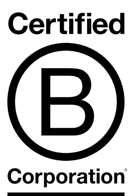
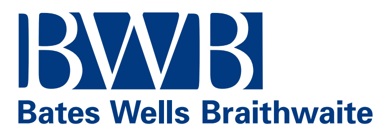
Summer 2017

Charity and Social Enterprise Update





In brief

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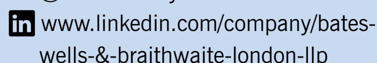
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Article 50 has now been triggered and, with the UK's impending exit from the EU, organisations that want to retain a presence there – in particular, to maintain funding – need to consider their options as soon as possible. **Stephanie Biden** and **Sinead Corcoran** outline the issues *(page 4)*.

Trade marks law is harmonised throughout the EU, so clients may be worried about the impact of Brexit on their brands. But **Mathew Healey** says it's not all bad news for UK trade mark owners *(page 5)*.

In a special focus, **Gillian Roche-Saunders** and **Oliver Hunt** explain what crowdfunding is and how charities can benefit from this method of raising funds *(page 7)*.

In our regular update on fundraising developments, **Lawrence Simanowitz** discusses recent guidance from the Fundraising Regulator and the Information Commissioner's Office alongside the current focus on wealth screening and the legality of opt-out consent *(page 10)*. Legacy fundraising has hit the headlines with the resolution of the *Ilott v Mitson* case: challenges to charity legacies are on the rise, says **Leticia Jennings** *(page 12)*.

Charities registered in England and Wales that wish to carry out activities in Scotland need to be aware of the requirements for registration with the OSCR. **Amanda Ogilvie** explains *(page 13)*.

The Charity Commission has warned against the use of cash couriers to send funds overseas, and **Augustus Della-Porta** urges caution, *page 15*. The use of cash couriers is just one among many risks that charities should manage: **Huw Evans** gives his top tips for identifying and managing your organisation's risks *(page 16)*.

Education specialist **Caraline Johnson** looks at mergers in the FE sector *(page 18)*; while governance expert **Tesse Akpeki** explains the benefits of values-driven leadership *(page 19)*.

Finally, our tax expert, **Bill Lewis**, looks at the Gift Aid Small Charitable Donations Scheme that promised fireworks but has delivered a damp squib *(page 21)*; and **Emma Knuckey** reports on the latest developments at the Charity Commission and Charity Tribunal *(page 22)*.

What next?

Rosamund McCarthy and Luke Fletcher introduce our summer update by asking what might be in store for our clients in the coming months.

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Luke advises a wide range of clients – including charities, social enterprises, responsible businesses and impact investors – who aim to make a difference in society at home and abroad. Areas of focus include designing innovative legal and constitutional structures and acting for clients making and managing impact oriented businesses and investments.

As this update goes to press, the United Kingdom is preparing for its second general election in three years. Over the past few weeks BWB clients have been grappling with the complexities of the restrictions on political campaigning in a pre-election period. In its March 2017 report the House of Lords Select Committee on Charities recognised that advocacy is an important and legitimate part of the sector's role. However, charities are bound to comply not only with electoral restrictions on political campaigning but also with the particular rules which apply to charity campaigning. The Charity Commission's guidance CC9, Campaigning and political activity guidance for charities, is essential reading for any campaigning charity, both before and after the election.

Once the dust settles following 8 June, we can expect a number of public initiatives – put on hold during the pre-election 'purdah' period – to re-emerge. For instance, regulations allowing charitable companies to convert to charitable incorporated organisations, which were consulted on in summer 2016, may now be finalised. The scope of the rules on 'people with significant control', which currently affect charities and social enterprises structured as companies, is due to expand.

There will be new faces at the Charity Commission. Helen Stephenson CBE succeeds Paula Sussex as chief executive of the commission in mid-July. Chair William Shawcross will finish his second three-year term early next year.

Brexit will of course continue to dominate. In this update we explore why – and how – some UK charities and NGOs are taking steps to establish an alternative presence elsewhere in the EU. Yet European initiatives will still play an important part of the legal landscape. Our update on fundraising regulation – which continues apace – includes highlights from the General Data Protection Regulations which will be implemented in the UK despite its imminent departure from the EU. BWB is a founder member of the European Social Enterprise Law Association, an international network of social enterprise legal experts which grew out of the European Commission's Social Business Initiative. ESELA to continues to thrive notwithstanding Brexit. At ESELA's annual conference in April 2017 a lively team of speakers and delegates from across Europe debated the opportunities for business and nonprofits to jointly create social impact.

The Law Commission's charity law project is due to make its final recommendations later in 2017. The aim of the project is to remove legal complexities which impose unnecessary administrative and financial burdens on charities: an uncontroversial objective which should receive support whatever the result of the election. Social finance initiatives have cross party support and should continue under a new government: a recent development is the Good Finance website, supported by DCMS, which helps charities and social enterprises navigate the sometimes confusing world of social investment.

Finally, governance will be a key theme for charities and social enterprises in the coming months. A new Charity Governance Code is expected to be published later in the year, following a period of consultation. The House of Commons Business, Energy and Industrial Strategy Committee recently published its report on corporate governance in March 2017: we'll be keeping tabs on whether any of the committee's recommendations or other proposals put forward by the likes of B Lab UK make their way into the work of the new government.

As usual, whatever the post-election period holds, we'll be continuing to monitor developments and commenting on what they mean for our clients in our regular legal updates.

Brexit focus: Preparing for Brexit

As the UK prepares to leave the EU, a number of UK-based charities and NGOs have been considering whether to establish an additional or alternative presence in the EU.

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Stephanie Biden and **Sinead Corcoran** outline the options

Many organisations will consider it important to retain a presence in the EU post-Brexit. Some are heavily reliant on grants from the EU; while others want to continue to engage in EU-led debates in their sector.

Eligibility for EU funding

At present, the UK is still a member state of the EU but it will cease to be so by the end of March 2019 – unless the UK and every other member state agrees an extension to Article 50's two-year timeframe. While it is not yet clear what (if any) transitional arrangements will be put in place for UK-based organisations currently in receipt of ongoing EU funding, based on the existing general criteria, following Brexit UK organisations will cease to be eligible for future EU funding.

Many UK charities already perceive themselves to be at a disadvantage in new funding bids, particularly where these involve potential bid partners established elsewhere in the EU. We have seen anecdotal evidence of institutions being asked to withdraw from pan-European funding bids because of concerns about how a UK partner might damage the prospects of a consortium.

These concerns are leading some charities to explore the option of setting up European affiliates in other EU jurisdictions to supplement, or in lieu of, a UK office. These organisations will need to consider the eligibility criteria for EU grants to ensure they satisfy the necessary requirements.

As with any grant, the terms of the grant will depend on the specific agreement between funder and recipient. In line with the regulations under which EU funding is made available to third parties, EU grants commonly require that the recipient be 'established in a member state' of the EU (or sometimes in another eligible country, such as the country where the funded project is to be delivered).

Broadly, 'establishment' requires that an organisation is formed under the law of that member state and has its 'real seat' in that country. For example, being incorporated as a charitable company in England and Wales would amount to being 'formed' under the law of that jurisdiction. For UK-based organisations, merely establishing a branch in an EU member state that does not have a separate constitution under the law of that state would not be sufficient.

'Many UK charities already perceive themselves to be at a disadvantage in new funding bids, particularly where these involve potential bid partners established elsewhere in the EU'

The organisation's 'real seat' is where its managing board and central administration are located, or its principal place of business. The EU's guidance confirms that this requirement is 'to avoid awarding contracts to firms which have formed "letter box" companies in an eligible country to circumvent the nationality rules'. While it is possible to establish virtual offices simply through a registered address or PO box, this is unlikely to meet EU funding requirements, which generally require the organisation to have a more substantive presence in the member state. The organisation in the member state must usually be the autonomous, effective decision-making centre for the grant-funded project.

In addition to meeting the specific funding requirements of any grant, organisations intending to establish themselves in another EU member state with a view to applying for EU funding will need to ensure that their organisation is legally formed in the member state, and sufficiently autonomous to meet the relevant eligibility criteria of having a 'real seat' in that country.

An added complication is that eligibility criteria may also require the new organisation to be established in an EU member state for up to three years. Organisations should consider their registration options early and establish an EU-based entity before the UK leaves the EU to ensure they are eligible to apply for funding at the earliest opportunity.

Practical considerations

Whatever your motive for establishing a separate presence elsewhere in the EU, there are various practical issues to consider, such as how long it will take to register in the EU and whether it is possible to exercise a level of corporate control over the new entity, so that the 'parent' NGO in the UK can control appointments to the board of the overseas entity.

To regulate the relationship between the two entities it may help to have a formal agreement (such as a collaboration agreement) that states clearly how financial and other information between the two entities is to be shared; how public funding and fundraising will be managed; and to ensure that both entities work together to approve an overall budget. Having clearly defined roles for both entities is fundamental when trying to meet eligibility criteria for funding. When bidding, it should be clear which entity is responsible for delivering which part of the programme.

It is also vital that board members share the same vision for the organisation and the direction it is taking, so that a divergence between boards does not become problematic. This issue may be prevented by considering whether some of the UK board members could also be on the new entity's board, ideally forming a majority if control is to be maintained. It is usually also important to ensure that you have a formal licence of your organisation's brand and any other relevant intellectual property to the new entity. The licence can include terms to prescribe how the new organisation may use the brand and intellectual property, ensuring it does not do anything that would bring your organisation into disrepute. In addition, the UK entity may wish to provide services to the new entity for a fee, in which case the details should also be formally set out in an agreement.

You may also wish to consider the immigration status of staff who are now likely to remain based in the UK post-Brexit, as well as those transferring to the new EU entity. In respect of any EU nationals based in the UK you may wish to consider whether they can gain permanent residence in the UK, which would be theirs for life (subject to a requirement that they return to the UK within the first two years) even if they relocate elsewhere in Europe. Those who have been lawfully in the UK for five years would clearly be eligible for permanent residence and others with shorter residence in the UK may have other immigration options to explore.

Registering abroad

Some of the most popular destinations that NGOs are considering include Germany, Belgium, Ireland and the Netherlands. Advocates for International Development, with assistance from BWB, has recently published a short guide to registering in each of these jurisdictions and in Spain.

EU Registration Options for NGOs: Preparing UK-based NGOs for Brexit: http://www.a4id.org/publications/eu-registration-options-for-ngos-preparing-uk-based-ngos-for-brexit/

Brexit and brands

Whatever else you think of 'Brexit', it's not all bad news for UK trade mark owners.

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Mat heads up our team of specialist in-house trade mark attorneys and helps charities and social enterprises with their registration and management of large international trade mark portfolios, and the effective resolution of trade mark disputes without resorting to court action. He has more than 15 years' experience of assisting clients with registration and protection of their intellectual property rights.

Mathew Healey explains the likely impact of Brexit on trade marks

Brexit will have a significant impact on countless areas, and one of those most acutely affected will be the business of protecting names and brands. Trade mark law is highly harmonised across the EU: our UK trade marks statutes are tied to an EU directive, and there is a single 'EU Trade Mark' registration that allows for brands to be protected across all 28 member states.

One of our clients' biggest concerns has been 'what will happen to our EU Trade Marks?' Firstly, and crucially, nothing will change in the short term. The UK will remain a member of the EU during the two-year period following the triggering of Article 50, and EU Trade Marks will continue to be effective within the UK during that time.

Once the Brexit process has been completed, EU Trade Mark registrations will no longer offer protection in the UK, although they will remain effective throughout the EU as constituted at that point.

The good news is that provision will almost certainly be made for EU Trade Mark owners to retain their existing rights in the UK under those registrations. The exact mechanism has not been determined, but one possibility is that owners will be able to split existing EU registrations into two separate rights, one covering the UK and one covering the remainder of the EU. There may be a re-registration process with associated costs, but we're hopeful this will not be the case, at least for UK-based trade mark owners. We are monitoring the situation, and when there is more to report we'll be getting in touch with EU Trade Mark owners to advise on next steps.

Clients with interests in more than one territory often ask whether, in the current circumstances, they should still be applying to register EU Trade Marks, or whether they should follow a different approach. For now, our advice is to continue to register EU Trade Marks on the basis that, whatever happens, there is likely to be continuity of protection. Even if this ultimately requires a re-registration process, the cost is unlikely to be greater than the additional expense of filing separate EU and UK applications from the outset.

'The good news is that provision will almost certainly be made for EU Trade Mark owners to retain their existing rights in the UK'

The second major implication of Brexit in this area is that English trade mark law will cease to be determined at an EU level. The Court of Justice of the European Union (CJEU) is currently the final court of appeal in UK trade mark matters. The UK courts refer knotty legal questions to the CJEU, which issues a binding opinion that determines how the point is decided the next time it arises before the local court in London, Lisbon or wherever else.

Following Brexit, this will probably change. This means that, over time, the trade mark laws in the UK (and, of course, in many other areas) are likely to diverge from those in the rest of the EU. This will be inconvenient, particularly, for those whose brands are used and protected across multiple jurisdictions.

BWB says

However, whatever else you think of Brexit this change, could, over time, be good for British SMEs and charities. The EU courts have, in my view, tended to reach decisions that help big businesses, particularly pan-European businesses, whereas the English courts have taken a more rounded approach, balancing the interests of organisations of all kinds, as well as consumers' rights not to be misled.

We're hoping that the English courts will foster an environment that helps UK charities and social enterprises to develop and protect their brands.

Mat Healey

Crowdfunding for charities and social enterprises

Crowdfunding has created new opportunities for raising funds from the public.

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Gillian's compliance experience spans a wide range of financial sectors. Her area of particular specialism is regulation for the venture finance industry – companies involved in providing finance to SMEs. Her clients in this part of the market range from venture capital and private equity investment houses to corporate finance advisers and business angels.

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Gillian Roche-Saunders and **Oliver Hunt** explain what crowdfunding is and how charities and social enterprises can benefit from this new method of financing

Over the past decade, the ability for organisations of all kinds to raise funding from the public has increased dramatically, fuelled by technological advances that have made online 'crowdfunding' possible.

What is crowdfunding?

Crowdfunding, in the broadest sense of the term, encapsulates three distinct models of raising finance – donations or rewards-based crowdfunding; peer-to-peer lending; and investment crowdfunding. A range of different platforms operate in each space, and charities and social enterprises can benefit too.

Donations or rewards-based crowdfunding is perhaps best known for facilitating charitable giving (for example, JustGiving) and 'fan financing' – that is, the funding of projects or products using contributions amassed from an existing supporter base (for example, Kickstarter). The key principle across this strand of crowdfunding is that returns are non-financial. In other words, 'crowd-investors' (or more appropriately, donors) receive no financial benefit after parting with their money, and either make a gift, or redeem a reward in the form of, say, a prototype product, an experience or a voucher. (Of course, millions of pounds are also donated directly to charities via their own websites, but we have not considered this to be crowdfunding for the purpose of this article.) CrowdJustice (see page 9) is an example of a donations-based platform that raises money for legal action, including legal action by charities.

Peer-to-peer lending, or P2P, on the other hand, is – as it sounds – a debt-based method of financing. It involves individuals lending to either other individuals, or to businesses. Like any conventional loan, these are repayable after an agreed period of time, along with interest. Leading platforms include Zopa and RateSetter.

Finally, investment crowdfunding is itself split into three categories: equity, debt securities and community shares.

The equity category involves investors purchasing shares in early stage businesses. These are transferable (can be bought and sold in secondary markets), and will fluctuate in value according to the business's performance. Crowdcube and Seedrs are two of the most widely-known equity crowdfunding platforms.

The debt security category involves a group of investors buying a piece of debt issued by a business (often called a bond), which, like a loan, is repayable after an agreed period of time, along with interest. The debt security will often be transferable, and may fluctuate in value (although to a much smaller degree than with equity, as above). Abundance is a widely-known debt security platform and we feature another platform, TRINE, on page 9.

Community shares are a unique form of share capital issued by co-operatives and community benefit societies. Community shares are a hybrid between company shares and debt, in that they can pay interest on each issued share, but the interest payment can fluctuate according to the society's financial performance. They are not transferable, but they can be 'withdrawn', meaning the society can buy them back from the investor. Popular community share platforms include Ethex (which specialises in 'positive investments') and Crowdfunder.

> 'The choice to raise investment may be more appropriate for some organisations than others, and should be based primarily on the ability to satisfy the financial commitments made in any offer to investors'

Crowdfunding in the UK accounted for around 12% of all business investment in 2015 (c£3.2bn). P2P takes up the largest slice of the pie, lending £1.49bn to UK SMEs (excluding almost another £1bn lent to individuals). Equity-based crowdfunding facilitated £332m of share acquisitions over the same period, representing more than 15.6% of UK seed and venture-stage equity investment. Debt securities investments amounted to £6.2m. Community shares raised £61m for 97 organisations in 2015. Donations

and rewards is the fastest growing area, with £12m pledged in 2015. More than a quarter of a million businesses and individuals raised funds via some form of crowdfunding in 2015.

How could crowdfunding work for charities and social enterprises?

The crowdfunding sector is largely focused on commercial businesses, but crowdfunding can also work for charities and social enterprises.

Many charities already partner with donations-based sites such as JustGiving to encourage fundraising for specific projects, and these donations can benefit from gift aid. Social enterprises can do the same, although they will not qualify for gift aid without charitable status.

Charities and social enterprises could also benefit from P2P loans, but the rates required on P2P loans are often more appropriate for commercial businesses.

In many cases, charities and social enterprises will get the funds they need without needing to consider raising investment, including via crowdfunding. For those that do consider it, perhaps the most useful form of investment crowdfunding for charities and social enterprises would be investment via debt securities. Charities and social enterprises structured as companies limited by guarantee can issue debt securities in the same way as other commercial businesses, and the terms of the debt can be flexible, depending on the needs of the organisation and the appetite of investors.

For those organisations structured as co-operatives or social enterprises, the community shares model is also very popular. Community shares have the advantage of being outside the scope of most investment regulation, which can significantly reduce transaction costs and simplify the offer process. You can read about Community Channel's use of community shares on page 9.

The choice to raise investment may be more appropriate for some organisations than others, and should be based primarily on the ability to satisfy the financial commitments made in any offer to investors. A regular, reliable income stream from an asset or trading activity will often be a key prerequisite for a charity or social enterprise seeking investment.

Sourcing investment through 'crowdinvestors' could provide a useful additional funding stream for charities and social enterprises. Crowdinvestors may often be partly motivated by support for the organisation's mission (and so willing to accept a lower financial return), and may also provide more funding than if they were donating because they expect their capital to be returned. Investments into charities, CICs and community benefit societies can also benefit from Social Investment Tax Relief, which will be an added incentive for high-net-worth supporters.

Crowdfunding in practice

BWB acts for a large number of crowdfunding platforms in the commercial and charity and social enterprise sectors. Below, three BWB clients with a variety of models demonstrate how crowdfunding can be used to attract support for a range of causes.

TRINE

With 1.2 billion people around the world currently lacking access to electricity, TRINE seeks to solve this problem by offering a crowdinvesting platform that connects disposable income from private individuals with local solar companies in emerging markets which are in need of financing. By doing so, TRINE enables its crowdinvestors to earn a return on impact investments, while simultaneously providing people access to clean energy and reducing tons of CO_2 emissions.

BWB worked with TRINE to establish its current model, an example of debt security based crowdfunding.

www.jointrine.com

CrowdJustice

CrowdJustice is a platform for raising funds and organising support for legal cases. Its mission is to increase access to justice by using technology to harness the power of communities to come together around legal issues that have an impact on them. It gives people the tools to raise funds for a legal action, whilst simultaneously increasing awareness of an issue and amplifying communities' voices. CrowdJustice has raised over £2.5 million to support over 150 cases, three of which have crowdfunded all the way to the Supreme Court.

BWB advised CrowdJustice during its establishment, particularly regarding how charities can use judicial reviews and on the eligibility of donations made via CrowdJustice for Gift Aid. CrowdJustice is an example of a donations-based crowdfunding platform.

www.crowdjustice.com

Community Channel

In 2016 the community television station Community Channel raised over £360,000 in crowdfunding via Crowdfunder. The process involved converting the Channel from a company limited by guarantee into a community benefit society, under a process permitted by the Cooperative and Community Benefit Societies Act 2014. This allowed the Channel to offer 'community shares' to the public in its crowdfunding campaign, giving its large supporter base the opportunity not only to make a financial contribution to the Channel, but also to hold shares in the organisation, and to be engaged in its running. The Channel also registered as a charitable community benefit society with HMRC, allowing shareholders to receive Social Investment Tax Relief on their investment amount.

BWB advised Community Channel on its change in legal structure from a company limited by guarantee into a community benefit society.

Fundraising update

The first few months of 2017 have seen further developments in the regulation of fundraising following a turbulent 2016.

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Lawrence Simanowitz summarises the key changes

Recent developments include further guidance from the Fundraising Regulator (FR); the conclusion of the Information Commissioner's Office (ICO) investigations into several more charities; and a joint conference hosted by the FR, the ICO and the Charity Commission for the charity fundraising sector, at which the ICO issued a paper setting out its position in several key areas.

ICO investigations into charities

The ICO has now completed its investigations into 11 charities for alleged breaches of data protection law, following the sanctions already imposed on two charities at the end of last year. The breaches alleged include breaches in the areas of data sharing, wealth screening and data matching/telematching. In March 2017 the ICO imposed fines on all 11 charities, with the fines varying from £6,000 to £18,000.

In February 2017 the ICO announced that there were no further ongoing investigations into charities. But it also stated that the fines issued could have been far higher and it did not rule out future investigations, in which it may impose higher penalties.

The Fundraising and Regulatory Compliance Conference

At the end of February 2017 the ICO, the FR and the Charity Commission jointly hosted a conference to address current developments.

The focus of the conference – like that of the recent fines issued by the ICO – was, in particular, on wealth screening and data matching/telematching. At the conference, the regulators stated that:

- It is a contravention of data protection law to undertake wealth screening of an individual without first informing them that their personal data may be used for this purpose. Furthermore, charities should not rely on the pursuit of their legitimate interests as the basis for undertaking all forms of wealth screening. In some circumstances, individuals must have given their consent.
- If organisations obtain personal data from public sources, including the electoral roll, Companies House and Facebook, they must still proactively provide these individuals with the required privacy notice, explaining what their data is being used for.
- It is unlawful to use data matching or telematching to obtain any personal data – such as a phone number or an address – that an individual has not already provided to the charity.

The position taken by the regulators suggests that organisations will no longer be able to use both wealth screening and telematching in any but the narrowest of circumstances. Many charities' fundraising operations may be affected, and the viability of many major donor programmes may be called into question.

Charities considering maintaining or adopting these practices should take advice on their options. While the ICO's position clearly carries great weight, there remain significant questions about the basis on which they have reached this view, as well as their very strict interpretation of the law. The ICO is being asked for clarification and possible modification of its position.

Fundraising Regulator guidance on consent, purposes and transparency

The FR also used the spring 2017 conference to launch its latest guidance on charities' responsibilities in relation to data protection, with a particular focus on fundraising activities, consent and legitimate interests. While the guidance is not statutory, the FR has stated that it has been reviewed and approved by the ICO.

The guidance acknowledges the validity of so-called 'opt-out' consent, but recommends a move towards using opt-in consent where consent is required. It suggests that opt-out consent may be under question following the implementation of the General Data Protection Regulations (GDPR).

ICO consultation on guidance regarding consent under GDPR

As well as the new FR guidance, the ICO recently

consulted on further draft guidance about how organisations should seek consent under GDPR.

The draft guidance focused on the new definition of consent under GDPR, including the requirement that it be unambiguous and given by making a statement of clear affirmative action. It also highlighted increased record-keeping requirements for charities, the requirement for separate consent for each different type of data processing, and the specific rights of individuals to withdraw consent.

The draft guidance outlines the practical steps that organisations may need to take, and notes that organisations can only rely on previous consents if they meet the new requirements of the regulations.

No date has been given yet for when the final version of the guidance will be published.

While greater clarity is welcome, the ICO appears to be taking a restrictive approach to the implementation of the GDPR. In particular, it has stated that there is no such thing as opt-out consent.

Our view is that it is both lawful and can be perfectly good practice for charities to invite people to fill in a form that clearly explains what fundraising materials they will receive and gives them the opportunity to opt out. Certain forms of opt-out consent may remain valid post-GDPR implementation, but this is an area in which charities will have to tread very carefully to remain compliant and to avoid regulatory action.

Registration with the Fundraising Regulator

On 13 March 2017, the FR opened its registration system for charities in England and Wales that do not already contribute to its annual levy. Charities with a yearly fundraising spend of more than £100,000 have already been asked to pay a levy – on a sliding scale dependent on fundraising spend – and are automatically registered with the regulator.

Charities with a smaller spend may now voluntarily register with the FR for an annual fee of £50. They will be sent a registration pack and will be able to use the FR's 'Registered With' badge on their website, as well as other marketing materials.

According to the FR's timetable, May 2017, the registration system is due to be opened to third-party fundraisers; charities not registered with the Charity Commission; Institute of Fundraising members; and former members of the Fundraising Standards Board.

Consultation on the Code of Fundraising Practice

As highlighted in our Spring 2017 update, the FR has undertaken a consultation into the Code of Fundraising Practice – which concluded at the end of April 2017 – to engage with key stakeholders ahead of making the first set of substantive changes since it took on responsibility for the code from the Institute of Fundraising (IoF).

The consultation was not intended to presage a root and branch review of the code, but to develop it in line with current issues, and tackle any issues of clarity and accessibility. It specifically omitted any consideration of either consent issues or the Fundraising Preference Service, as these will be addressed in a separate consultation later this year. The proposed changes to the code relate to:

- the role of charity trustees;
- the fundraising ask;
- the timing of solicitation and disclosure statements;
- whistleblowing by fundraisers;
- vulnerable people;
- charity collection bags; and
- using third parties.

The outcome of the consultation is expected to be announced in summer 2017. We will keep you updated on developments and BWB's response to the consultation.

Charity legacies – best practice for managing disputes in the wake of *Ilott v Mitson*

Legacy income is on the rise, but despite a recent success for charities in the Supreme Court, so are challenges to charity legacies.

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Leticia is a partner in the Dispute Resolution team, where she leads on a variety of contentious matters including contract disputes, shareholder disputes, fraud and asset recovery, charity proceedings, and the enforcement of judgments. She has extensive experience of both litigation and mediation, and a successful track record of obtaining injunctions (including freezing injunctions).

Leticia is an experienced Supervising Solicitor appointed by the High Court on the execution of search orders, and often works in conjunction with other members of the team on complex, multi-venue searches.

Leticia Jennings sets out the practical steps for charities to take if a legacy is challenged

Charity legacies are in the headlines following the Supreme Court's recent decision in the long-running case of *Ilott v Mitson*. Mrs Ilott had challenged her mother's will, under which the estate was divided equally between three charities, claiming that her mother, from whom she was estranged, should have made reasonable financial provision for her.

Bringing a decade-long legal battle to an end, the Supreme Court agreed with the judge at first instance that Mrs Ilott was entitled to only a modest payment from the estate, overturning the Court of Appeal's subsequent decision to increase the award to a six-figure sum. The Supreme Court confirmed that the courts will only interfere with a person's testamentary freedom in very particular circumstances, and that charities do not have to justify their position as beneficiaries.

This is great news for charities, and there was much relief right across the third sector, although the 10 years it took to get to this stage cost the charities significant time and money on litigation. The Supreme Court's judgment is welcome, but with challenges to legacies becoming more frequent, charities need to be aware of the steps they can take to resolve disputes as they arise.

Practical steps when a charity legacy is challenged

Challenges to legacies to charities include: challenges to the validity of the will containing the legacy; claims under the Inheritance (Provision for Family and Dependants) Act 1975 (as in the *Ilott v Mitson* case); and claims based on proprietary estoppel, where a person claims that the testator promised property to them and that they then acted on that promise to their detriment.

So what should charities do to resolve disputes as quickly as possible, while keeping costs and reputational damage to a minimum?

- Seek early legal advice on the merits of the claim. Facing legacy disputes head on can save much time and money, and it may be possible either to see off very poor claims in their entirety through correspondence, or to resolve claims with real merit without the cost of going to trial.
- Consider the evidence available to support the charity's position. For instance, if the claim concerns testamentary capacity, it is usually possible to obtain a copy of the testator's medical records. If the will was professionally drafted, the drafting solicitor is obliged to provide an account of the circumstances surrounding the making of the will, which may include the testator's reasons for leaving a legacy to a specific charity.
- If more than one charity is involved, the charities should consider appointing one firm of solicitors to act for them jointly, to keep costs down.

> 'Facing legacy disputes head on can save time and money – it may be possible to see off poor claims through correspondence, or to resolve claims with real merit without going to trial'

- Consider lodging a caveat at the Probate Registry, to prevent anyone obtaining a grant of probate while the charity takes advice and gathers evidence. This is a cheap and simple process.
- It is often possible to reach a settlement through discussions and correspondence. Otherwise, consider formal negotiations using a specialist mediator.
- Always keep PR issues under review. It is good practice to prepare a clear statement of the charity's position, but be wary of making any kind of public statement without legal advice.

In our experience, it is entirely possible to resolve most legacy disputes without recourse to litigation, and the sooner a charity takes steps to address the situation, the better placed it will be to reach a prompt and cost effective solution.

Are you operating in Scotland?

Scotland has its own legal system. What do English and Welsh charities need to consider if they want to carry out activities there?

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Amanda Ogilvie, who is qualified as a solicitor both in Scotland and in England and Wales, explains the implications of operating north of the border

Scotland has its own legal system distinct from the laws of England and Wales. Charities in Scotland are regulated by the Office of the Scottish Charity Regulator, or OSCR, and it is important for English and Welsh charities to understand when they might need to register with OSCR and what other factors might need to be considered when carrying on activities in Scotland.

When do English and Welsh charities need to register with OSCR?

The starting point is that any entity that wishes to represent itself as a charity in Scotland needs to register with OSCR. However, the rules apply slightly differently in the case of charities that are already registered in England and Wales (or elsewhere). A charity that is registered with the Charity Commission for England and Wales that wishes to represent itself as a charity in Scotland only needs to register with OSCR if it wishes to:

(i) set up a separate entity in Scotland;

(ii) operate wholly or mainly from Scotland;

(iii) occupy land or premises in Scotland; or

(iv) carry out activities in any office, shop or similar premises in Scotland.

While it is generally relatively straightforward to establish whether a charity satisfies criteria (i) – (iii), it can be more difficult to determine whether a charity's activities in Scotland satisfy criteria (iv). Generally speaking, this can include a wide range of activities. Therefore, a charity that is fundraising, providing support to beneficiaries or carrying on any office functions in Scotland may need to register with OSCR. However, this will only be the case if the activity/ies in question are carried out in an 'office, shop or similar premises' – meaning any place of business.

According to OSCR's guidance for cross-border charities, it is unlikely that a charity will need to register in Scotland just because it carries out some intermittent work from a private residence in Scotland: for example, if a volunteer or employee does some occasional work from home in Scotland. However, if the employee also attends regular meetings or visits other organisations in their offices in Scotland then this could trigger the requirement for the charity to register with OSCR.

Other factors, such as the significance and impact of the charity's activities in Scotland on its overall operations and whether these activities are frequent or ongoing are also relevant in determining whether a charity will need to register in Scotland. Therefore, while holding regular meetings from a community hall or similar premises in Scotland may trigger the requirement for the charity to register with OSCR, holding one-off events in Scotland would be unlikely to do so provided that the events are not held on a regular basis, there is no commitment to repeat the events in future and most of the charity's activities continued to take place in England and Wales.

What if my charity needs to register with OSCR?

Charities can apply for registration with OSCR by completing an application form and trustee declaration form. However, charities may need to consider making changes to their charity's constitution before they can be added to the Scottish Charity Register. Some key considerations are listed below.

The Scottish Charity Test

A charity wishing to register with OSCR must meet the Scottish charity test – set out in the Charity and Trustee Investment (Scotland) Act 2005 (the 2005 Act). To meet the test, a charity needs to show that its purposes are charitable under Scots law and that it provides public benefit in achieving those purposes. Some charities may need to consider amending their constitution to meet this requirement, particularly if the constitution refers to general charitable purposes and/or the laws of England and Wales in the objects or dissolution clause.

Trustee benefit

The 2005 Act includes specific provisions in relation to remuneration of trustees that are different, in some respects, to those in England and Wales. A charity registered in Scotland may never pay more than a minority of its trustees (there are some exceptions where the provision was in force prior to November 2004). Unlike the Charity Commission, OSCR does not have the power to authorise a payment to a trustee that is not permitted under the charity's constitution.

Conflicts of interest

There are some important distinctions between the rules relating to conflicts of interest under Scottish law and those in England and Wales. For example, where a trustee has been appointed by a third party there are specific restrictions that may prevent them from taking part in a decision if the interests of the charity and the third party don't coincide.

What are the implications of being a cross-border charity registered with OSCR?

A charity that is registered with both the Charity Commission and OSCR will need to comply with charity law requirements in Scotland and in England and Wales, some of which are the same in both jurisdictions, and some not. Some of the key Scottish requirements are outlined below.

Reporting

All charities registered in Scotland need to submit an annual return and annual accounts to OSCR. OSCR does not insist on separate Scottish accounts, so cross-border charities may submit accounts that describe their activities throughout the UK, provided that they comply with the Scottish statutory requirements and include some specific narrative regarding the charity's activities in Scotland. Cross-border charities also need to file an information return with OSCR regarding the charity's activities in Scotland.

Reference to charitable status

Charities registered in Scotland must clearly state on certain documents, including external letters and emails and the website home page:

- the charity's name (and any other name by which it is commonly known);
- if the charity's name does not contain 'charity' or 'charitable', a statement or description of the fact that it is a charity; and
- its Scottish Charity Number.

See http://www.oscr.org.uk/charities/managing-your-charity/trustee-duties/publicising-charitable-status for more details.

For English and Welsh charities that are not registered with OSCR, any stationery used in Scotland should only use the terms 'charity' or 'registered charity' if it also makes it clear that the charity is registered with the Charity Commission for England and Wales.

Consents

Charities registered in Scotland need to seek consent from OSCR at least 42 days before making any of the following changes to the charity:

- changing the charity's name;
- amending the charity's objects/charitable purposes;
- winding up or dissolving the charity;
- amalgamating with another body; or
- applying to the court in relation to any of the above.

Fundraising

Fundraising regulation in Scotland has undergone some significant changes in recent months. A new self-regulatory system of fundraising was launched in July 2016, which is different to the system in England and Wales. This included the creation of the Independent Fundraising Standards and Adjudication Panel for Scotland which oversees fundraising standards and fundraising complaints.

Cash couriers

Recent Charity Commission guidance warns against the use of cash couriers by charities sending funds overseas.

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Augustus Della-Porta summarises the position

The commission, in collaboration with the Metropolitan Police, has recently published guidance strongly advising against the use of cash couriers where a charity is sending funds overseas. This has followed a number of seizures of cash at ports from individuals who have stated they are carrying cash on behalf of a charity.

Most countries have formal banking systems in place. Sending funds in this way provides an audit trail and is the best way to ensure trustees meet their duties to act prudently and safeguard the charity's assets, even if the administrative costs to a charity can be high.

In some circumstances, using local banks may be impossible, such as when war or natural disaster has damaged or destroyed banking infrastructure; banks are subject to financial sanctions regimes or to punitive state-controlled exchange rates; or local law prevents local NGOs from receiving funds from foreign entities.

In this situation, charities may consider other ways to transfer cash to partner organisations or projects on the ground. It may be possible to use intermediaries – using another charity or NGO to hold or transfer funds on the charity's behalf – or a money service such as Western Union. These methods are higher risk than formal banking services, so their use should be limited to meeting essential needs. You will also need to consider the relevant regulatory issues and risks and put procedures in place to manage such risks, including appropriate audit trails.

Transferring funds by using cash couriers brings significant risks. The individual carrying the cash is a potential target for criminals, and the charity will find it more difficult to obtain adequate records and evidence of expenditure, which can cause difficulties in auditing the charity. The increased risk of loss of these funds has consequent reputational issues for the charity if the money falls into the wrong hands, and even if cash is seized by the police it can take months to get it back.

To justify using cash couriers a charity should be able to demonstrate it has considered the risks and taken steps, such as:

- recording the trustees' decision to use couriers and why it is in the best interests of the charity to do so, underpinned by risk assessments and regular review;
- assessing the risk of losing the funds and the courier's safety, putting in place appropriate insurance;
- documenting the agreement with the courier and providing supporting documentation for the courier to furnish to the relevant authorities;
- keeping records of cash, including how it was spent, with receipts where possible;
- contacting police for advice and to give notice in advance, ensuring any cash above €10,000 is declared (funds below this amount may still be seized if the police believe it is intended to be used for criminal purposes); and
- reporting any loss to the Charity Commission under the serious incident reporting framework.

In sending funds overseas trustees should always comply with general trustee duties by carrying out appropriate due diligence on partner organisations, monitoring the use of funds and keeping records of actions taken. Failure to do so could lead to an order for the recovery of funds by the commission. Trustees should also ensure they comply with HMRC guidance on sending funds overseas.

Find out more

Stephanie Biden discusses HMRC guidance on sending funds overseas in our Spring Faith-based update at **http://www.bwbllp.com/knowledge/2017/01/30/faith-based-update-spring/**

The Commission's new guidance can be found at **https://www.gov.uk/government/news/regulator-warns-charities-against-the-use-of-cash-couriers.** See also the Commission's toolkit on holding, moving and receiving funds safely in the UK and internationally at **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571771/Chapter_4_new.pdf**

Charity risk management: protecting your charity, volunteers and service users

Risk management is a vital ingredient of running a charity or social enterprise.

CaSE Insurance provides charities and social enterprises with easy access to a dedicated suite of low-cost insurance policies designed specifically for the sector and underwritten by Brit Insurance.

CaSE Insurance is a joint venture between the partners of BWB and NCVO.

Find out more
caseinsurance.co.uk

Huw Evans from CaSE Insurance gives his top tips for navigating the risk management process

Like any business, charities and social enterprises need to manage their risks, some of which will be similar to those faced by commercial organisations. Risks may vary greatly dependent upon the size, nature and complexity of the activities the organisation undertakes, as well as its legal structure and how it is set up and governed.

What is risk management?

Risk management involves identifying and addressing risks that an organisation faces. By proactively focusing on these risks your aim is to reduce the likelihood of a risk occurring and/or reduce the impact it would have on your organisation. Thus, the fundamental questions that you should be asking yourself when assessing risk are:

- what you may lose or suffer (the event);
- how likely it is that the event could occur (the frequency); and
- the extent to which you can afford that event occurring (the impact).

Areas of risk that a charity may face are broken down into five primary categories by the Charity Commission, each requiring detailed assessment:

- **governance risks** are concerned with your organisational structure, the competence of trustees and conflicts of interest;
- **operational risks** relate to the welfare and safety of your staff, volunteers, service users and beneficiaries (including health and safety), poor contract pricing and the security of assets;
- **financial risks** are primarily concerned with reporting, reserves and cash flow, income source dependency, investments and insurance;
- **external risks** involve your reputation and public perception, demographic changes that lead to increases in your beneficiary group, turbulence in the economy or political sphere and changing government policy; and finally
- **compliance risks** relate to acting in breach of trust, poor knowledge of your legal responsibilities as an employer and poor knowledge of relevant regulation.

Identifying risk

Identifying risks can be done in many ways, but it should be done objectively and with a strong degree

of commitment. The resources required to thoroughly identify and catalogue risks will depend on the size and complexity of your organisation, but this stage is likely to involve individuals across the organisation and from all levels, with an openness to allow ideas from anyone. It is unlikely that a single trustee will have enough knowledge to complete this task singlehandedly (except perhaps in the smallest of charities).

Assessing frequency and impact

Once risks (the events) are identified and recorded, they should be put into perspective in terms of their impact and frequency. A common method for assessing risks is to use the list of identified risks and score each individually for their likelihood (frequency) and impact, allowing you to address risks in order of priority.

Recent thought on risk management suggests that you should take rare or unprecedented events with large potential impacts into much greater consideration – whatever their scores in your risk assessment. Although highly unlikely, these events are often driven by external factors beyond your control and their potential impact is too significant to ignore. An example is the growing awareness of the risks around potential cyber hacking, which could lead to the mis-payment of funds or the loss of valuable data.

Evaluating risks

Your risks are recorded and assessed, now they need to be evaluated. There are four primary strategies for managing the individual risks that you have identified. First, you can transfer or share the financial impact, usually through a partnership or other contractual agreements. Second, you can avoid the risk altogether by ceasing the risky activity. Third, you can choose to manage, mitigate, limit or reduce the risk through building reserves, staging commitments or improving control procedures. Finally, you can simply accept a risk as necessary and regularly review it.

Once your organisation is satisfied that each risk has been identified and evaluated, the trustees can plan how to address the major risks. The board can then include a statement about the charity's risk management in its annual report. For some charities this is a regulatory requirement; even where it is not required it is regarded as good practice.

The output of the evaluation process should be a prioritised list of risk management processes that must be implemented throughout the organisation, and a plan, process and timescale for review. It is also likely that you will produce an insurance purchasing plan that has been agreed by the board. At this stage, your trustees or the designated person in your organisation should seek out a specialist charity insurer or broker who can review your insurance purchasing plan together with the risk management work that you have done. Your broker/insurer should support your efforts by discussing your activities and risk management processes and offering guidance and warnings where possible; through this risk management support your broker or insurer can get a thorough understanding of your charity's activities and ensure that you are correctly and adequately insured.

An ongoing process

Risk management is not a one-off event and should be viewed as an ongoing and fluid process. While your organisation's staff are likely to be responsible for most of the implementation of your risk management processes, they are also going to be responsible for regular feedback, thought and comment on progress and for communicating emerging concerns or risk to the board.

Two-way communication between staff and the board regarding risk should be embedded in your charity's culture. Keeping up-to-date records such as recording accidents and potential incidents will allow new risks to be identified and addressed, new projects or activities to be considered from a risk standpoint and failures of processes to be reported and corrected.

Find out more

The Charity Commission's guidance on charities and risk management is at https://www.gov.uk/government/publications/charities-and-risk-management-cc26/charities-and-risk-management-cc26.

Mergers in the further education sector

Mergers between further education colleges are becoming increasingly common.

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Caraline has particular expertise on school issues and the complexities of education in general. She has worked all over the country advising on a full range of state education issues including policy initiatives, building programmes, funding and grants, projects, shared use, SEN, admissions and exclusions, tribunal work, appeals, child protection and safety issues.

Education specialist **Caraline Johnson** explains what can help make a merger successful

This is a time of great activity in the further education world. The sector is suffering like many others with funding cuts and, as responsible multimillion pound businesses, colleges are considering the challenges and opportunities that the future may hold. The economic climate and the impetus of the government's policy of consolidation led by the Area Reviews conducted by the FE Commissioner is stimulating collaboration in the sector. This can be by informal partnership working, formal federations or, increasingly, full merger.

Outside of the FE world it is not commonly known that there are several different types of college delivering further level education. There are three main state-funded institutions: general FE colleges, sixth form colleges and Special Designated Institutions (SDIs). The general and sixth form colleges are statutory corporations under the Further and Higher Education Act 1992, but while SDIs achieve their designation to be funded to deliver further education through the 1992 Act, they can take a variety of legal forms. There are only a small number of SDIs nationally and BWB is fortunate to act for three such clients, including one currently contemplating a merger.

The majority of mergers are effected by a process known as 'Type B', in which one college dissolves and all of its assets, property and liabilities transfer into the second college, which becomes the new merged entity. This is a quicker and slightly simpler process than 'Type A' in which both colleges dissolve and come together in a newly-created entity.

What is very often unknown or overlooked is that FE colleges are also exempt charities – the clients we are working with have appreciated our knowledge and experience of both specialist education law and charity law, enabling full consideration of the public benefit aspects of merger arrangements as well as the educational and commercial considerations. This is particularly important in due diligence and land transfers. The primary consideration is ensuring that the boards of both colleges are confident that the new merged college will continue to meet both colleges' public benefit duties and provide quality education to the student beneficiaries and local community.

There needs to be careful project management and regulatory oversight of the process as there are governance and statutory requirements that need to take place in the correct timeframe and at the correct points in the project's critical path. A particularly important date is the launch of the required statutory consultation on the proposal to dissolve one of the colleges to achieve the merger. There must be four months between the start of the consultation and the completion of the merger.

To help make a merger successful, we suggest:

- recognise at the outset the coincidence of interest between the colleges and adopt a joint approach to everything, including appointment of advisers;
- be open and honest about potential 'show stopper' issues and how the colleges might resolve them together;
- set up transitional governance arrangements with clear reporting lines early in the process;
- be pragmatic about the levels of due diligence the colleges undertake on one another, focusing on the most important things and making sure there is resource inside the colleges to gather all the information professional advisers will need to review;
- the legal process is only the beginning – the year after the completion date is when the main work takes place to embed the new college's ethos and avoid silos developing; and
- choose your merger partner(s) carefully – shared culture will be vital for the merged college's future.

Find out more
You can find more information on our services on our Education sector pages at http://www.bwbllp.com/sectors/education/

Values-driven leadership

Values-driven leadership can maximise the potential of an entire organisation.

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Governance expert **Tesse Akpeki** elaborates on the advantages of a values-driven approach and explains how it can be achieved

Values-driven leadership occurs when leaders are driven by values that shape their mindset and inform their decisions and actions. Values articulate what the organisation cares about, shape culture and are the building blocks for appropriate conduct, mindsets and behaviour.

Benefits of values-driven leadership

Where boards are led by their values, they are clearer about what is expected of them. Service quality improves and the organisation achieves at a higher standard. Those connected to the organisation feel the difference values make as they walk through the door. It comes through in what they hear, how they feel and the difference the work of the organisation makes.

- The organisation achieves mission impact and delivers its mission with skill, care and commitment.
- A values framework encourages engagement and connection. It delivers meaning, fulfilment and motivation within the organisation and with the world outside – beneficiaries, members and funders.
- Against the backdrop of values, trustees set boundaries firmly and test what can be accomplished and what can't. Values help leaders to develop a framework to address challenges and seize opportunities in a way that is likely to yield results.
- People in the organisation take responsibility for their contributions, are held accountable and act accountably, while also able to face setbacks. The growth mindset allows trustees and the executive to devote more attention to learning from their mistakes without being obsessed or paralysed by them.
- Values enable the organisation to pursue change thoughtfully.
- Embracing diversity as a value supports the organisation to delight in difference and to be thoughtful and deliberate in how it can be truly inclusive, accepting and open.
- The trustees are more confident in taking manageable and informed risks and adopting good ideas that result in innovation and creativity.
- Board members and staff are recruited in line with the organisation's values. Succession planning attracts leaders with a mindset that shapes the future of the organisation. Staff and volunteer surveys include questions that provide evidence of how the values are working.
- The organisation is better able to handle rivalries that obstruct effectiveness. Trustees and staff identify issues that sabotage working relationships and avoid practices that can result in a toxic culture.
- The organisation retains talent, as staff find validation in values that matter most to them. Trustees, staff and volunteers connect with their commitment and passion to make a difference. These find expression through the values adopted by the organisation. As values are reinforced there is renewed and enhanced energy to fulfilling the mission of the organisation.
- As challenges mount, leaders are mindful of the impact of their work and how it impacts on others. They intentionally determine behaviours that serve them well and avoid inappropriate and spirit crushing behaviours such as bullying and harassment.
- Values could be a heartbeat for openness, accountability, support, respect, fairness, teamwork, integrity, courage, honesty and excellence. As a platform, values foster an environment and create conditions where people feel safe, appreciated, validated, inspired, energised, motivated, free to contribute and able to express their commitment.
- Ongoing work implements and embeds the values, making the organisations a unique place to be
- Values-based leadership distributes accountability throughout the board and is built into board culture and activities.

Bringing values to life

Developing values entails going through a mindful process. Values are chosen from a range of alternatives with an understanding of how they are important for the wellbeing and success of the organisation. Insight comes from the process of developing the values and equipping staff, trustees and volunteers to bring the values to life.

- Ensure strategic intentions and the strategic framework are aligned with the values.
- Implement transparency of process for appointments for board positions and hiring.
- Clarify expectations. Codes of conduct are extremely helpful.
- Incorporate a culture of positive dissent in the board room. Welcome candour and a culture of curiosity and inquiry. Be open and honest. Value the input of every member of the team.
- Evaluate performance and the impact of values.
- Put in place processes and procedures that are properly executed.
- Ensure that people are treated fairly, equitably and ethically.
- Allow people struggling with a dysfunctional culture to speak up and encourage them to do so.
- Say thank you and show appreciation.
- Invest in relationships – keep positive relationship bank accounts. Make more deposits with fewer withdrawals so the account reflects a positive balance. Build trust and keep promises.
- Integrate a values and behaviours audit as part of the governance assessment. Identify what the culture allows or does not allow to happen.
- Embrace tasks/activities within role descriptions and person specifications.
- Build resilience continually.
- Connect and make the best use of resources. Support ongoing mentoring, training, professional development and quality assurance.
- Recognise that requests for guidance are not expressions of weakness. Employees should share uncertainty with their leaders and ask for help. This encourages a spirit of learning.
- Identify alignments. When people are in conflict they focus on their differences. Instead emphasise your common purpose. What are you trying to achieve. What is your shared goal or purpose?

A meaningful value system links to commitment, engagement, participation, connection, reflection, renewal, a sense of belonging and meaning. It is more than having a values statement, it is what really matters lived out across the organisation.

Questions for discussion

How can we create an organisational culture that maximises the potential of the organisation?

What is our shared purpose or goal?

How can we engage people in ways that value their knowledge, experience and contribution?

How can we engage in conversations based on collaboration and partnership?

Gift Aid Small Charitable Donations Scheme 2017 – a firework or another damp squib?

The Gift Aid Small Charitable Donations Scheme (GASDS) introduced in 2013 raised much less for charity than had been expected.

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Bill advises on all aspects of taxation affecting charities (VAT, PAYE, corporation tax). Typical work undertaken includes reviewing the VAT structure of charities, advice on VAT & property construction and property leases, advice concerning PAYE taxes, PAYE investigations, expenses policies, and employed/self-employed status issues, gift aid reviews and gift aid audits, corporation tax and charities – making use of tax exemptions, use of trading subsidiaries, and general VAT and income tax issues affecting businesses, charities, and individuals.

Bill Lewis asks whether recent changes designed to make the scheme more attractive will make a difference

When the GASDS was first proposed by government in 2011 this was in response to concern that many charities, particularly smaller ones, were put off from claiming gift aid because of the complexity of the rules and the fear of penalties if they made a mistake. GASDS was intended to bridge that gap.

However, by the time that GASDS was implemented the rules made clear that only charities that were already claiming gift aid could make use of GASDS. I predicted at the time that, because of this and other complexities introduced into the scheme, GASDS would be a damp squib rather than the intended firework. The government had hoped that the sector would benefit by £100 million per year, but in the first nine months of GASDS a mere £2 million was claimed. The announced firework had indeed proven to be a damp squib.

The original features of GASDS can be summarised as follows:

- Repayment claims can be made on small cash donations of up to £5,000 per charity per year (£8,000 from April 2016) without the need for supporting gift aid declarations. The amount that will be repaid is 25% of the gift. There is no need for a donor to be a UK taxpayer; the repayment is no longer linked to tax, it is in effect a government grant.
- Small donations for this purpose are those of £20 or less.
- GASDS is only available to Charities and Community Amateur Sports Clubs (CASCs) that have been recognised as a charity for at least two years, make gift aid claims at least once every two years and have a clean gift aid record for the last two years.
- Charities with community buildings can claim on donations of up to £5,000 (£8,000 from April 2016) received through each building as well as on general donations received by the charity.

At its introduction, the government committed to reviewing GASDS within three years. This review has taken place and the resultant changes took effect from 6 April 2017.

Under the new rules the requirement for the charity or CASC to be registered with HMRC for at least two years, and for it to have made a gift aid claim in the last two years have been removed. This means that new charities and CASCs can claim GASDS. So a positive improvement.

In addition:

- Donations can now be made via contactless payments. Payments made by cheque, debit/credit card, text message and bank transfer remain excluded from GASDS.
- Charities that claim for repayments under the community buildings rule can only claim on donations of up to £8,000 per community building – they can no longer claim for donations under the general allowance available to all charities and CASCs as well. This is an unwelcome change in the name of fairness.
- However, it is no longer necessary for donations to be received inside a community building for it to come within the community building amount; rather donations made in the local authority area in which the building is located can qualify.

The government has estimated that the changes will increase the amount claimed by the sector under GASDS by £15 million per year.

So, a firework or another damp squib? There are positive changes, but the scheme remains full of complexity so may continue to be off-putting. Perhaps not a damp squib, but I fear this firework will struggle to gain much altitude. If the government truly wants GASDS to be more popular then more fundamental reform and simplification is needed.

What's new at the Charity Commission and Charity Tribunal?

Emma Knuckey reports on recent developments at the Charity Commission and in the Charity Tribunal.

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Emma has been advising on charity law since qualifying as a solicitor in 2002. Following initial experience in private practice advising on charity law and private client matters, Emma spent seven years as an in-house lawyer at the Charity Commission. She joined BWB in 2015.

Charity Commission

Case reports

In cases where the Charity Commission has concerns about a charity, it may decide to open an operational compliance case rather than taking the more significant step of initiating a statutory inquiry. The commission has recently reported on two such cases, both of which resulted in funds being returned or repaid to the charity concerned.

Earl of Chester's Fund

The commission has published a case report into Earl of Chester's Fund, a grant-making trust, following a complaint to the commission that the charity had made a grant to a non-charitable company linked to a trustee. There were media reports that the grant was funding the costs of a new company that produces giant figurines. The trustees said that the non-charitable company provided support to the long term unemployed and to ex-offenders. However, the trustees were not able to demonstrate that they had considered the grant in detail in trustee meetings or elsewhere, and did not appear to have restricted the grant to ensure that the funds could only be used to further the charity's objects. The grant was in breach of the governing document, which restricted trustee benefits; the trustees had not sought permission to make it; and they had failed to identify and manage conflicts of interest. The trustees accepted that the grant was made in error and made restitution of £24,000 to the charity 'as an act of good faith'.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/591519/earl_of_chesters_fund.pdf

Politics and Economics Research Trust

The commission also published a case report into Politics and Economics Research Trust, an educational charity which promotes research into matters of public taxation, public policy, applied economics and political science. The commission had received complaints about the charity's funding of two non-charitable organisations with political aims, Business for Britain and Taxpayers' Alliance. The charity did not put in place formal grant agreements or processes to monitor research projects. Following the commission's intervention, the trustees reviewed the research report produced by Business for Britain and asked for the funding to be returned to the charity, on the basis that the research report did not conform to what was agreed during the grant application stage, and because the trustees' view was that the report represented a 'position statement' by Business for Britain, rather than a nuanced position on the UK's relationship with the EU.

The commission's lessons for other charities when making grants include: having written agreements containing the grant terms and conditions, undertaking risk assessments at an appropriate level when grants are to non-charities and putting monitoring arrangements in place that are proportionate to the value of the funding and the assessment of the risks.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590457/politics_and_economics_research_trust.pdf

Watch Tower Bible & Tract Society of Britain – update

The commission has settled its litigation with Watch Tower Bible & Tract Society of Britain. The commission had opened a statutory inquiry to investigate how the charity safeguards children and adults at risk. The charity challenged the commission's decision to open a statutory inquiry in a number of courts, but was not successful. The challenge to the inquiry was concluded in July 2016 when the Supreme Court dismissed the charity's application to appeal against the Court of Appeal's refusal to grant the charity permission to seek judicial review of the decision to open the inquiry.

As part of the inquiry, the commission issued a Production Order under section 52(1) of the Charities Act 2011, requiring the disclosure of documents that the commission considered were relevant to the inquiry. The charity sought to challenge the Production Order by way of judicial review and in March 2016 the Court of Appeal granted the charity permission to seek judicial review and decided that the application should be heard by the Administrative Court rather than the First-tier Tribunal.

The commission has said that the charity has now provided a response to the Production Order by making certain documents available for inspection by the commission and, since the Production Order was issued, the commission has obtained additional information from the charity and other sources. The commission has therefore decided to revoke the Production Order and the charity has agreed to withdraw its application for judicial review.

The commission says it will continue to work with the charity to establish the facts and understand the charity's safeguarding policy, procedures and practices in order to explore the issues that are the subject of the ongoing statutory inquiry.

Charity Tribunal

There have been two recent cases in the First Tier Tribunal (General Regulatory Chamber) (Charity) (FTT) concerning the commission's power to order a charity to change its name under Section 42 of the Charities Act 2011.

Cambridge Islamic College

The FTT has given directions in a charity names case, involving an appeal against a commission direction made under section 42(1) requiring the charity Cambridge Islamic College (CIC) to change its name.

The commission's direction had been made at the request of BWB client Cambridge Muslim College (CMC), which is also a charity. The commission considered evidence that the use of a similar name by CIC was confusing donors and supporters, and that CMC's efforts to resolve matters amicably had failed.

CIC's appeal against the direction in the FTT had originally been stayed while CIC also sought a review of the decision using the commission's internal review process. However the commission's direction was upheld on internal review so the stay in the FTT was lifted.

The FTT has now directed that CMC can be joined as a party to the proceedings before it. Judge McKenna has also directed that the parties agree directions and a schedule of agreed facts with a view to bringing this matter to a 'focused' one-day oral hearing, scheduled for July 2017. If the appeal is unsuccessful, the direction will stand and CIC will be required to change its name.

http://charity.decisions.tribunals.gov.uk/documents/decisions/CIC%20Directions%20(02%20February%202017)-1.pdf

Leeds Cat Rescue

The FTT has struck out, on the commission's application, the appeal by Leeds Cat Rescue against the commission's decision not to make a direction ordering another charity to change its name under section 42. This is because the commission's decision does not fall within the list of decisions appealable to the Tribunal: as illustrated by the Cambridge Islamic College case referred to above, there is a right of appeal against the making of a direction under section 42, but this does not include the refusal to make a direction under that section.

Judge McKenna noted that Leeds Cat Rescue has other potential remedies available, including an application for judicial review and asking the commission for an internal decision review.

http://charity.decisions.tribunals.gov.uk/documents/decisions/Directions%20(16%20January%202017)2.pdf

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The information in this update is necessarily of a general nature. Specific advice should be sought for specific situations.