as part of a joint community for members of both Institutes;

- e. Staff and services that neither Charity could afford, or justify the expense of, on their own;
- f. Joint projects for delivery of services such as care services to achieve economies of scale.

### Key areas for consideration

Before entering into any collaborative arrangement the Charity Trustees need to be certain that the arrangement is in the best interests of their Charity (as opposed to the Institute) although normally the interests of the two will be fully aligned. The Charity Trustees of each Charity therefore need to be satisfied that there will be appropriate benefits for the Charity in terms of cost benefits or improvements to services or the ability to obtain a wider range of services.

Key to any collaborative working arrangement will be to understand how the two Institutes/Charities will maintain their independence and autonomy. In particular, it is sensible to:

- Set out a clear demarcation between the ways in which the Charities will collaborate, and the extent to which such collaboration impacts on the Institutes or is subject to oversight by the Institute.
- Provide that any risk or liability is fairly balanced between the two Charities.
- Provide that any benefits are fairly balanced between the two Charities.
- Give advance thought as to how the arrangements could be terminated if either Charity wanted to withdraw. Parties always enter into these arrangements with the best of intentions and therefore feel it wrong to consider in great detail termination provisions at the outset. However, this creates a danger that critical issues will be overlooked and, if a termination does happen, neither side will be in the best position.
- Consider how any disputes will be resolved as each Charity is likely to be an equal partner in the collaboration with equal weight on any decision made.

The Charity Trustees will need to be satisfied that the joint working does, in fact, advance their individual Charity's objects. Normally we would expect the Charities to have broadly similar objects (e.g. to advance the Roman Catholic religion for such purposes as are charitable in law) but this should not be assumed. Care will also have to be given to making sure that neither Institute receives excessive private benefit from the arrangements.



## Maintaining Financial Independence

A key area for consideration will be finance. Each Charity will need to ensure that they can in fact contribute towards any financial obligations. If they cannot, the “paying” Charity will need to consider the extent to which it is appropriate for them to subsidise the “non-paying” Charity and if this is consistent with their charitable objects.

Most Charities will have an express power allowing them to support other Charities and, if not, there is usually an implied power to work towards the furtherance of their charitable objects by working with other organisations (providing there is similarity of objects).

Careful thought will be needed if the Charity is to engage in collaborative working with a non-charitable venture, due to issues of private benefit that may be gained by the non-charitable venture.

In order to establish a collaborative way of working, you would normally expect there to be a written agreement which will take the form of a contract, or a service level agreement or maybe a memorandum of understanding. Any legal agreements of this nature need to be sufficiently robust to protect each of the Charities’ respective interests.

It may be that one suggestion of collaborative working is for the two Charities to share Charity Trustees, especially where the pool of suitable candidates is small in each Institute. However, this needs to be approached with considerable caution as the Charity Trustees will potentially be putting themselves in a position where they have distinct conflicts of interest (i.e. they will have duties of loyalty to their own Institute that they may want to prefer over the interests of the other Institute).

It is also necessary to check the constitutional documents of the Charity to ensure that Charity Trustees can be appointed who are not members of the Institute.

## Mergers

Collaborative working between Institutes (as opposed to the Charities) is contemplated by Canon law. Canon 580 makes provision for the aggregation of two, or more, Institutes: *“The aggregation of one institute of consecrated life to another is reserved to the competent authority of the aggregating institute; the canonical autonomy of the aggregated institute is always to be preserved.”*

### The point of aggregation is that:

- It enables Institutes that share a common spirituality to support one another in their consecrated life.
- The aggregating Institute has no jurisdiction over the aggregated Institute.
- The bonding achieved through aggregation enables the Institutes to collaborate and share personnel and resources, whilst preserving and promoting their own spirituality and each maintaining their own distinct nature and autonomy.
- It is therefore possible for any collaboration to be achieved both in civil law for the Charity and in Canon law for the Institute.

We would expect that a merger of two Charities would be more likely to arise in circumstances where two Institutes decide to merge, as opposed to there being a merger of assets in one charity, with two stand-alone Institutes remaining. Canon law makes specific provision for Institutes to merge.

Canon 582 makes provision for mergers and takeovers: *“Mergers and unions of institutes of consecrated life are reserved to the Apostolic See only; confederations and federations are also reserved to it.”* Effectively the terms merger, union or takeover can be used interchangeably.

### Normally the process involves either:

- a. One Institute disappearing by effectively becoming subsumed within another Institute. This is often considered appropriate when one Institute has become so small that it starts to lose its own vitality and begins to lack the personnel or resources to carry out its Mission. If there is no reasonable hope for growth and development, it may be appropriate for the Institute to be taken over and merged into another existing Institute.

- b. Two Institutes disappearing and a new Institute being created out of their combined assets and members. This type of fusion would result in both Institutes losing their identity and a whole new Institute being formed with a new name, personality and structure.

In any such merger, the primary concerns are to ensure that:

- The good of the Church is preserved;
- The identity of each Institute is respected;
- The individual members of each Institute are prepared emotionally, spiritually and psychologically for the change;
- All the civil issues relating to personnel, temporal goods and the ongoing management of the Institutes' apostolic works are addressed.

If one Institute is going to disappear altogether, individual members need to have the right to consider whether they may want to transfer to another Institute as opposed to the new entity, or indeed to leave Religious life completely. This raises all of the issues which have been addressed in chapter 2.

Canon 582 also allows Institutes to come together as a federation or confederation and work together for a common purpose, whilst each individual Institute retains their own individual identity and autonomy. However, as with a merger or union, this involves a yielding of some level of power over the Institute to an external authority and therefore such a structure requires the approval of the Apostolic See. (Looking at this from the perspective of the Charity, similar issues arise).

A merger is often used by commercial organisations as a way to save costs, increase profits and improve services. As far as Charities are concerned, a merger should seek to ensure a better outcome for beneficiaries as well as a better use of charitable funds.

### Structures of Mergers

There are several ways that a merger can be achieved:

- a. The two Charities can both transfer their assets to a newly formed entity.
- b. One Charity can be dissolved and its assets transferred to the other Charity.
- c. Two or more Charities can be grouped together and one of the Charities can become the sole trustee of the other Charities. This can cause difficult

situations as, when acting as the Charity Trustee of one of the group Charities, the trustee Charity has to ensure that it is making decisions that are in the best interests of the relevant Charity and not the trustee Charity or the group as a whole. This is not strictly a merger but more of a federation or confederation.

Which structure is adopted for a merger will depend, in part, upon the powers contained in the merging Charities' constitutional documents. In particular, the provisions that will apply upon the dissolution of any Charity and the charitable objects of each Charity which will need to be compatible (although this can be resolved with the assistance of the Charity Commission).

### Key Challenges

Particular thought will have to be given in situations where any property is treated as permanent endowment or is held in special trusts. There is also a requirement, in some cases, under Canon law to consider the intentions of the original donors<sup>20</sup>. This is partially reflected in civil law as the court or the Charity Commission have the power to amend charitable purposes (known as *cy-près* jurisdiction). However, whilst any amendment of charitable purposes has to be consistent with the "spirit of the gift" it must also be balanced with "the social and economic circumstances" prevailing at the time of the proposed alteration<sup>21</sup>. This balancing act is inconsistent with the Canon law position, and may therefore affect the ability for the Charities to rely on *cy-près* application in these circumstances.

A further key issue will be to choose the most appropriate structure for the new Charity.

The most difficult issue will be moulding together the cultures of the two Institutes and their Charities to provide a new unified Institute and unified Charity. Considerable thought will have to be given to the appointment of the Superior and the Charity Trustees. It may be appropriate in the initial stages for both sides to be represented equally on any new trustee board.

Inevitably painful decisions will have to be made and a merger invariably leads to the need to rationalize properties, staff and activities and focus on those that are core to the common good. Good communication is the key to a successful merger and this needs to be part of a well thought-out strategic plan for the implementation of the merger.

## 7. Dissolution and Suppression of the Institute

In some cases the Institute may take the view that it is better to simply dwindle away over time, rather than take any steps to formally restructure at this stage. This may be appropriate in cases of a small domestic Institute that has maybe two or three Religious remaining and no prospect of new Members but the question remains “Who will be the last out to turn off the light?”.

When an individual dies, they normally leave behind an estate which has to be administered by their personal representatives. Whilst most Religious do not have personal assets, or personal assets that are not already administered by the Institute, the Institute itself will leave behind assets. As we have already established, the Institute’s assets will most likely be held in the Charity.

Therefore, when there are no members of the Institute remaining, what happens to the Institute and what happens to the Charity?

As we have mentioned above, the death of the last member of an Institute does not mean that the Institute (under Canon law) ceases to exist. It will only cease when formally suppressed.

The position is similar with the Charity:

- a. If it is a charitable trust, the assets in the name of the last Charity Trustees will in fact, when they die, continue to be held on trust for the purposes of the Charity by their personal representatives, who will need to appoint replacement Charity Trustees who can then dissolve the Charity.
- b. If it is a CIO or company it will continue to exist until formally dissolved or liquidated.

Most Charity’s Constitutions will provide for what happens upon dissolution of the Charity, but the key issue will be who determines that it is time for the Charity to be dissolved. This is normally the responsibility of the Charity Trustees.

<sup>20</sup> Canon 1300 provides that: “The legitimately accepted wills of the faithful who give or leave their resources for pious causes, whether through an act inter vivos or through an act mortis causa, are to be fulfilled most diligently even regarding the manner of administration and distribution of goods, without prejudice to the prescript of canon 1301 §3.”

<sup>21</sup> Section 62(2), Charities Act 2011.

However, if there are no members of the Institute remaining, who will be the Charity Trustees?

- In most cases the Charity’s constitution will provide that the Provincial or Superior will appoint the Charity Trustees.
- However, if there is no longer a Provincial or Superior what happens? The remaining Charity Trustees will have the statutory power under section 36 Trustee Act 1925 to appoint replacement or additional Charity Trustees.
- If there are no Charity Trustees capable of making the appointment, then the necessary appointments can be made by means of an application to the Charity Commission (or the court) (under section 69(1) Charities Act 2011) or by the Charity Commission of its own motion under section 80(2) Charities Act 2011.
- It is important to note that (subject to any provisions to the contrary in the Charity’s constitution) neither the Diocesan Bishop, or the Apostolic See, have any rights to appoint the Charity Trustees in the event of the Provincial, Superior or Charity Trustees being unable to make the appointment themselves.

## 8. Usage of Assets

To the extent that any assets remain in the Charity, at the point when there are no longer any members of the Institute, the Charity Trustees are still required to apply the assets in accordance with the Charity’s charitable objects. In some cases this may cause a problem if the objects have been drawn too tight, for example if they refer to “*supporting the charitable work carried out from time to time by the [Institute]*”. In most cases though the objects will include a default provision providing that the assets should be used for the “*advancement of the Roman Catholic religion in such ways as are charitable in law*” in which case the assets can be donated to another suitable Charity with similar objects.

It would also be appropriate for Institutes that are part of an International Institute to consider, at this stage, amending the dissolution provisions of the Charity’s Constitutions to specifically provide that, upon dissolution, the assets of the Charity will be passed to the International Institute for charitable purposes. In some cases it may be necessary to specify appropriate purposes that are charitable.

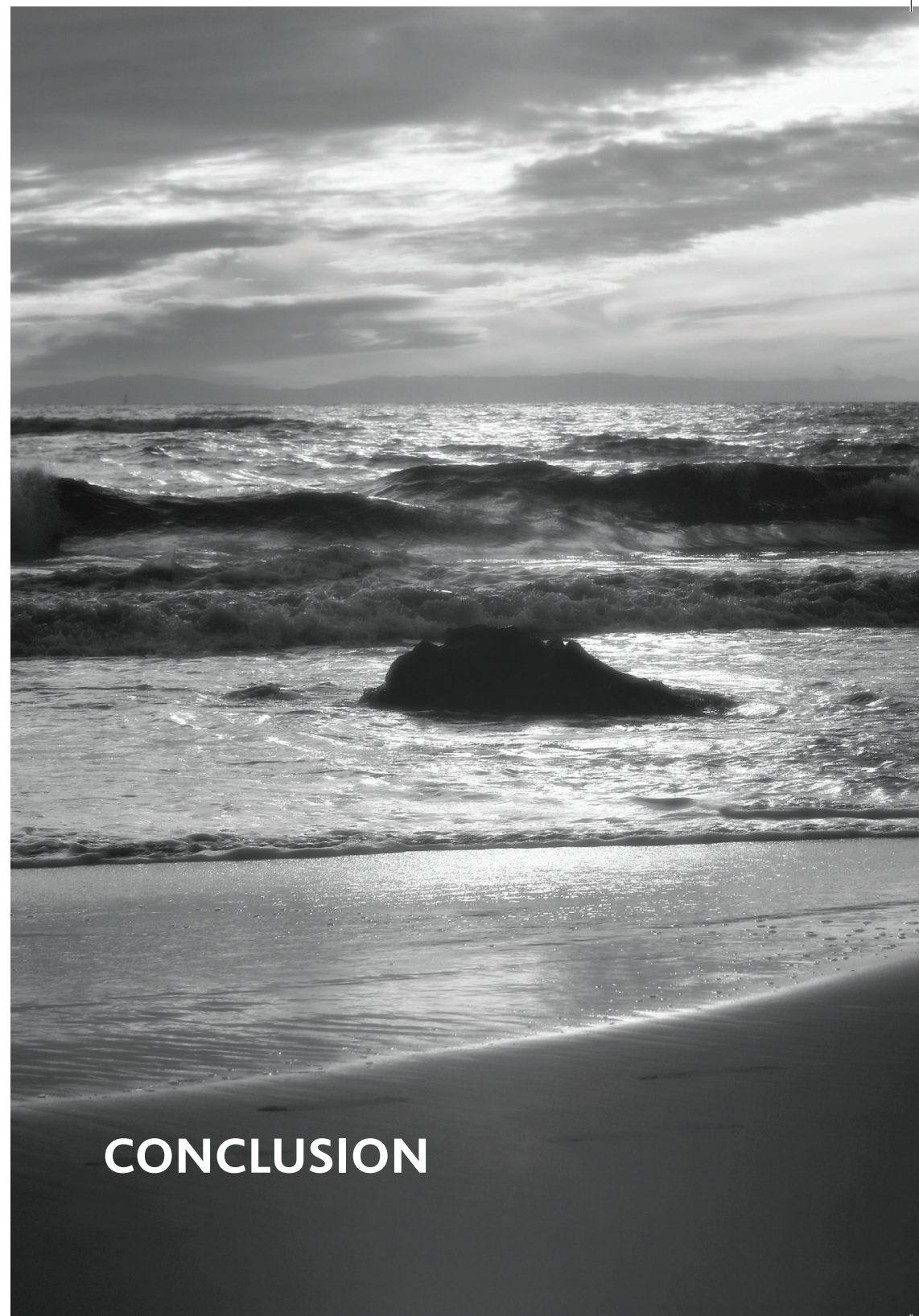
If the objects are no longer capable of implementation, or there are no dissolution provisions, then it may be necessary to apply to the Charity Commission for a

Scheme to enable the assets to be applied cy-près for similar charitable purposes. Again, it is worth noting that in such circumstances neither the Diocesan Bishop, nor the Apostolic See, nor any Superior of the international Institute (subject to any provisions to the contrary in the Charity's constitution) have any rights to direct where the assets of the Charity go or the manner in which they are applied. In addition, the Canon law issues referred to above will apply.

If such an eventuality is on the horizon, it makes sense to appoint individuals to act as Charity Trustees who are not Members of the Institute and ensure that they have a clear understanding of how the Charity should function following the extinguishment of the Institute.

Whilst an Institute could decide to dissolve the Charity at an earlier stage, the assets of the Charity would need to go to another Charity and the Institute would be left with no means of support for its members.

In a few such cases we have established separate residual trusts, governed by friends of the Institute, often Religious themselves, for the initial purpose of providing care and maintenance of the Institute's, last members until death and thereafter for agreed purposes within the Catholic ethos.



## CONCLUSION

## CONCLUSION

The issues set out above are being experienced by Institutes on a regular basis.

We have provided you with a broad understanding of the key issues so as to enable you to think about what steps, if any, you and your Charity may need to take.

It is fair to say that there is simply no right or wrong answer to these issues or approach to follow. In each case, it will be a matter for individual discernment for the Institute and the Charity Trustees.

What is, however, fundamental is that Charity Trustees plan the strategic future of their Charity and ensure that this is continually updated and refreshed to ensure that it meets the current needs of the institution and society.

Stone King LLP & Buzzacott LLP

## APPENDIX 1

### A FINANCIAL PLANNING CHECKLIST

#### Property issues

Any form of forward planning must involve a detailed consideration of property needs. One of the main sources of inward cash flow for many Institutes over the next decade may be the proceeds from the sale of properties. Some such proceeds will need to be reinvested into property but some will be available to increase investment levels. In most cases, because property will be such an important asset for many Institutes, the need to give careful thought regarding the Institute's future property strategy is of paramount importance and now is the time to be doing just that. Ideally Institutes should carry out a review of their property needs regularly – at least every five years. As property markets begin to recover, the Institute will want to be in a position of knowing exactly what its strategy is so that it may implement decisions at the best possible time.

Such a review will involve assessing the state of existing properties and future property needs. It will involve asking a number of questions, including but not necessarily limited to the following:

- What major repair and/or refurbishment work is required to existing properties in the next few years?
- Will any extensions or major building projects be undertaken? If so, have proper costings been obtained making allowance for all known costs including any VAT payable? Has professional advice been sought? (It may, for example, be possible in the case of a "new build" to use a separate legal entity called a "design and build" company to construct the property and hence obtain VAT relief on professional fees in addition to build costs).
- Is there a need for a rolling programme of work that is of a periodic nature such as external and internal painting and decorating?
- Are the properties occupied by the Institute currently suitable for future needs given the increasing age profile of members?
- Will major modifications be needed to facilitate the needs of increasingly older occupants? For example, new specialist furniture such as orthopaedic beds, chairs, specialist baths, stair-lifts, other lifting equipment, etc?

- Where property is to be purchased, have legal advisers and property advisers been appointed and briefed to ensure that all appropriate searches, surveys etc, are carried out? Have their fees been budgeted for?
- Will new purchases or major property work require planning permission? Will this be obtainable with ease or does lengthy preparatory work need to be undertaken including detailed discussions with planners and local Councils?
- Will new property purchases lead to the need to purchase significant amounts of new furniture and fittings?
- Will any properties be sold in the next few years? The likelihood that such properties will be able to be sold quickly and with relative ease should be considered. For example, are the properties registered with the Land Registry or subject to restrictive covenants? If so, then perhaps now is the time to be talking to legal advisers about the possibility of getting them removed. The proceeds from the sale of an institutional type property are likely to be higher if the property can be developed – what is the likely attitude of the local planning authority, and of neighbours(!), to any application likely to be?
- If houses are to be sold, will this necessitate moving members to other houses? Is this feasible? How will it be received by the members involved?
- Will it be easy to sell properties that have been closed or will there be a period when such properties will need to be secured and certain expenses will have to be paid? How much will these total? Should the property be rented out for a short period whilst issues are resolved rather than leave it empty?
- Where sales are contemplated, have professional advisers been briefed adequately to ensure that the Charity Trustees meet all of their obligations to obtain advice and written the reports in accordance with the Charities Act 2011 to enable them to dispose of the property?
- Will properties need to be rented in the future? Will a formal lease be needed or will the let be such that a licence to occupy will suffice? How long will any formal leases need to be for? Has provision been built in to ensure that any formal licence or lease is reviewed by a property surveyor or legal adviser to ensure that they are not onerous?

### Care for the elderly

The age profile of members of Institutes brings with it a number of specialist concerns, many of which have a financial impact:

- Will members of the Institute require specialist care in the future necessitating the employment of nursing staff, specialist furniture and equipment, etc?
- Will housing requirements change? Will existing houses need to be adapted, new houses purchased?
- Will elderly members requiring nursing care be cared for by the Institute or will they be moved to a specialist nursing care home?
- Has allowance been made for the fact that certain costs will inevitably increase as members become older e.g. medical expenses, light and heat costs, etc?

### Staff and employment costs

As members of the Institute become older, the need to employ lay staff will increase. Lay staff will be needed in a nursing, domestic and administrative function. Salaries will need to be included in any financial forecast together with the associated costs such as employer's National Insurance and pension contributions.

### Car and travel expenses

Often the Institute will spend considerable amounts of money on motor vehicle fleets. The following questions need to be asked:

- Are the existing cars now of an age where expenditure on repairs etc can be expected to rise?
- Will members currently needing cars need them in the future?
- Will members not currently in need of a car need one in future?
- Will the type of car needed in future be different to that currently used?

### Salaries, pensions receivable and other income

As members of the Institute grow older, the number of members earning salaries will decline and such income will decrease. Often the income will be replaced by pensions but these usually will be much smaller.

When forecasting future income, a number of factors need to be taken into account and a number of questions asked:

- Will any members of the Institute who are earning salaries or receiving stipends at present need to give up work in the near future to carry out an administrative role within the Institute?
- Has a detailed analysis been done showing the number of members reaching retirement age in the next few years, showing the timing of such retirements and their impact on income levels?
- Have voluntary National Insurance contributions been paid for all members to ensure their entitlement to a state pension?
- Will lump sum pensions be received in the near future? If so, has thought been given to what will happen with these sums?
- Has thought been given to the value of pensions that might be lost over the next few years because of deaths? Often these will be the larger pensions.
- Has a contingency been built in to future projections to try and take account of the uncertainty surrounding state pension levels? It should be assumed that state pensions will fall in real terms in the future.

When forecasting future income, thought needs also to be given to the reliance of the Institute on investment income and interest receivable and the sensitivity to interest rate changes and stock market volatility.

Also bear in mind that as income declines and expenditure increases, a vicious circle starts because cash at bank and investment levels will be reduced and so exacerbate the decline in the income derived from such assets.

### **Cash management**

- It is a fundamental requirement of charity law that the Charity Trustees maximise the return on any asset whilst not exposing it to undue risk. Good cash management is essential, therefore, an Institute should ask:
- Are maximum returns being achieved on money held at the bank? For example, are your monies in the best possible type of account? Is only a minimum amount held in current accounts? Rather than simple deposit accounts, could some of the money be put into term deposit accounts or treasury accounts for a period of 30 days, three months, six months or longer?
- Are unnecessary bank charges being incurred? Have these been discussed with the bank manager?

- Has consideration been given to a centralised banking system?
- Should some of the money held in bank accounts be invested?

### **Investments**

If the Institute is unlikely to need to access cash over the longer term then consideration should be given to the return that may be achieved from that cash having regard also to the potential risk associated with any investment. In respect to those monies not required immediately but needed in the medium term (say less than five years) then advice should be sought on whether such cash might be placed on term deposits that provide security but give rise to a return greater than one that might be obtained from simply holding the funds in a current account or simple instant access deposit account. Where monies are unlikely to be needed in the longer term other than to generate income, advice should be sought on whether such funds should be invested in listed investments, for example, before doing so, the Institute might give thought to the following:

- What you want from your investments – do you need the income or can you afford to receive less income but perhaps concentrate on ensuring the long term capital growth of your portfolio. Now is the time to think about your investment policy and ensure it meets your needs.
- When did you last meet with your investment managers? If investments are one of your Institute's key assets you should be talking to them quarterly, being open with them and asking their advice. The quality of that advice will depend on what you tell them about your future plans and needs. It is essential that investment managers understand your needs and that they are in a position to act in your best interests at all times. But in order to do this, investment managers need to understand your circumstances if they are to help you to make the right decisions over the next few years.
- Will there come a time when you need to realise investments because you will need the cash – have you worked out when this is likely to be? Have you told your investment managers?

## APPENDIX 2

### COMMON SENSE INTERNAL CONTROLS

#### Cash at bank and petty cash

- Ensure that the Charity Trustees are the only people who can authorise the opening or closing of bank accounts. The possibility of unauthorised bank accounts being opened and used to siphon off money has been reduced by recent Banking Acts but not eliminated altogether. I am aware that in some cases individual members of your own Institute have been known to open bank accounts without the Charity Trustees being aware of it! If they can do it, so can employees.
- Ensure that all monies received are banked promptly and that no money is used to “feed” petty cash.
- Ensure that all cheques over a certain amount (say £1,000 maximum) require two signatories. Similarly, the bankers mandate should be drawn up to ensure that all significant cheques (say over £10,000) have two signatures, one of whom should be a Trustee.
- Never sign blank cheques.
- Never sign a cheque without demanding to see the supporting documentation to which the payment relates e.g. the invoice, etc.
- Keep all cheque books under lock and key and check new cheque books when you receive them to make sure all cheques are there.
- Consider using electronic banking for making payments. Provided proper safeguards are in place, it is often far more secure than using a cheque book. The key mistake made is not to replicate the dual signatory controls used in cheque signing. All banks should be able to ensure that an electronic banking system requires two people to authorise payments before they are made. Often this is done through the individuals entering a PIN – modern day technology means that this should be capable of being done by using a small electronic device that can be used remotely by the second signatory. (PINs as their name suggests are “personal” and should never be revealed to others!)
- Encourage people making regular or unsolicited payments into your bank accounts to do so by direct debit, standing order, BACs or electronic banking.
- Think about the amount of cash you need to keep on your premises and the security risks it gives rise to. Consider also the level of cash you are entitled

to hold on your premises if your insurance policy is to cover you for loss. Keep cash under lock and key or in a safe and keep the key in a secure place. Never reveal the combination number for safe locks.

#### Payroll

- Remember if you pay someone regularly and that person is not working for a company or cannot prove to you that they are self employed, you should be processing their pay through a payroll and, if appropriate, deducting PAYE and NIC. If you fail to do this, and the HMRC find out, you will be required to pay over all the PAYE and NI that the Revenue have lost not only for the current year but for several preceding years as well. You will also have to pay interest on these amounts and penalties on top. It is very unlikely that you will be able to recover these amounts from the employees concerned - it will be a direct cost to the Institute.
- HMRC guidelines state that the fact that an individual may work for other organisations is largely irrelevant as is whether or not they invoice you. An individual is likely to be employed by you if most of the following statements apply to them:
  - You can tell them what work to do, as well as how, where and when to do it;
  - They have to do their work themselves i.e. they cannot ask someone else to do it on their behalf;
  - You can move the worker from task to task;
  - They are contracted to work a set number of hours;
  - They get a regular wage or salary, even if there is no work available;
  - They have benefits such as paid holiday or sick pay as part of their contract;
  - You pay them overtime pay or bonus payments;
  - They manage anyone else who works for you.

On the other hand, if any of the following statements apply, your worker is likely to be self-employed:

- They can hire someone else to do the work you’ve given them, or take on helpers at their own expense;
- They can decide what work is done and when, where, or how it is done;



- You pay them an agreed fixed price - it doesn't depend on how long the job takes to finish.
- Take up references and never rely purely on a pre-written reference given to you by the applicant - they can be forged. A written reference should always be sought directly. In addition, a telephone call to a named referee to inform them that you will be writing to them may help. It will confirm that the referee is bone fide.
- It is a criminal offence to employ someone who is not in this country legally. Relevant documents should be checked for all employees and potential employees - checking for only those who look or sound foreign could mean that you are contravening the law which could now result in a prison sentence.
- Ensure someone in authority, and certainly not the person responsible for preparing the payroll, reviews the payroll before it is paid. This review should be evidenced by that person signing the payroll. When reviewing the payroll they should look for bogus employees, duplicate names and unusual or large payments. Many charities have lost money by finding that they have been paying someone who doesn't work for them or that they are paying an employee excessive amounts as a result of that employee deliberately overstating their hours on a timesheet.
- Ensure annual pay rates are properly authorised by the Trustees each year.
- Wherever possible insist that employees are paid via the banking system rather than in cash or by cheque.
- Ensure all employees have contracts of employment and that you are complying with employment law in other respects such as having a grievance procedure and staff handbook.
- Ensure you are complying with the requirements of the Pensions Act 2006 and have procedures in place to auto-enrol "workers" into a compliant pension scheme.

### IT controls

- Take regular backups of all data. This includes financial data, databases, correspondence, registers etc. In fact of everything. These backups should be stored off site to avoid them being destroyed in any disaster. In practice you should:
  - Take a backup each day.
  - Have a separate backup disk for each day of the week.
  - Take at least two weekly backups and store one off site. Again use a different back up disk for alternative weeks.
  - Test your backups.
- Ensure that your computer systems have access and password security. Different levels of password security may need to be set up for different parts of programmes. For example, you would not want everyone who could input receipts and payments into your accounting records to have access to the bank reconciliation option or the payroll for security reasons. Such security measures also prevent people accessing data and corrupting or destroying it.
- Ensure you have adequate maintenance cover for both your computer hardware and your computer software.
- Ensure that your computer equipment is adequately insured and that you have the ability to obtain replacement equipment and programmes very quickly if disaster should befall.
- Ensure you have guidelines to ensure employees, members of your Institute etc. cannot load/download programmes, or external data, onto your computer systems without checking the disks for viruses first. Similarly, ensure you have a policy with regard to employees using the internet and their work email address for personal reasons.

### Overseas issues

- Individuals are still "taken in" by letters or emails from people informing them that you have won some money or that there is cash being held for them – perhaps from a legacy – but that funds are needed first so that various legal and other costs can be paid. Most such correspondence is asking for bank details or requesting a cheque or cash transfer. Never, never give bank details to someone via an email – bankers will never ask anyone to confirm their banking details in this way nor would an organisation such as HMRC.

- When charitable funds or monies are transferred abroad the Charity Trustees are under a duty to ensure that the funds are applied for purposes consistent with the objectives set out in the Institute’s Charity’s governing document. Thus some form of receipt should always be obtained acknowledging receipt of the monies and providing a brief report confirming how the funds will be or have been utilised. This is as important when sending monies to the Institute’s Generalate as when monies are sent to missions in countries such as Zimbabwe, Sudan, etc. Failure to do this may lead to HMRC imposing a tax charge on the Charity.

## APPENDIX 3

### QUESTIONNAIRE FOR DEPARTING MEMBERS

The purpose of this questionnaire is to ascertain information that will enable us to consider objectively the amount of any financial provision which may be made for you pursuant to Canon 702 of the Code of Canon Law.

We have been advised that without this objective information we are unlikely to be able under our Civil Law constitution to make any financial provision for you once you have left the Institute.

We can assure you that the answers to these will be treated in the utmost confidence and used purely as a basis on which to make our decisions. We thank you for taking the time to complete this form.

We may ask you to produce independent documentary evidence to support your answers.

Please ask us if you find difficulty in answering any questions.

..... [Signature of relevant Superior]

For and on behalf of ..... (“the Institute”)

..... Date

**Please use the space provided below for your answers. If you need further space, please attach additional pages, marking each page with your name and the date.**

## 1 General

- 1.1 Your name  
.....
- 1.2 Current address  
.....  
.....  
.....  
.....
- 1.3 Date of birth  
.....
- 1.4 On what date did you enter the Institute?  
.....
- 1.5 On what date did you make final profession?  
.....
- 1.6 On what date did you leave/ do you intend to leave the Institute?  
.....
- 1.7 Whilst a member of the Institute did you have any period of absence from the Institute?  Yes  No  
.....
- If so, please state the length of time you were absent, together with a brief explanation for the absence.  
.....
- 1.8 Under Canon Law are you still a member of the Institute?  Yes  No  
.....
- 1.9 Do you intend to remain in religious life?  Yes  No  
.....
- 1.10 How would you describe your current state of health?  
.....
- 1.11 Do you require any special nursing care or assistance?  Yes  No  
.....
- If yes, please give brief details  
.....

- 1.12 For what particular profession or work did the Institute train you?  
.....  
.....
- Please include further training in later life as well as initial training  
.....
- 1.13 Please give details of your professional or vocational qualification  
.....
- 1.14 Are you employed or self-employed?  Yes  No  
.....
- Please give details of current employment or self employment  
.....

## 2 Income

- 2.1 On whom are you intending to rely for financial assistance for the remainder of your life?  Your own income  
 Family  
 The Institute  
 Other (please explain)  
.....
- 2.2 Are you in receipt of a state pension?  Yes  No  
.....
- If so, how much do you receive per week? £  
.....

2.3 Are you in receipt of any other form of pension?  Yes  No  
 If so, how much do you receive per week? £

2.4 Are you in receipt of any state benefit or allowance?  Yes  No  
 If so, how much do you receive per week, in total? £  
 If so, which benefit or benefits do you receive?

2.5 If under pensionable age, do you have an entitlement to a state pension and/or occupational pension payment?  Yes  No  
 If so, please obtain and send to us documentary evidence from the DSS and/or relevant pension provider.

2.6 Are you in receipt of any salary or other income from any other source?  Yes  No  
 If so, how much do you receive per month? Salary (gross) £  
 Other income £  
 Please send us a copy of a recent salary pay-slip or P60.

2.7 Do you have any savings or other capital?  Yes  No  
 If so, how much? £  
 If so, is it in liquid form (eg at a bank or building society) or invested in property, shares and the like?  Liquid form  
 Invested  
 If so, please confirm that any interest or dividend income is included in 2.6 above.  Yes  No

### 3 Expenses

3.1 Where do you intend to reside?  Alone  
 With relatives  
 With friends  
 In sheltered accommodation  
 Other (please give details)

3.2 What is a realistic estimate of your monthly expenditure? £

3.3 If your monthly expenditure amounts to £50 or more, please provide a breakdown of the estimated expenditure between the following headings:

Rent, council tax, water rates £  
 Insurance £  
 Light and heat £  
 Repairs and decorations £  
 Other premises costs £  
 Telephone £  
 Food and household £  
 Personal £  
 Transport and travel £  
 Other (please give brief details) £  
 Total (should match 3.2) £

#### 4 Other points

- 4.1 Are there any other matters/ points you feel relevant?  Yes  
 No

If so, please give brief details.

.....

[Signature] .....

Date .....

## APPENDIX 4

### ITEMS TO BE INCLUDED IN CHARITY MINUTES

1. Property transactions i.e. purchases and sales
2. Property leases and new rental agreements
3. Authorisation of major expenditure on a property – e.g. refurbishment, major repair work, etc
4. Approval of the annual accounts and approval of budgets
5. Risk management considerations including the annual review of the Charity's risk register
6. Meetings with investment managers
7. Meetings with bankers
8. Major purchase of new equipment e.g. large domestic items, computer equipment, etc
9. Consideration and approval/rejection of a request to transfer monies to the Institute's Generalate or other Provinces or overseas missions together with details of the terms of any such payments and how the use of the monies is to be monitored
10. Authorisation of other material donations or grants to UK charities
11. Changes to banking arrangements including changes to bank mandates
12. Legal issues arising
13. Members leaving the Institute
14. Employment issues including disputes
15. Pay reviews and the approval of annual/other pay rises and key promotions
16. Other disputes e.g. property, boundary, etc
17. Health and safety considerations and the results of inspections
18. Meetings with Regulators including the Care Quality Commission, Ofsted, etc and the result of inspections
19. Appointment of senior officers and employees
20. Changes to Trustees

## APPENDIX 5A

### STONE KING TEAM

Stone King has a long established reputation, developed over many decades, of providing advice to faith based organisations and we have a particular history of experience and expertise in acting for Roman Catholic charities. We have been actively involved at a national level in dealing with many issues that are relevant to our faith clients. The firm's core team of charity law specialists advising faith organisations is supported by members of other departments who are specialists in advising charities in their particular disciplines.

Across our offices, the core charity law Faith Team is led by two of our partners, Tim Rutherford and Robert Meakin.



**Tim Rutherford**  
**Partner, Charity & Social Enterprise Team**

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Tim is a partner in the Charity & Social Enterprise Team and works with a wide range of charities, advising across a broad spectrum of issues. Tim has particular expertise in acting for faith charities and has worked over many years for a number of Roman Catholic

religious orders, Dioceses and other Catholic organisations.

Tim was responsible for the first incorporation of a Roman Catholic religious order as a new Charitable Incorporated Organisation in 2014.

Tim is a regular speaker at events organised by faith organisations and has, in the past, spoken at events organised by Conference of Religious England and Wales, Conference of Religious Ireland and the International Union of Superiors General as well as Chapter meetings of clients.

Tim is a member of the Executive Committee of the Conference of Solicitors for Catholic Charities.



**Robert Meakin**  
**Partner, Charity & Social Enterprise Team**

Based in Cambridge and London offices  
T: 01223 451341 & 07980 617645  
E: robertmeakin@stoneking.co.uk

Robert is a partner in the Charity & Social Enterprise Team. Robert has over 25 years experience of advising a variety of charities but has a particular interest in faith charities and he previously worked at the Charity Commission. Robert is a qualified canon lawyer, having obtained a Masters in Canon Law (Distinction) from Cardiff University and has a PhD in charity law.

Robert is a frequent contributor to "The Charity Law and Practice Review" providing papers, in particular, on issues relevant to Roman Catholic charities and the relationship between Canon law and secular Charity law.

Robert is a trustee of 4 faith charities, including East Anglia Roman Catholic Diocese and the Association of Church Accountants and Treasurers.



**Michael King**  
**Consultant, Charity & Social Enterprise Team**

Michael has acted for faith charities throughout his extensive and ongoing career and is a nationally renowned expert on charity law issues and, in particular, issues relating to Roman Catholic charities.



**Alexandra Whittaker**  
**Senior Associate, Charity & Social Enterprise Team**

Alexandra has specialised in advising faith charities for over 10 years. She is described by the legal directories as a "star associate".



**Hugh Pearce**  
**Senior Partner, Commercial Property Team**

Hugh will be a familiar face to many within the Catholic charity sector and works closely with the charity team and the firm's faith clients, especially in advising on matters with a property dimension. He has a coordinating leadership role in the firm's Faith Team and he sits with

Tim as a member of the Executive Committee of the Conference of Solicitors for Catholic Charities.

## APPENDIX 5B

### BUZZACOTT TEAM

Buzzacott acts for a significant number of religious Institutes providing audit, direct tax, VAT and other financial advisory services. The Faith Section of the Buzzacott Charity Team is led by Amanda Francis.



**Amanda Francis** BSc ACA  
T: 020 7556 1261  
E: francisa@buzzacott.co.uk

#### Experience

Amanda is the Managing Partner of Buzzacott LLP. She is a partner in the Charity Team and works with a wide range of charities including the Diocesan clients, 40 plus

Roman Catholic Religious Institutes and a number of Anglican Communities. She has specialised in the provision of audit and advisory services to the not-for-profit sector, and in particular faith based charities, since the early 1990s.

As well as audit, Amanda undertakes projects for clients including assisting with strategic reviews and financial forecasting, advising on reserves policies and the content of trustees' reports, the format of the annual accounts, the transfer of foundations to new charitable bodies, and many other matters. She is a member of the Buzzacott team which authored "Charity Accounting and Taxation" published by Bloomsbury Professional Publishing and presents at our client seminars as well as external conferences and events. She is a regular presenter at the Association of Provincial Bursars Annual Conference and at the Conference of Religious.

Amanda is a Governor and the Treasurer of Royal Star and Garter Homes, a registered charity providing residential, nursing and dementia care to Ex Service personnel. She is also a Governor and Chair of the Audit Committee of ifs School of Finance, an educational establishment with degree awarding powers but one that also offers further education and A level courses, and is also a trustee of the Buzzacott Stuart Defries Memorial Fund.

Amanda is a Dame of the Papal Order of Saint Sylvester.



**Luke Savvas** is a Partner in the Buzzacott tax team and has worked in the accountancy and tax profession since 1992, having specialised in charity taxation since 1998. He advises faith based charities on Gift Aid, trading, property transactions and all aspects of direct tax.



**Ellen Main-Jeffrey** is a Director within the VAT Services Team, with 30 years experience, working across the practice. She advises faith based charities on VAT registration, partial exemption, property transactions and all other aspects of VAT.



**Rachel O'Donoghue** is a Partner in the Financial Planning team. Rachel advises clients on employee benefits, financial planning, investment, auto-enrolment and executive pension and benefits packages.



**Kimberly Bradshaw** heads up the HR Consultancy service. She has gained extensive HR experience whilst working across a variety of sectors including private, public and not-for-profit. She is involved in recruitment, re-structuring and executive coaching.

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