

Summer 2018

Charity and Social Enterprise Update





In brief

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In this issue, **Lucas Atkin** and **Victoria Hordern** have some useful tips for charities on being ready for the GDPR, which comes into force in May (*page 3*).

Charities need to be aware that they are being held to a far wider interpretation of ‘safeguarding’ than that strictly prescribed by law, say **Emma Dowden-Teale** and **Claire Whittle** (*page 4*).

Employee references can be a minefield, say **Lucy McLynn** and **Victoria Cook**, but it is important to be consistent in your approach to avoid accusations of discrimination (*page 6*).

Mindy Jhittay, a leading figure in BWB’s Counter-Fraud team, answers your questions about social engineering fraud (*page 8*).

Suhan Rajkumar explains recent changes to the Charity Commission annual return (*page 10*).

The National Federation of Women’s Institutes has a proud history of campaigning on women’s rights and social justice (*page 11*).

We announce the launch of Purposely, BWB’s new digital tool to help companies embed purpose (*page 12*).

On the Charity Governance Code, **Tesse Akpeki** stresses the importance of board diversity (*page 13*), and **Rachael Chapman** looks at the recommendation of a trustee code of conduct (*page 14*).

Oliver Scutt explains the new provisions on automatic disqualification of charity trustees and senior managers (*page 15*); while **Emma Knuckey** and **Megan Read** review the impact of the Charity Commission’s new regulatory powers (*pages 20–21*).

Molly Carew-Jones and **Hannah Lyons** explore the growing popularity of society lotteries to raise funds (*page 16*); and **Philip Trott** looks at immigration issues as we approach Brexit (*page 17*).

In our tax focus, **Bill Lewis** explains HMRC’s approach to the distinction between grants and fees (*page 18*); and Bill and **Susan Shi** give an update on the accounting rules for gifts of profit from trading subsidiaries (*page 19*).

And finally, **Emma Knuckey** provides our usual roundup of the latest from the Charity Commission and the Charity Tribunal (*page 22*).

GDPR: the deadline looms

Significant changes in data protection law are coming into effect across Europe.



Lucas Atkin
Solicitor
T: 020 7551 7600
l.atkin@bwbllp.com

Lucas is an information lawyer specialising in data protection. He advises on all aspects of data protection law at national, EU and global levels. Lucas assists clients from a wide range of sectors, including charity, media, retail, insurance and sport. He regularly provides specialist training and advice on the implementation of the GDPR at all levels of understanding.



Victoria Hordern
Head of Data Privacy
T: 020 7551 7951
v.hordern@bwbllp.com

Victoria Hordern joined BWB in 2018 as our new Head of Data Privacy. Victoria has advised on data privacy issues in the public and private sectors for more than 12 years. Her experience includes UK, pan-European and global privacy matters covering the full range of data protection and ePrivacy compliance requirements.

Lucas Atkin and Victoria Hordern explain what charities and social enterprises need to do

GDPR stands for General Data Protection Regulation. It is a new piece of legislation that comes into force on 25 May 2018 across the EU (the terms of the GDPR will substantively survive Brexit). It takes data protection law into the modern age, given the impact on people's rights to privacy of the commoditisation of the internet and smartphones and the value of personal information in a world of online commerce. People worry about the technicality of the term 'data protection' – think of it instead as a framework setting out how organisations should respect the privacy of the people whose information they collect and use as part of their daily operations.

Will GDPR affect me?

Almost certainly. The GDPR applies to 'personal data', which is defined in very broad terms: any information from which a living individual can be identified (both directly and also in combination with any information your organisation has or is likely to have).

What are the key points for charities and social enterprises?

- **Fundraising and promotion of your aims/ideals:** the use of email, SMS and telephone (and, arguably, social media) to raise funds from or send promotional material to individuals is either prohibited or restricted. In general, you need those individuals' prior opt-in consent to carry out such activities.
- **Think about whose personal data you are processing:** you should carefully consider whose personal data you use as part of your everyday operations. Common examples include employees, volunteers, service users, website visitors, members and service beneficiaries.
- **Privacy policies:** you must provide those whose data you process with certain information, including what you do with their data, why you need it and what their rights are. Organisational privacy policies should be available to all individuals whose personal data you process.

- **Practical compliance:** as soon as they hold personal data, charities and social enterprises take on obligations under the GDPR. Every person carrying out work on your behalf needs to ensure that your organisation is compliant. As a minimum, organisations should implement an internal data protection policy and staff training. Do your IT systems offer adequate protection?
- **No leniency in cases of non-compliance:** in cases of non-compliance, the Information Commissioner's Office (ICO – the UK's independent authority established to uphold and enforce data protection law) has not shown leniency towards organisations providing a public benefit or social service. Non-compliance will be treated as non-compliance, regardless of your motivations for processing personal information.

There are many more aspects of the GDPR that may affect your organisation's day-to-day operations, which could require significant strategic and organisational planning.

The GDPR is an evolution, not a revolution – it should be seen as an opportunity for your organisation to observe individual's rights to privacy in a way that strengthens your relationship with them.

Find out more

Information and guidance about the GDPR has been published by:

- the Fundraising Regulator <https://www.fundraisingregulator.org.uk/information-registration-for-fundraisers/guidance/gdpr-charitable-fundraising-guidance-briefings/>
- the ICO <https://ico.org.uk/for-organisations/charity/>
- NCVO <https://www.ncvo.org.uk/practical-support/information/data-protection> and
- Third Sector <https://www.thirdsector.co.uk/gdpr>.

Safeguarding – is your charity meeting its obligations?

In light of recent serious incidents that have affected the public and charity sectors, not only have the requirements in relation to safeguarding developed, but so too has the scope of ‘safeguarding’ within the charity sector.



Emma Dowden-Teale
Partner
T: 020 7551 7890
e.dowden-teale@bwbllp.com

Emma advises on all aspects of regulatory and public law, both contentious and advisory, including in respect of equality duties and human rights. Within her broader practice, Emma leads the firm’s multi-disciplinary safeguarding practice.



Claire Whittle
Senior Associate
T: 020 7551 7605
c.whittle@bwbllp.com

Claire has experience in a wide range of public and regulatory work. She works with a diverse range of clients, including public and private sector bodies, charities, social enterprises and individuals. Claire is, among other things, a safeguarding expert.

Emma Dowden-Teale and Claire Whittle summarise developments and highlight key points for charities

Generally, legislation refers to safeguarding in the context of working with children and vulnerable adults. Recently government has, in effect, broadened the scope of what it considers ‘safeguarding’ in the charity and humanitarian sector, to include not only children and vulnerable adults, but also the duty of care charities owe to other groups that they come into contact with: their staff and volunteers; beneficiaries generally; and those who live and work in their areas of operation.

In this context, it is essential that charities review the suitability, robustness and effectiveness of their processes and policies in relation to safeguarding; and in relation to staff safety and staff conduct more broadly (for example, HR and whistleblowing policies). Key developments are summarised below:

1. The Charity Commission

In September 2017 the commission produced an updated version of its guidance on reporting serious incidents and in December 2017 it published updates to its Safeguarding Strategy.

The commission also issued a regulatory alert in December 2017 reminding charities of their safeguarding obligations and the commission’s expectations of them.

This is the moment in time for charities to raise any issues that have emerged in the light of recent developments and the current climate. Trustees should carry out a review, including on the adequacy and robustness of the charity’s safeguarding measures, procedures and policies and the management and reporting of past incidents. Trustees should consider reporting any previously undisclosed safeguarding issues or serious incidents, complaints or allegations. Failure to do so may be considered misconduct and/or mismanagement and may be a breach of trustees’ duties.

Recent increases in serious incident reports relating to safeguarding have led the commission to establish a

new taskforce, announced as part of its ‘suite of steps on safeguarding’, to ensure all reports are dealt with efficiently.

In March 2018, two safeguarding summits were convened by the Charity Commission. The first, held jointly with the Department for International Development (DfID), focused on charities and umbrella bodies working internationally. The second, held for charities and umbrella bodies working in the UK, was co-chaired by the Minister for Civil Society, Tracey Crouch MP.

Charity Commission: regulatory alert – <https://www.gov.uk/government/news/regulatory-alert-to-charities-safeguarding> – suite of steps on safeguarding – <https://www.gov.uk/government/news/charity-commission-announces-suite-of-steps-on-safeguarding>

Information on the safeguarding summits: <https://www.gov.uk/government/news/safeguarding-summit-statements-by-the-international-development-secretary-and-dfids-permanent-secretary> <https://www.gov.uk/government/news/uk-charities-commit-to-strengthening-safeguarding-culture-and-capability>

2. Charities working overseas

DfID has established a new safeguarding team, which has contacted the international NGOs to which DfID contributes financially regarding their safeguarding obligations.

At the joint safeguarding summit in March, DfID announced a series of steps to tackle safeguarding issues. Crucially, it will introduce enhanced safeguarding standards for organisations it works with, and funding will depend on meeting these standards. An international safeguarding centre to support organisations to implement best practice on safeguarding and maximise transparency in the charity sector was also proposed. DfID has encouraged organisations to appoint a Director of Safeguarding, and has noted the importance of charities reporting incidents when they occur.

The parliamentary International Development Committee has launched an inquiry into sexual

exploitation and abuse in the aid sector, which is entirely separate to the work of the Independent Inquiry into Child Sexual Abuse (whose work continues). A draft International Development (Safeguarding Vulnerable Groups) Bill will make safeguarding a key DfID consideration; and allow for the most stringent DBS checks for those who provide aid, even when not working specifically with children and/or vulnerable adults.

Proposals for an international safeguarding centre can be found at <https://www.gov.uk/government/news/actions-to-tackle-exploitation-and-abuse-agreed-with-uk-charities>

The launch of the sexual exploitation inquiry is covered at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-development-committee/news-parliament-2017/sexual-exploitation-launch-17-19/>

And the draft bill is at <https://www.parliament.uk/documents/commons-committees/international-development/Sexual-exploitation-and-abuse-in-the-aid-sector-explanatory-Bill.pdf>

3. Government strategy on preventing child abuse within the UK

The government has outlined updated plans to tackle child abuse, which include improvements to information sharing between police, social workers and healthcare professionals.

<https://www.gov.uk/government/news/government-outlines-strengthened-plans-to-tackle-child-abuse>

4. Updated Statutory Guidance

Following a consultation on amendments to the 'Working Together to Safeguard Children' guidance, the government intends to widen some obligations on safeguarding partners; and include specific sections on sports organisations and religious organisations, following the enactment of the Children and Social Work Act 2017, which will be brought into force later this year.

The government's response to the consultation is at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/683115/Changes_to_

[statutory_guidance-_Working_Together_to_Safeguard_Children.pdf](#)

Key action points

It is vital that organisations have appropriate governance structures and clear policies and processes that are fit for (new) purpose and are followed in practice. The rise of public and political awareness of safeguarding and appropriate sexual conduct within charities means that organisations must keep up to date with rapid development of regulatory requirements and expectations.

Organisations are expected to maintain a safe and trusted environment for everyone who comes in to contact with them, including their staff and volunteers. The Charity Commission, in particular, is encouraging organisations to report all serious incidents (recent and past) as soon as possible. All charities that may come into contact with children and vulnerable adults are expected to have a safeguarding procedure and a trustee who leads on safeguarding; they should also have appropriate codes of conduct and HR policies to deal with 'safeguarding' in their duty of care for staff, and appropriate governance in place to deal with any incidents that arise.

Ultimately, charities are required to develop a culture that places beneficiaries and safeguarding at the heart of charity, public sector and aid work, coupled with effective policies and procedures that manage incidents fairly and lawfully, if and when they arise.

Find out more

Recent BWB articles on safeguarding and serious incidents:

<https://www.bwbllp.com/knowledge/2017/09/28/serious-incident-reporting-guidance/>

<https://www.bwbllp.com/knowledge/2017/12/19/recent-guidance-on-safeguarding-for-charities-and-the-housing-sector/>

BWB's multi-disciplinary Safeguarding team can provide advice on all aspects of safeguarding work including policies and procedures, dealing with safeguarding incidents and disciplinary procedures and required reporting. Members of the team have recently spoken at the annual Bond conference on what safeguarding means for governance and assisted NCVO in producing safeguarding guidance for its members.

For ease of reference

Employee references are currently a particular issue for charities.



Lucy McLynn

Partner & Head of
Employment
T: 020 7551 7806
l.mclynn@bwbllp.com

Lucy is ranked by Chambers UK legal directory as a 'Leader in Employment', and recommended by the Legal 500 directory. She is a regular advocate in the Employment Tribunals and the Employment Appeal Tribunal, including in numerous reported cases, acting for both employers and employees. She conducted the case of *Coleman v Attridge Law*, which established the principle of associative discrimination under UK law. She has a particular interest and expertise in advising on discrimination, the status of atypical workers, whistleblowing, maternity and working time issues.

Lucy McLynn and Victoria Cook set out some pointers for charities navigating this area

For understandable reasons, charities are giving a lot of consideration at present to the question of what sort of references should be given for departing and former employees. This is particularly an issue where an employee's departure is under some kind of cloud.

The starting point is that there is no legal obligation on an employer/former employer to give a reference for an employee/former employee. An employer may decline to give references.

You should be consistent in your practice, as a refusal to give references for some staff, while giving them for others, could amount to (or be viewed as) discrimination if based on a protected characteristic. Alternatively, it could amount to a breach of the implied term of mutual trust and confidence (if the employment relationship is still continuing at the time).

There is nothing to stop an employer who has a general practice of giving references declining one for a particular employee in circumstances where they feel unable to give a supportive reference because of the employee's conduct – provided that that conduct has not been raising complaints of discrimination, bringing discrimination proceedings against the employer, and giving evidence or information in connection with any such proceedings. Refusing to give a reference in those circumstances would be likely to be victimisation. You should bear in mind that protection from victimisation and discrimination (where it arises from or is closely connected to an employment relationship which used to exist) continues after the employment relationship has ended.

If, as an employer, you do decide to give a reference, you should remember that you have a duty of care towards both the employee and the recipient of the reference. The duty of care owed to both parties is to provide a reference that is fair, true and accurate.

When considering the duty of care owed to the recipient of the reference, the employer or ex-

employer providing it should ensure that it is accurate and not misleading. A reference does not need to be comprehensive and full as long as it is not inaccurate or misleading when taken as a whole. When giving a reference, you should consider the overall effect of the reference on the reader. Omission of key information may be problematic if the reference is misleading as a result of the information omitted (even if it is, strictly speaking, accurate).

It is common for references to be agreed for outgoing employees under settlement agreements. These generally emphasise their strengths and do not mention the reasons why it has been necessary to end the employee's employment. Legally, the omission would need to be significant for the reference to be viewed as misleading. Increasingly, however, charities may feel that it is morally wrong to give references that fail to mention any concerns about employees' capability or conduct, and thus have the effect of passing the problem on to the next employer.

The referee must, on the other hand, balance the duty owed to the recipient with that owed to the employee, i.e. the subject of the reference. The referee must not jeopardise the employee's future employment prospects without good cause and must ensure that the reference, in addition to being true and accurate, is also fair. For example, a reference that includes allegations of misconduct that have never been put to the employee, or which mentions complaints made about the employee of which the employee had not been aware, would breach that duty of care, even though it was accurate.

Charities will evidently be in a better position to give fair references about problematic employees if they have addressed issues internally – raising concerns with employees and carrying out investigations and disciplinary processes. Charities should think ahead to how they will address the question of a future reference when deciding whether to seek to agree an exit with an employee when those steps have not been taken.

Some charities are now adopting an approach that has been prevalent in other sectors, such as financial services, for many years. This is giving a



Victoria Cook
Senior Associate
T: 020 7551 7806
v.cook@wbllp.com

Victoria is a dual-qualified barrister and solicitor. Victoria advises mainly employer clients on a broad range of employment law and HR issues including dealing with disability issues, employment matters involving safeguarding, vetting and barring, all forms of discrimination, redundancy and restructuring, TUPE, employment status, interns and volunteers. Victoria undertakes a broad range of contentious work including representing clients at employment tribunals, negotiating settlements and judicial mediation.



reference that is, effectively, a ‘statement of service’; something like, ‘Mr Smith worked for x organisation from date to date in x role’. You should bear in mind that this is still a reference, and could still be viewed as misleading if it fails to mention something very material about the subject’s employment. It also does nothing to address the point about passing on the problem employee to the next employer, which will often be another charity.

You should not assume that the inclusion of any kind of waiver of liability in a reference is going to get around the various issues that have been outlined here. Equally, even if a reference is marked ‘strictly confidential’, it will be disclosable to the subject of the reference under a Data Subject Access Request.

It is increasingly common for employees, including managers, to give ‘personal’ references for former colleagues. Such references make it clear that they are given in a personal capacity, but then usually go on to describe the working relationship with the former employee (and will in all likelihood be viewed as references from the organisation in the court of public opinion, if issues ever become public). Charities

should give careful consideration to whether they should expressly ban employees from giving personal references that refer in any way to the work context.

Charities, however small, should in any event have a policy about who can give references and in what form, and ensure that this is clearly communicated to all staff.

There are a host of different considerations that will apply when a charity is in receipt of a reference for a prospective employee: these will feature in a second article in our Autumn 2018 Update.

Find out more

Our Employment team can advise on any aspect of employment or termination. For more information, contact Lucy or Victoria, or view our Employment pages at <https://www.wbllp.com/services/employment/>

Fraud awareness – social engineering

How can charities and social enterprises protect themselves against fraud committed by social engineering?



Mindy Jhittay
Senior Associate
T: 020 7551 7853
m.jhittay@bwblp.com

Mindy is a Senior Associate and a leading figure in BWB's Counter-Fraud team. She advises charities and social enterprises, company directors and shareholders, regulatory bodies and private individuals on a wide range of commercial contentious matters, including resolving disputes about branding, trade marks, passing off, domain names and copyright and the prevention and cure of fraud.

Mindy Jhittay, co-leader of BWB's Counter-Fraud team, answers some frequently asked questions

What is social engineering?

Social engineering exploits human weakness, not just technological flaws in a system, through 'bogus boss' email scams, invoice redirection and 'vishing' (telephone fraud). It is a form of psychological manipulation – criminals get you to perform actions or divulge confidential information so that they can gather data, access your system or commit fraud.

Once you know how these sorts of scams work, you can take steps to avoid them.

What are phishing, vishing, smishing, twishing...?

Vishing is a variation on phishing, as are smishing and twishing.

Phishing is where a fraudster makes contact by email and typically impersonates your bank or another well-known company. The email is sent because the criminal is 'fishing' for your personal data, or it will be designed to get you to click a link or open an attachment, such as a fake invoice. By doing so, you infect your computer with malware or ransomware and, if your computer is linked to your charity's network, the virus quickly spreads to your colleagues too.

Malware (malicious + software) is a computer virus that uses stealth tactics to steal from your bank account. It includes key logger software, which tracks what you are typing, including passwords.

Ransomware (ransom + malware) encrypts your files and demands cash to restore your data. The well-known Wannacry virus, which affected one third of NHS Trusts last year, infected the hospital computer system via a phishing email.

Vishing (voice + phishing) is where contact is made by telephone and the caller tries to get you to reveal confidential information or transfer funds to the criminal by claiming to be from, for instance, your bank or the police.

Smishing (SMS + phishing) is another variation, this time through the medium of SMS (text) messages.

Twishing (Twitter + phishing) is designed to obtain your personal data through Twitter.

What is CEO fraud?

CEO fraud is sometimes referred to as 'bogus boss' fraud. You receive an email from your boss or another senior member of your organisation, who asks you to urgently make a payment or to let them know the deadline for making a same day payment.

When you respond they will tell you that they can't access your charity's online banking system, so they need you to make the payment instead. You want to be helpful, so you follow the order and make the payment – but you haven't paid a real supplier, you've been tricked into paying a criminal.

How to beat 'bogus boss' fraud

Be alert to unusual or seemingly urgent requests for money or for sensitive information.

Scrutinise the email address – it can be very easy to use email addresses that are similar to real ones at a glance. Consider the difference between m.jhittay@bwblp.com, m.jhittay@bwblp.com and m.jhittay@bwbl1p.com. All three are subtly different and only one of these is genuine.

Put a process in place for verification of urgent requests – can you call the sender or contact them by another method, without replying to the email?

Be careful about how you use out of office messages and consider limiting the information given in messages sent externally. If you have nominated a colleague for people to contact in your absence, always let them know and always tell them how they can reach you if they receive requests that claim to be urgent.

Consider implementing a system that flags up external emails. That way you will be alerted to the fact that an email that seems to be an internal one from a colleague has, in fact, not been generated from within your organisation.

What is invoice redirection fraud?

Invoice redirection fraud is another common email fraud.

The first step is for the criminal to identify your key relationships – often suppliers to or partners of your charity. They can do this by hacking into either party's computer system to access confidential information. However, they can also keep an eye on information you make public for another reason, for example, testimonials on your website from beneficiaries and service users or a press release that identifies a new project with a new partner.

The next step is to initiate a bogus transaction, which usually involves asking you to settle a pending invoice to a new sort code and account number.

How to avoid falling victim to invoice fraud

Requests to amend a sort code and account number are suspicious. Never take them at face value. Always verify the request using a different method of communication that you know is genuine. Make this a standard operating procedure.

‘Be careful – it is very easy for criminals to mask their caller ID so that their call or text message looks like it is genuinely coming from your bank or another trusted supplier’

Beware of phone fraud

Email has made fraud easier for criminals, but you should be on your guard for phone fraud too. Criminals often use phone calls to trick you into making payments directly. They research how your charity operates and will then call you and pretend to be from your bank.

They work to build your trust so that when they claim there is a problem with your account, you are more likely to disclose confidential information, like your username or passwords. They then persuade you to transfer funds to accounts controlled by the fraudster, while they stay on the phone, talking you through the process.

How do you know who to trust?

Remember that your bank will never ask you for PINs, passwords or payment authorisation codes – they already have this information and they don't use it to verify your identity. Don't trust the caller just because they have information about you.

Be careful – it is very easy for criminals to mask their caller ID so that their call or text message looks like it is genuinely coming from your bank or another trusted supplier.

If you are unsure about a call that you have received, just hang up. Call the bank back as soon as you can on a number you already have or one that is publicly available. If you can, use a different phone.

Our top three tips to avoid becoming a victim of fraud

1. Be alert and challenge urgent or unusual requests and promote staff awareness through training and less formal communications.
2. Review your processes to ensure that they contain provisions such as dual authorisation and monitoring of financial transactions.
3. Cover the security basics including up-to-date computer systems and virus protection, unique user IDs and passwords and restrictions on access to online payment systems and other sensitive information.

Top three tips if you are a victim of fraud or attempted fraud

1. Contact your bank immediately to see if they can freeze or recover the transaction and report the matter to Action Fraud.
2. Consider whether you need to report what happened to the Charity Commission as a serious incident.
3. You may want to seek legal advice on your obligations, your investigation and next steps, and potential recovery of funds.

Annual returns – are you ready?

The Charity Commission has announced that a number of new questions will be included in its latest annual return.



Suhan Rajkumar
Solicitor
T: 020 7551 7718
s.rajkumar@bwbllp.com

Suhan joined the Charity and Social Enterprise Department as a solicitor in November 2017. Having trained and qualified with a large city firm, Suhan gained experience in a variety of financial, capital markets and real estate transactions, including both detailed technical advice and large-scale cross-border projects.

Suhan Rajkumar outlines the changes

All charities with income of more than £10,000 and all CIOs (regardless of income) must complete the commission's annual return.

The latest additions to the annual return apply to financial years ending from 1 January 2018.

They are intended to add greater transparency and accountability. Charities should consider their response carefully, bearing in mind that most of the responses will be made public.

What do the new questions cover?

1. Fundraising

Charities will be asked if they work with commercial participators or professional fundraisers, and if so, if they have a written agreement in place. It is a legal requirement to have such an agreement, so this question is framed to flag non-compliance.

2. Government funding

Charities will be asked about the number and total value of contracts and grants they receive from central or local government. The commission aims to identify charities that may be solely or primarily reliant on public funding as its research indicates that such charities are more likely to be in financial distress.

3. Overseas and unknown income

The annual return will now have questions about overseas income from specific sources, although this information will not appear on the charity's public register. The commission is seeking to monitor the risks of overseas funding sources – particularly given the possibility of loss of European/EU funding following Brexit.

Charities will also be asked about funding from unknown sources (charities are required to report receipt of sums in excess of £25,000 from unknown, unverified or suspicious sources as serious incidents).

4. Employees' salaries

Charities will be asked about the number of employees with total employee benefits of more than £60,000 (to be published in income bands, going up to '£500,000 and over') and for the total

employee benefits of the highest-paid employee (although this won't be published).

5. Payments to trustees

Were any trustees paid for being a trustee, for providing any services to the charity, or receiving any direct or indirect benefits? Were any employees former trustees of the charity?

Any benefit to trustees must be authorised by the charity's constitution, by the statutory powers to benefit trustees in the Charities Act 2011 or by the commission. Charities should take particular care if considering employing an ex-trustee.

6. Overseas expenditure

The annual return already asks where charities operate, and about total expenditure by country. Charities will now also be asked whether they transferred money outside of the regulated banking system, and about the methods and values of transfers. While it is not illegal to transfer money outside regulated banking services, the commission expects trustees to use them where available.

Find out more:

The commission issued an alert on using the regulated financial sector in February 2018: see <https://www.gov.uk/government/news/alert-for-charities-use-the-regulated-financial-sector>

The commission will ask if trustees are satisfied with the adequacy of their risk management policy and procedures to deal with risks arising from activities and/or operating locations.

7. Trading subsidiaries

The annual return will ask if trustees are also directors of any of the charity's subsidiaries.

8. Safeguarding

Where trustees, staff or volunteers work directly with vulnerable beneficiaries, charities will be required to provide information on DBS checks.

Conclusion

These questions highlight key areas of non-compliance and risk. It remains to be seen what the commission will do with the additional information and if the added regulatory burden is justified.

Find out more

A longer version of this article, prepared by Thea Longley (partner) and Beatrice Leong (paralegal) first appeared in the February 2018 issue of Charity Finance magazine <https://www.civilsociety.co.uk/finance/are-you-prepared-for-new-reporting-requirements.html>.

National Federation of Women's Institutes

The WI is the largest voluntary women's organisation in the UK, with approximately 222,000 members in 6,300 WIs.



The WI was established in 1915 to enable women to play an effective part in their communities and help in the production of food during the First World War. Since then, the aims of the organisation have broadened and the WI today plays a unique role in providing women with educational opportunities and the chance to build new skills, as well as influencing local and national issues that matter to members. WI campaigns are central to this remit, and 2018 marks 100 years of WI campaigning.

Every year, WI members put forward a range of issues for national debate at the Annual Meeting, which, if passed, form the basis of the organisation's campaigning in the years ahead. The resolution process means that members play a central role in defining policy and bringing issues onto the WI's national agenda.

Since the early days, the WI has supported women's right to speak out and to create a world in which women's voices are heard equally. In 1921 a resolution urged WIs to 'educate members in the powers of the Parish, District and County Councils with a view to getting local women on all these bodies'. The WI also campaigned to remove obstacles to women serving on juries in 1921 and to bring women into UK police forces in 1922, both pioneering campaigns that WIs continued for years, until WWII brought women into the police force and the Juries Act of 1974 removed restrictions against women serving.

After a 1943 resolution was passed calling for 'equal pay for equal work', members kept up momentum for decades, lobbying the Chancellor of the Exchequer in the 1950s and then campaigning for equal pay in professions such as teaching.

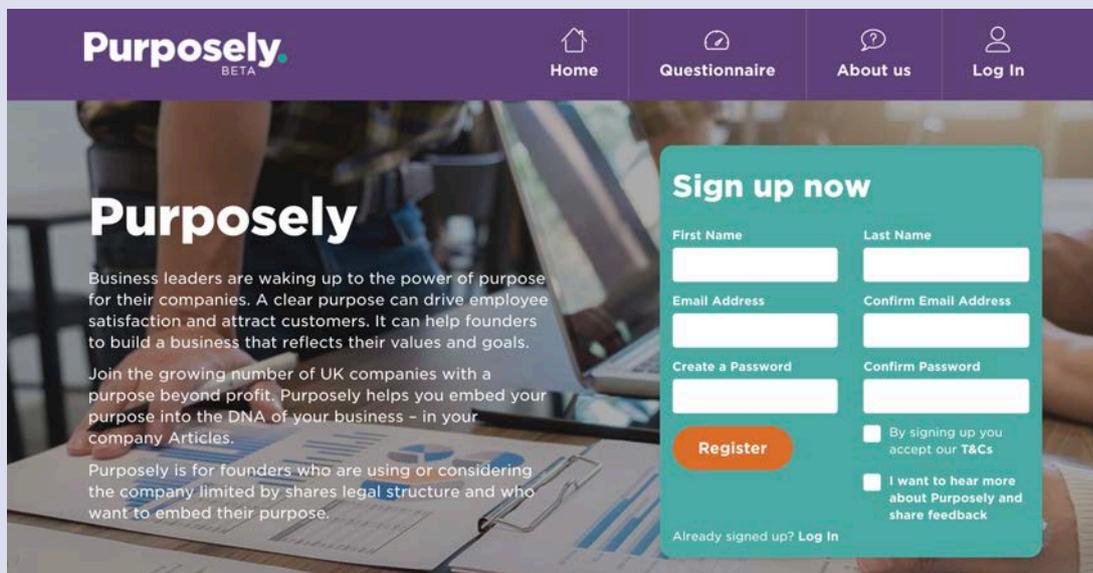
The WI was one of the first organisations to talk about AIDS in 1986; and it called for breast cancer screening in the 1970s, which eventually resulted in the introduction of the national screening programme in 1988.

The WI has also worked hard to protect our natural world, including the 1954 resolution for a 'campaign to preserve the countryside against desecration by litter'. This led to the formation of Keep Britain Tidy, which is still campaigning for cleaner and greener places.

The current campaign focuses are equally as diverse and progressive, with matters such as loneliness, climate change, the plight of honeybees, food waste and dementia care currently on the agenda.

BWB is proud of its long association with the WI. Over the years, BWB has advised the organisation on a variety of issues, including governance, constitutional issues and structuring, contracts, fundraising, intellectual property, employment and property.

BWB launches Purposely: A digital toolkit to enable commercial companies to embed purpose



Purposely is a first-of-its-kind digital toolkit that helps founders, business leaders and investors to embed a commercial company’s purpose into its governing articles.

Charitable companies and community interest companies already use the flexibility afforded under s172(2) of the Companies Act to define purposes other than the benefit of shareholders. By making it easier for commercial companies to embed a legal commitment to social purpose, commercial companies will now be able to redefine what success looks like beyond profit and create a duty for directors to act in line with this purpose for years to come.

The toolkit was designed and created by UnLtd, the Foundation for Social Entrepreneurs, in partnership with BWB, and with strategic support from the Department for Digital, Culture, Media & Sport (DCMS). The launch of Purposely follows the findings of the government’s 2016 Mission-Led Business Review, which showed that there is an appetite for purpose-driven businesses, but also a lack of knowledge on the part of businesspeople and their advisers as to how to effectively embed purpose within the DNA of a business.

Purposely is accessible via a free online portal and asks users a series of questions about their business, before providing a set of modified company articles based on their answers. This tailor-made legal framework legally obliges founders and business leaders to live out aspects of their purpose, the scope of which is determined by how purpose-driven those who own the business want it to be.

By embedding purpose in the articles, Purposely ensures that a commitment to purpose is authentic and supports company founders to make sure that this commitment is more likely to be sustained over the long term. Other benefits include supporting businesses to recruit and retain talent in an increasingly competitive labour market, focusing the resources of the company on a redefined vision of success, aligning the interests of entrepreneurs and shareholders around a common purpose and supporting the business to leave behind it a positive legacy.

Embedding purpose within a company’s constitution has in the past often been seen as an intimidating task for many business founders, owners and advisers. However, Purposely makes it easy by providing a tailored version of a company’s articles that sets out each business’ own unique commitment to purpose – which should help it stay true to its purpose over time.

Purposely is available at <https://getpurpose.ly/>

Governing for impact – diversity and the Charity Governance Code

The positive impact of diversity at board level is becoming well-recognised in the sector.



Tesse Akpeki

Lead Onboard Governance Consultant
T: 020 7551 7702
t.akpeki@bwbllp.com

Tesse is a consultant, trainer and Centre for Effective Dispute Resolution-accredited mediator. She was formerly head of governance and trustee services at the National Council for Voluntary Organisations and has worked extensively with third sector organisations nationally and internationally.



Governance expert Tesse Akpeki explores the latest developments

'Promoting and supporting diversity in the workplace is an important aspect of good people management – it's about valuing everyone in the organisation as an individual. However, to reap the benefits of a diverse workforce it's vital to have an inclusive environment where everyone feels able to participate and achieve their potential. While UK legislation – covering age, disability, race, religion, gender and sexual orientation among others – sets minimum standards, an effective diversity and inclusion strategy goes beyond legal compliance and seeks to add value to an organisation, contributing to employee well-being and engagement.' – Chartered Institute of Personnel and Development (2017)

Delivering Through Diversity, a study by McKinsey, published in January 2018, shows that an effective organisation, no matter what sector it is in, needs to be composed of a group of people who think differently. The environment has to be safe to share and to use these differences to deliver the vision of the organisation. The authors of the report stress the importance of listening – to understand problems, barriers and obstacles – before exploring and offering solutions. Ask questions that invite engagement and avoid statements that invite judgement. The concept of organisational diversity is also broadening to include personality type, thinking style and other factors.

Ground-breaking research by the Charity Commission into awareness and effectiveness of charity trustees in England and Wales, Taken on Trust (2017), found that men outnumber women trustees on boards by two to one. The average age of trustees is 55-64 years. Yet 71% of trustees are recruited through an informal process. The report recommends that charities do more to promote diversity on their boards and encourage applications from women, young people and people from ethnic minority and socially diverse backgrounds. A separate analysis by CharityData reveals that one in 12 trustees is called John or David.

The new Charity Governance Code, published in 2017, emphasises the importance of recruiting and retaining a diverse board that leads effectively and

achieves high performance. Principle 6 of the code recommends that 'the board's approach to diversity supports its effectiveness, leadership and decision making'. This is the standard against which charities will be assessed for diversity effectiveness. Trustee boards with income of more than £1m should ensure that there are plans in place to monitor and achieve the board's diversity objectives. As part of the annual report, the board is expected to report on what it has done to address board diversity, with an explanation of where diversity objectives have not been met.

In building cultural competence that goes beyond diversity we have to find creative ways to use next-gen talent. The bottom line is that this approach is about inclusion not exclusion. That means everyone working for the best interests of the vision. The potential benefits of strong performance make the effort to foster inclusion and engagement well worth it.

9 practical questions for charities

1. What does diversity, engagement and inclusion mean for you?
2. How do you know your goals are moving you towards success?
3. Are your initiatives moving you towards or away from your goals?
4. What is working for you?
6. How can you share the learning and how can you stay resilient?
7. What have been your struggles?
8. What resources, training or supportive mechanisms are you using?
9. Where next for you?

Find out more

The McKinsey report, *Delivering through Diversity*, is at <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>

The Charity Commission report on the effectiveness of trustees is here <https://www.gov.uk/government/publications/taken-on-trust-awareness-and-effectiveness-of-charity-trustees-in-england-and-wales>

Trustee codes of conduct

The new Charity Governance Code recommends that charities adopt a trustee code of conduct.



Rachael Chapman
Solicitor
T: 020 7551 7626
r.chapman@bwblp.com

Rachael is a solicitor in BWB's Charity and Social Enterprise Department, where she advises a range of third sector organisations on governance and commercial issues.

Rachael Chapman explains what's involved

Following the publication of the new Charity Governance Code in 2017, an increasing number of charities are considering putting a trustee code of conduct in place. This article looks at what's meant by a trustee code of conduct, whether every charity should have such a code, and the provisions a typical code might contain.

1. What is a trustee code of conduct?

A trustee code of conduct is a document which the trustees of a charity agree to be bound by, which sets out the standards which are expected of them in the performance of their duties. Often a code of conduct will go beyond both the constitution of the charity and also general charity law duties of trustees.

A code of conduct can also clarify existing charity law trustee duties. For example, general duties of confidentiality can be rather vague. A code of conduct can provide an extra level of guidance to trustees, giving practical advice and examples.

“Trustees are expected to “apply or explain” the Charity Governance Code, so we would suggest that all charities should have a trustee code of conduct in place unless there is a good reason not to’

2. Should all charities have a trustee code of conduct in place?

The new Charity Governance Code sets out a range of governance-related standards that charities should aim to comply with. The code is divided into principles. One of the principles is ‘integrity’, and a recommended practice to demonstrate integrity is that ‘trustees adopt and adhere to a suitable code of conduct that sets out expected standards of probity and behaviour’.

The Charity Governance Code is not legally binding; however, it is based on a foundation of trustees’ legal duties and sets out best practice in relation to

governance. Trustees are expected to ‘apply or explain’ the code, so we would suggest that all charities should have a trustee code of conduct in place unless there is a good reason not to.

3. What should a code of conduct contain?

The content of a trustee code of conduct will depend on the nature of the charity itself, and the types of issues that the trustees will need to deal with. It is important that the code of conduct is realistic, relevant and clear.

A code of conduct will often deal with the following:

- **Integrity and honesty** – trustees agree to deal with colleagues and third parties with integrity and honesty.
- **Protection of reputation** – there may be a provision under which the trustees commit to protect the reputation of the charity. This can be quite specific: for example, there may be a defined process that trustees should follow when dealing with the media.
- **Personal gain** – a trustee code of conduct may go further than the provisions around trustee benefits in the charity’s constitution and can set out how and when a trustee may use the resources of the charity, claim expenses and accept gifts and hospitality.
- **Personal relations** – the code of conduct may contain rules around how the trustees act towards each other and charity staff, and may seek to clarify the relationship with the Chief Executive.
- **Attendance at board meetings** – the code of conduct may specify how a trustee should participate in board meetings: for example, by requiring the trustee to study materials circulated in advance of the meeting and arrive ready to participate in the meeting.

Find out more

If you would like to discuss putting in place a code of conduct for your charity, or would like us to help with a review of your existing code of conduct, please contact Rachael Chapman at r.chapman@bwblp.com or your usual BWB contact.

Automatic disqualification of charity trustees and senior managers

New rules on automatic disqualification come into force in August 2018.



Oliver Scutt

Associate
T: 020 7551 7689
o.scutt@bwbllp.com

Oliver is an associate in the Charity & Social Enterprise team. He has previously worked as internal legal counsel for 8 Miles LLP (private equity fund) and Triple Point (an investment management firm). He has experience in structured and project finance, venture capital and private equity, as well as general corporate/commercial work.

Oliver Scutt explains how charities can prepare for the changes

The remaining provisions of the Charities (Protection and Social Investment) Act 2016 will be coming into force on 1 August 2018. This has two main implications:

1. From 1 August 2018, the list of circumstances in which someone is 'automatically disqualified' from charity trusteeship will be significantly extended. The list currently includes circumstances such as bankruptcy, disqualification from company directorship, removal from charity trusteeship by the Charity Commission under certain statutory powers and unspent convictions for dishonesty and deception. From 1 August, it will also include unspent convictions for bribery, terrorism and money laundering and certain other circumstances, such as contempt of court and being on the sex offenders register.
2. Anyone automatically disqualified from trusteeship will also be automatically disqualified from being a 'senior manager' in a charity.

It is possible to apply for a 'waiver' from disqualification in some circumstances. Since 1 February 2018, individuals who are not currently disqualified but will be under the new rules have been able to apply for a waiver in advance of the rule change.

So, what should charities do now? The Charity Commission has published new guidance for charities which includes specific advice for charity trustees and senior managers and guidance on how to apply for a waiver.

In summary, key actions include:

1. identifying the circumstances that trigger automatic disqualification. The commission has published a useful summary of the existing and new circumstances;
2. identifying which posts are 'senior' – the commission's guidance includes very useful guidelines on how to identify a senior manager. In most cases, a charity is unlikely to have more than

two: the chief executive (or equivalent) and the chief finance officer (or equivalent);

3. ensuring that your recruitment procedures identify disqualified prospective appointees;
 4. checking whether existing trustees and senior managers will be affected. The commission suggests that trustees and senior managers should be asked to sign a declaration confirming they are not disqualified under the new regime before 1 August and at regular intervals thereafter.
- Charities can make use of the official individual insolvency register, the register of disqualified company directors and the register of charity trustees removed or disqualified by the commission to check the eligibility of their trustees and senior managers. The commission's guidance contains links to these registers; and
5. reviewing your employment or consultancy contracts for senior manager positions. (Charities may need legal advice about this.)

Where trustees and senior managers are affected, they – and the charity – should consider whether it would be appropriate to apply for a waiver. The commission's starting point when considering a waiver will be that a trustee should normally remain disqualified. However, it lists factors that will affect its decision, including where it may be positive to appoint a disqualified person, such as at a charity dealing with rehabilitation of offenders or having a high proportion of service users with criminal records.

You can find the commission's full guidance on waivers here: <https://www.gov.uk/government/publications/how-the-charity-commission-assesses-waiver-applications-and-makes-a-decision>

It will usually be an offence to act as a charity trustee or senior manager while disqualified, although there are some exceptions. The Charity Commission can also order the disqualified person to repay expenses, benefits, remuneration or benefits in kind from the charity.

Find out more

Charity Commission guidance on disqualification is at <https://www.gov.uk/guidance/automatic-disqualification-rule-changes-guidance-for-charities>

The information specific to trustees and senior managers is at <https://www.gov.uk/guidance/automatic-disqualification-rules-for-charity-trustees-and-charity-senior-positions>

Winning big

With increasing scrutiny of fundraising methods, charities have been looking for new approaches.



Molly Carew-Jones
Solicitor
T: 020 7551 7677
m.carew-jones@bwbllp.com

Molly is a solicitor in the Charity & Social Enterprise team where she advises charities, not-for-profit organisations and businesses with a social purpose on a range of issues. She specialises in advising on fundraising law, including commercial participation, professional fundraising, corporate sponsorship and society lottery regulation.



Hannah Lyons
Associate
T: 020 7551 7845
h.lyons@bwbllp.com

Hannah advises charities, social business and other not-for-profit organisations on a wide range of legal matters including charity formations, mergers and incorporations and constitutional and regulatory compliance. Hannah also has experience in advising on Intellectual Property and Data Protection law, and public sector contracting.

Molly Carew-Jones and Hannah Lyons explain what's involved in running a society lottery

One area of fundraising where we have seen a marked increase in activity is society lotteries – giving donors an opportunity to support a cause that they care about, as well as the chance to ‘win big’. Under the Gambling Act 2005, lotteries can only be run for good causes. A society lottery is a lottery that is promoted for the benefit of a non-commercial society, which includes charities as well as other not-for-profit organisations.

Before moving into a world of tickets, draws and prizes, there are a few key points that charities should consider:

■ Are you running a lottery?

The definition of a lottery includes more than your typical ‘weekly draw’. The Gambling Act defines a lottery as any activity where there is a requirement to pay to participate and one or more prizes are awarded by chance. This catches raffles as well as other games where skill is not required to win.

If a charity wants to offer its supporters the chance to win a prize, a lottery is not the only option available and there are ways to structure prize draws to make sure they fall outside of lottery regulation, for example by introducing an element of skill or having a free route of entry.

■ Do you need a licence?

Large society lotteries (as defined by the Gambling Act) need a Gambling Commission licence. Smaller lotteries are required to register with the relevant local authority. There are also various exemptions that allow certain lottery activity to take place without a licence, for example where a raffle is incidental to a charity dinner or a school fête. However, it is important that the charity is able to meet all of the requirements of any such exemption.

■ Which entity should hold the lottery licence?

Consideration should be given as to whether a lottery licence is best held by the charity or a trading subsidiary. Housing the licence within a subsidiary can help to isolate risk for the charity and can also manage potential VAT complications.

■ How are society lotteries regulated?

The rules relating to society lotteries are set out in the Licence Conditions and Codes of Practice (LCCP). The LCCP contains various caps on lottery income, expenses and prize funds, as well as rules designed to ensure responsible gambling and ongoing requirements to report to the Gambling Commission. Charities must ensure that they have appropriate procedures in place to comply with the LCCP or engage a licenced External Lottery Manager to take over these functions.

Recent changes to the LCCP

The LCCP is updated by the Gambling Commission from time to time and since April 2018, charities that operate society lotteries have been required to:

- make it clear to supporters before they buy a lottery ticket exactly which charity the lottery proceeds are going to; and
- publish what proportion of money raised from lottery ticket sales in the previous year was applied directly for the purposes of the society.

Charities can comply by including the relevant information in the charity’s annual report, on the lottery page of its website or by using any other means appropriate to the size and scale of the organisation. Organisations operating multiple lotteries under a shared brand will also need to make it clear to the public (on both advertising and lottery tickets) which society is benefitting under each draw.

As with all fundraising activity, these changes reflect a movement in the sector towards greater transparency.

Find out more

Gambling Commission guidance on society lotteries: <http://live-gamblecom.cloud.contensis.com/PDF/Promoting-society-and-local-authority-lotteries.pdf>

LCCP: <http://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/LCCP/Licence-conditions-and-codes-of-practice.aspx>

Brexit: ‘Nothing is agreed until everything is agreed’

Charities may not have been among the sectors consulted on Brexit but the changes will hit them all the same.



Philip Trott
Partner
T: 020 7551 7722
p.trott@bwbllp.com

Philip is a partner in the Immigration department. He is recognised as a leading expert in both business and personal immigration and was one of the first lawyers to specialise exclusively in immigration law.

Philip Trott advises charities and social enterprises to be mindful of the latest negotiations when considering their EU employees’ future in the UK

Almost two years after the UK voted to leave the EU, negotiators from the two sides published a joint report setting out, among other areas, the agreement reached on the controversial issue of protecting the rights of EU nationals in the UK post-Brexit. On 19 March 2018, UK and EU negotiators agreed terms for the Brexit transitional period, set to last from 29 March 2019 until 31 December 2020.

What has been ‘agreed’ so far?

Firstly, it is important to note the caveat in the report: that ‘nothing is agreed until everything is agreed’. Although the report reflects agreement ‘in principle’ on key issues of citizens’ rights following Brexit, nothing is set in stone until final agreement is reached in all matters pertaining to the UK’s withdrawal and those agreements are enshrined in law.

Keeping that in mind, what does the post-Brexit landscape look like for EU nationals hoping to come and live in the UK?

The Prime Minister Theresa May has guaranteed on 19 October 2017 that EU nationals currently living ‘lawfully’ in the UK would be able to stay here. The joint report builds on this and separates EU nationals into categories depending on when they arrive(d) in the UK. The determinative date will be 29 March 2019, the date of the UK’s formal withdrawal from the EU.

Currently, EU nationals who have been living in the UK for five continuous years (as workers, self-employed, students, job-seekers or self-sufficient) automatically acquire ‘permanent residence’ status which allows them to remain in the UK indefinitely and apply for British citizenship after one year of further lawful residence. A new ‘settled status’ will be introduced to replace permanent residence. This is intended to involve a streamlined, low-cost and user-friendly application process.

Those who have been continuously and lawfully living in the UK for five years by 29 March 2019 will be able

to obtain settled status and stay in the UK indefinitely. Those arriving in the UK by 29 March 2019, but who have not been here for five continuous years, can apply to stay in the UK until five years have elapsed and then apply for settled status.

Family members who live with or join EU nationals in the UK by 29 March 2019 will also be able to apply for settled status after five years here.

The latest development has been that EU citizens arriving in the UK during the Brexit transitional period will have ‘the same rights and guarantees’ as those who arrive before 29 March next year.

Questions left unanswered

EU negotiator Michel Barnier referred to the transitional compromise agreement as a ‘decisive step’ towards an overall deal but noted that it remained only a step in an on-going process. Further negotiations will focus on the nature of the permanent future relationship between the EU and UK.

EU nationals concerned about their status in the UK post-Brexit should take advice before the new settled status system is introduced. In particular, those who have already acquired permanent residence should obtain a permanent residence card to prove that they are entitled to apply for the new settled status immediately.

Remember, nothing is agreed until everything is agreed!

Find out more

The joint report setting out the agreement reached on protecting the rights of EU nationals in the UK post-Brexit can be found here:

https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en

Theresa May’s open letter on EU nationals can be found here: <https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>

Grants, contracts and VAT

In this focus on tax issues relating to charities we look at new guidance from HMRC on the VAT implications of payments to charities – are they grants, which are outside the scope of VAT – or fees, which are potentially subject to VAT?



Bill Lewis
Consultant
T: 020 7551 7830
b.lewis@bwblp.com

Bill has 30 years' experience working in tax. He advises on all aspects of taxation affecting charities, including VAT, PAYE and corporation tax.

Bill Lewis reviews HMRC's new guidance on the issue

Most people who work for the sector will at some point need to ask themselves whether a payment their organisation receives is a grant outside the scope of VAT, or a fee and so potentially subject to VAT. There is no statute law that determines the position, instead consideration must be given to the facts behind a payment, the precedents set in case law, and who, if anyone, benefits from the work funded.

HMRC has recently expanded its guidance on this question in its Supply and Consideration Manual. The new guidance is far more detailed than its predecessor, which is welcome. HMRC lists factors that indicate a payment is outside the scope of VAT, or a fee paid in consideration for a supply, but does not appear to regard any one factor as outweighing any other. It sees the issue as one of overall perception; the more tests on either side that are met then the more likely the payment is a grant or fee. It still leaves much to individual judgement to see which way the VAT treatment falls in any given circumstance.

My approach when considering whether a payment is a grant or fee is to ask 'who benefits from the payment'? If there is a clear benefit to the funder, or to named individuals, then we are usually looking at a supply of services, potentially subject to VAT. Where the funder does not gain any tangible benefit, and the real beneficiary of the funding is either the recipient or the wider general public, then we are usually looking at a grant outside the scope of VAT.

With this in mind, I take the view that if a payment is to help the funder fulfil their own legal or statutory responsibilities then it cannot be a grant but must be consideration for a supply of services and therefore a fee. There is a clear benefit to the funder. However, where a payment is made because the funder would like something done but appears to have no clear benefit from that, then the payment is not a fee but is a grant.

Once you have answered that question then most other issues fall away. I think that a 'totting up' exercise of arguments for and against a payment

being a grant in order to determine the VAT treatment is incorrect. For me it is the overall intention behind a payment and who benefits that counts.

A particular problem can occur when the funding comes from a government organisation. HMRC says: 'The majority of grants originate from central or local government and are given to organisations to support specific community activities or initiatives to benefit the public. This type of funding helps government to achieve its aims by enabling others to provide a wide range of activities and avoids government directly managing projects.'

'I think that a "totting up" exercise of arguments for and against a payment being a grant in order to determine the VAT treatment is incorrect. For me it is the overall intention behind a payment and who benefits that counts'

HMRC, therefore, clearly generally regards government-funded grants as being provided for the benefit of the wider public and not as a fee for the provision of services. This should be the case even when the recipient of the funding applies under tender and is tied by a firm results-driven agreement. However, as mentioned above, this would not be the case where the funder is paying for an activity they are legally obliged to carry out.

Overall, I believe the new guidance is to be welcomed, but I am afraid it still leaves too much to the judgement of the recipient of funding.

Find out more

HMRC's Supply and Consideration Manual:
<https://www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vat-sc51600>

Charities and trading subsidiaries

In the second of our articles on tax, we look at new Financial Reporting Council guidelines that have changed the accounting treatment of gifts of profit from wholly-owned trading subsidiaries to their parent charities.



Susan Shi
Solicitor
T: 020 7551 7902
s.shi@bwbllp.com

Susan recently joined BWB from Linklaters, where she specialised in tax law. She advises a range of third sector organisations on general charity law and tax matters.

Bill Lewis and Susan Shi summarise the changes and their implications

Many charities are structured so that part of their operations (typically non-charitable trading activity) is carried out via a wholly-owned, non-charitable trading subsidiary. The trading subsidiary is liable for corporation tax on its profits, but can usually avoid or reduce a tax bill by paying all or part of those profits to its parent charity under gift aid, within nine months of the end of the relevant accounting year.

Changes to accounting treatment

In December 2017 the Financial Reporting Council published a series of amendments to Financial Reporting Standard 102. These amendments have been phrased as 'clarifications', rather than changes, so they have immediate effect.

The amended guidelines change the way gifts of profit from a trading subsidiary to its parent charity are accounted for. Under the revised guidelines, until a gift is actually paid to the parent, or until there is a 'legal obligation' to make the payment, the gift cannot be recognised in the profit and loss account of either the parent or the subsidiary.

The legal obligation to pay a the subsidiary's profits to its parent must exist by the subsidiary's 'reporting date', which is the last day of the accounting year in which the profits arose. If no legal obligation exists, and the subsidiary does not make the gift of profit before its reporting date, then the gift payment can only be shown in the accounts for the year in which the gift is actually made. This applies even if at its reporting date the subsidiary 'expected' to make the gift, and does in fact make it within nine months of this date.

It is unclear precisely what steps need to be taken to create this 'legal obligation', but evidence of past practice and board meetings to approve a future payment will no longer be enough. The consensus among the accounting industry is that a Deed of Covenant, under which the subsidiary covenants to pay all or part of its profits to its parent, is the safest way to ensure that a legal obligation is created.

No changes to deferred tax treatment

The tax treatment of gift aid payments is not affected by this change. As long as it is 'probable' that the subsidiary's profits will be paid to the parent within nine months of the end of the reporting date, then there is no need to recognise a deferred tax liability on those profits in the accounts.

No changes to actual tax payments

The actual tax to be paid also remains unchanged. If the subsidiary actually gives its profits to its parent within nine months of the accounting year in which they were made there will be no tax to pay on those profits.

The next steps for charities and their trading subsidiaries

If charities and their trading subsidiaries want to account for gifts of profit from the subsidiary to the parent in the year the profits were made, but the gift will not be paid to the parent until after the year end, they should ensure that they have Deeds of Covenant or Deeds of Gift in place.

Find out more

Please contact Bill Lewis, Susan Shi or your usual BWB contact for advice on how your charity may be affected.

The Charity Commission's new regulatory powers two years on

The Charities (Protection and Social Investment) Act 2016 conferred new powers on the Charity Commission.



Emma Knuckey
Consultant
T: 020 7551 7790
e.knuckey@bwbllp.com

Emma has been advising on charity law since qualifying as a solicitor in 2002. Before joining BWB, Emma worked at the Government Legal Department (formerly the Treasury Solicitor's Department) and also spent seven years as an in-house lawyer at the Charity Commission.



Megan Read
Solicitor
T: 020 7551 7835
m.read@bwbllp.com

Megan advises charities, social enterprises and educational institutions on a variety of commercial, charity law and education law matters including formation and registration, constitutional and regulatory compliance, academy conversions and transfers and general charity and company law.

Emma Knuckey and Megan Read look at the use of those powers since their introduction

The Charities (Protection and Social Investment) Act 2016 ('the Act') introduced a range of new regulatory powers for the Charity Commission, including:

- a new power to issue an 'official warning' to charities or charity trustees;
- a new power to disqualify a person from serving as a charity trustee or senior manager of a charity;
- the ability to remove a disqualified trustee from office;
- additional powers to direct that charity property is used in a certain way, without opening a formal statutory inquiry;
- additional powers once the Charity Commission has opened an inquiry.

Some in the sector were concerned that the legislation did not contain sufficient safeguards, particularly the official warning and discretionary disqualification powers. We do not yet know exactly how often the new powers have been exercised, but at the time of writing details of three official warnings and four discretionary disqualification cases have been published.

Official warnings

The new power to issue – and publish – an official warning to charities or charity trustees where the commission believes there has been misconduct or mismanagement, or a breach of trust or duty, came into effect on 1 November 2016. The three warnings published by the commission to date are:

- **The National Hereditary Breast Cancer Helpline**
This was the first use of the power, so attracted a lot of media interest. The commission's concerns were around unauthorised payments to the founder, who was chair of trustees, and an informal loan agreement to one of the trustees; improper delegation of the administration and management of the charity; failure to keep proper minutes and other records of decision making and failure to properly implement and manage financial controls.

The commission had previously issued an action plan to the charity about these issues, which had not been adequately complied with.

- **Gurdwara Guru Nanak Parkash (Coventry)**

The trustees of this Sikh Temple were issued with an official warning for failure to manage the charity effectively. This included the failure of the trustees to work together and implement decisions in the best interests of the charity; failure of the trustees to manage charity property responsibly; failing to take adequate steps to prevent the circulation of views or material that could be seen to be inappropriately political or extremist in nature on its premises; and exposing members of the charity and its trustees to an undue risk of harm from repeated disruption on charity premises that had required police presence on a regular basis.

The commission had provided regulatory advice and guidance to the charity, which had not been followed, before the warning was issued.

- **The Islamic Trust (Maidenhead)**

The commission issued an official warning in respect of the trustees' failure to submit the charity's annual report and annual return. The charity had repeatedly failed to file annual accounting information so had previously been the subject of a statutory inquiry.

It is notable that in all three cases, the commission had previously engaged with the charity in some way, but as the problems had then continued, the commission had decided to issue and publish the official warning as the next step.

Powers to disqualify and remove trustees

The Act introduced a new discretionary power, in force from 1 October 2016, for the commission to disqualify a person from being a charity trustee of any charity, or of specific charities or types of charity. The person is also disqualified from being a senior manager in a charity (or the specified charities). The Act also introduced a power for the commission to remove a charity trustee if they have been disqualified from acting as a trustee, closing a loophole in the existing legislation.

Here are three examples of where the commission has used its new discretionary power to disqualify:

■ **Anatolia People's Cultural Centre**

The commission was informed by the police that this charity's premises had been searched as part of a counter terrorism investigation. A trustee was arrested on suspicion of terrorism offences and the charity's premises were closed by a court order. The commission opened a statutory inquiry and investigated concerns about the trustees' management of the charity, including that the trustees had failed to file accounting information for five consecutive financial years. The charity's premises had been used to display inappropriate images of individuals associated with extremist activities and the trustees were found to have failed to prevent the display of these images.

The commission's investigation found that the charity did not have a bank account, despite the fact that the charity was receiving donations and paying rent and utilities in cash. This, coupled with the trustees' failure to take any steps or actions to challenge the closure order or to recover any of the property that was held at the premises, and their failure to challenge negative media reporting about the charity, led to a finding of misconduct and/or mismanagement by the trustees.

The Charity Commission suspended the trustee charged by the police and later removed her from office, meaning that she was subject to automatic disqualification as a trustee for life. The commission used its new discretionary power to disqualify the five other trustees for a period of 10 years and also removed them as trustees of the charity under its separate new power to remove a disqualified trustee.

<https://www.gov.uk/government/publications/charity-inquiry-anatolia-peoples-cultural-centre/anatolia-peoples-cultural-centre>

■ **Peacetrail**

In this case the commission used its new power to disqualify the CEO of the charity from being a trustee or holding a management position in a charity for four and a half years.

<https://www.gov.uk/government/publications/charity-inquiry-peacetrail/charity-inquiry-peacetrail>

'To date, it seems that concerns that the commission's new powers would be over-used have not yet come to fruition, and that the exercise of new powers has been restricted to some of the most serious cases, or where charity trustees have not complied with previous regulatory advice or guidance'

■ **Deen Team**

This charity was subject to a statutory inquiry, which found serious failings, including poor financial management and mismanagement in the charity's administration. The trustees had failed in their legal duties, including by failure to keep sufficient accounting records or to submit accounts and annual returns and failure to comply with the governing document regarding trustee meetings and accounting records. The commission disqualified one of the trustees from being a charity trustee for four years and removed her as trustee of the charity.

The other trustees were not disqualified. Factors that distinguished the disqualified trustee from the other trustees were: she had been a trustee for the longest period; had been in post when the commission had provided regulatory advice and guidance to the charity, which was not followed; had failed to cooperate with the commission; had a payment of £2,000 of charity funds made to her with no evidence that it had been used for charitable purposes; and had been a trustee when the charity's premises was assigned to a separate company, resulting in a loss to the charity.

<https://www.gov.uk/government/news/individual-disqualified-as-trustee-for-4-years-after-failure-to-evidence-how-charity-funds-were-used>

<https://www.gov.uk/government/publications/deen-team-inquiry-report>

To date, it seems that concerns that the commission's new powers would be over-used have not yet come to fruition, and that the exercise of new powers has been restricted to some of the most serious cases, or where charity trustees have not complied with previous regulatory advice or guidance.

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



Emma Knuckey
Consultant
T: 020 7551 7790
e.knuckey@bwbllp.com

Before joining BWB, Emma spent seven years as an in-house lawyer at the Charity Commission providing legal advice to the commission's various caseworking teams regarding charity law, company law, administrative law, information law and litigation.

Charity Commission

Appointment of Chair

Baroness Stowell was confirmed as the new Chair of the Charity Commission from 26 February 2018, for three years.

She delivered her first major speech as chair at the NCVO Annual Conference in April. The focus of the speech was the fall in public trust and confidence in charities and the commission's role in helping to restore it.

Consultation on Complementary and Alternative Medicine

The commission has published a summary of key themes from the feedback it received from its Consultation on Complementary and Alternative Medicine, which ran between March and May 2017, as part of a review of how it decides whether organisations that use or promote complementary and alternative medicine (CAM) therapies are charities: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670555/The_use_of_complementary_and_alternative_medicine_Feedback_2017.pdf

The commission received more than 670 written responses to the consultation, which it said was far in excess of the number usually received for a commission consultation. It also held two discussion events for organisations with a particular perspective on the issues.

Given the high number of responses, and the amount of detail in some of them, the commission says it has taken longer than anticipated to analyse the responses. The commission is continuing with its review of existing policy in respect of the registration of CAM organisations as charities. That review will result in a decision as to whether the commission's current approach to CAM should be changed, and if so, what changes should be made. The responses received to the consultation will be considered as part of that review, in conjunction with other information, assessed against the legal framework governing charitable status.

Updated Regulatory and Risk Framework

The commission has published this new document, replacing the previous Risk Framework: <https://www.gov.uk/government/publications/risk-framework-charity-commission>

The significant changes to the body of the document are:

- there is a greater emphasis on the importance of understanding risk in the charity sector;
- there is a slightly stronger emphasis on the commission's proactive regulation;
- there is a greater emphasis on the nature of the commission as a public body, the importance of best regulatory practice, and on the commission's own objectives; and
- the revised wording demonstrates a greater stress on the importance of trusteeship.

The Annex (now Annex 1, and now found on the landing page, rather than in the main document) has been amended with the addition of new 'priority regulatory risk issues' under each of the following headings:

- **Fraud and financial abuse** – Fraud and other financial abuse of charities (including abuse arising out of conflicts of interest), including money laundering.
- **Safeguarding** – Serious harm to, and the abuse of, children or adults in connection with a charity and/or the failure by a charity that works with or has regular contact with children or adults at risk to have adequate and effective safeguarding policies and procedures in place. Lack of registration with another regulator where that is required has been added as a potential risk indicator to this category.
- **Terrorism and extremism** – Misuse of a charity for terrorist purposes or to promote extremism (including charity links with or support for terrorism, financial or otherwise, and/or connections to a proscribed or designated organisation, person or entity).
- **Public trust and confidence** – Other significant breach of trust, non-compliance or decisions made

by charity trustees that significantly affect public trust and confidence in charity. Conflicts of interest not being managed correctly has also been added as a potential risk indicator under this heading.

Charity Tribunal

In the First Tier Tribunal (Charity), a trustee of the charity Jole Rider Friends, Mr Swettenham, was unsuccessful in his appeal against orders made by the Charity Commission restricting transactions through the charity's main bank account and an associated bank account at Lloyds Bank, and restricting the use of its credit card without the Charity Commission's prior authorisation: <http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%2010%20January%202018.pdf>

Mr Swettenham and his partner have been the only trustees of this unincorporated charity for most of its existence and have been paying themselves for acting as directors without authorisation for such payments under the charity's constitution or by the Charity Commission. The commission's view is that there has been unauthorised remuneration to the two trustees totalling approximately £200,000. The commission therefore opened a statutory inquiry and made the two orders as temporary protective measures as it was concerned that Mr Swettenham and his partner would continue to pay themselves.

No appeal was lodged against the opening of the inquiry itself; this appeal against the orders required the tribunal to 'consider afresh' the commission's decision to make them. In doing so, the tribunal was able to consider evidence that has become available subsequent to the making of the orders.

The tribunal refused the appeal on the basis that it was satisfied that the commission's orders represented a proportionate response to the situation the charity was in, by preventing unauthorised expenditure, but allowing for legitimate expenditure.



Bates Wells Braithwaite

10 Queen Street Place, London EC4R 1BE

T: +44 (0)20 7551 7777

www.bwbllp.com

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



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