

CHARITY AND SOCIAL ENTERPRISE UPDATE

AUTUMN 2019

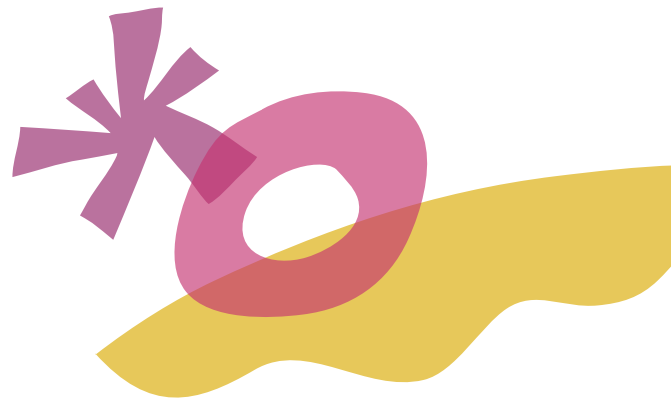
Certified



Corporation



In brief



In this edition, we have a specific focus on the challenges of charity leadership, starting with **Philip Kirkpatrick's** proposal for a new model of governance that places legal responsibility with those who are actually running charities (*page 3*).

Both charities and social enterprises play a vital role in the emerging impact economy, say **Luke Fletcher** and **Phillippa Holland** (*page 5*).

The climate emergency has now gone mainstream, and is a priority for many charities, not just those focused on environmental issues. **Mark Abbott** looks at how charities can get involved (*page 6*); while **David Hunter** outlines Bates Wells' own response to the climate emergency (*page 7*). **Jess Collings** provides a useful overview of the rules for charities looking to support political activity (*page 8*).

Charity leaders have to deal with multiple, complex issues including ensuring that the right people are in place to take the charity's purposes forward. **Tesse Akpeki** reports on new research on the importance of mapping talent to value (*page 10*); while **Victoria Cook** describes the key issues when investigating an issue that arises in your workplace or wider charity culture (*page 11*).

One of the most complex decisions leaders may need to grapple with is whether to set up an overseas base. **Ben Thomas** and **Augustus Della-Porta** introduce some of the important considerations involved in the decision (*page 13*).

In our look at the financial governance issues charity leaders face, **Laura Soley** and **Charlotte Blackburn** uncover the initiative to revitalise dormant charity funds (*page 15*); and **Rachael Southern** highlights the thorny issue of when to refuse donations in her update on charity fundraising (*page 16*). **Lucy Rhodes** and **Pippa Garland** find that the drive towards transparency will have implications for charitable trusts and charitable companies (*page 17*); and **Susan Shi** explains why HMRC is targeting 3,000 charities to send in corporation tax returns (*page 18*).

In our regular client focus we look at the work of Prisoners of Conscience (*page 19*).


Facebook is in trouble again for its data privacy. **Lucas Atkin** looks at the implications for charities and social enterprises using audience programs (*page 20*). **Catharina Waller** advises charities to consider their options when another organisation has a similar name (*page 21*).


Finally, in our regular roundup section, **Keya Advani** and **Jess Neville** look at the latest from the Charity Commission (*page 22*).


Inside

A new governance model	3
Impact economy	5
CLIMATE FOCUS	
Climate activism	6
Bates Wells response	7
Campaigning	8
Governance	10
Investigations	11
Going international	13
FINANCIAL GOVERNANCE	
Dormant funds	15
Fundraising	16
Transparency	17
Tax returns	18
Prisoners of Conscience	19
Facebook	20
Name registration	21
Charity Commission roundup	22

Follow us on:

 [@BatesWellsTweet](https://twitter.com/BatesWellsTweet)

 [@BatesWellsChaSE](https://www.linkedin.com/company/bates-wells-linked-in)

 <https://www.linkedin.com/company/bates-wells-linked-in>

Previous updates are available at:
www.bateswells.co.uk/insights

To update your contact details or mailing list preferences please contact the Marketing Department at:
BDM@bateswells.co.uk

Front cover image provided by
Prisoners of Conscience

Assured Unitary Governance – a new model

Is it time to place legal responsibility with those who are actually running charities?

Philip Kirkpatrick makes the case for a new governance model that acknowledges the increasingly complex environment in which charities operate.



Philip Kirkpatrick
Deputy Managing Partner
and Head of Charity

T: 020 7551 7762
p.kirkpatrick@bateswells.co.uk

Philip helps clients with their difficult commercial and governance issues, always recognising that these are human as well as legal matters.

Whenever anything goes wrong in a charity in a way that reaches the public ear, people freely express their views about what the trustees did or did not do that led to this particular sorry state of affairs. Too little credit is given to the trustees who actually faced those circumstances and too few of us ever ask what we would have done in their shoes.

It reminds me of Theodore Roosevelt's famous 'man in the arena' speech, which begins:

'It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes up short again and again...'

One reason why trustees come up short is that the measures against which they are judged are unreasonable. This is particularly so in large, complex charities that have a sizeable workforce doing specialist work; but my criticism of the current model of charity governance is also applicable more widely.

The Charities Act 2011 tells us that the charity trustees are the people 'having the general control and management of the administration of a charity'. If you have ever had the general control and management of the administration of any business, you will know that it is a full-time job. And yet, at the helm of these complex charities we appoint a range of skilled and less skilled people and ask them to undertake this task on a part-time, generally unremunerated basis.

We tell them to develop strategy and policies, when they are, on the whole, less competent to do so than the staff they employ, without whose support an effective strategy and suitable policies are unlikely to emerge.

We tell them that they should not get

involved in day-to-day management – but that they have to ensure that this management is undertaken properly. How? How do they get the assurance that they need? Where do they obtain it from when even a statutory audit does not now provide sufficient assurance?

We ask them to do all this on the basis of a quarterly – or monthly at the very most – board meeting, with little if any involvement in the charity's daily activities.

We tell them they are responsible if it all goes wrong and we make them carry the can when it does.

And we ask them to do it with no reward except their own satisfaction in having tried to do something good for society.

At the same time, we pretend that the people who are actually running the charity, the paid senior executives, are not in fact responsible – are not acting as trustees.

A new model of governance

It is my view that, essentially, the model we currently use is unfair on trustees. And all too often it does not work effectively. I have therefore proposed a completely new model, which I have called 'Assured Unitary Governance'. It is intended to be just one model among many.

Assured Unitary Governance recognises that those who are actually running the charity (the senior staff, often with 'director' in their job title) are the people 'having the general control and management of the administration of [the] charity' and it calls *those* people the trustees. Alongside these there would be a non-executive chair, normally recruited externally, and another non-executive 'senior independent trustee' serving on the board of trustees. Both of these could (but need not) also be paid to take on the significant responsibilities and time commitment that society now expects of trustees.



‘Those staff members who currently run large, complex charities would continue to run them, but would have the added regulatory burden, as well as the authority and the regulatory certainty, of being charity trustees.’

Separately, there would be an entirely unpaid ‘assurance board’. The members of this ‘board’ would actually be, or be incorporated within, the membership of the charity. They would not be trustees and would *not* have trustee responsibilities. The assurance board’s powers and responsibilities may depend on the legal structure of the charity, but might include:

- appointing the trustees from among candidates proposed by the board of trustees;
- approving the remuneration of all trustees and the granting of any other benefit to trustees;
- authorising any arrangement in which all of the trustees are conflicted;
- receiving annual reports and accounts;
- providing advice and support to the trustees on an ad hoc basis; and
- power to remove trustees.

In large part, the assurance board would perform the functions that most trustees of large, complex charities currently think they are performing, such as providing support and guidance to the executive, bringing to that support the particular skills and experience they have. But, unlike charity trustees, the assurance board’s powers would not render them legally responsible for the management and governance of the charity. The prospect of them incurring any legal liabilities would be extremely remote. Having said that, the assurance board members would need to be deeply informed about the work of the charity – probably with quarterly meetings – and would be chosen with care, like trustees.

Members of the assurance board would appoint their own successors or, if there was a wider membership, those appointments could be recommended by the assurance board members and approved by the wider membership.

Accordingly, those staff members who currently run large, complex charities

would continue to run them, but would have the added regulatory burden, as well as the authority and the regulatory certainty, of being charity trustees. Those people who do not actually run such charities on a day-to-day basis, but are currently being held to account for doing so as trustees, would be able to provide some of the oversight and assurance that the word ‘trustee’ signifies. But they would no longer be held to unreasonably high standards by regulators and the public in respect of a task that they cannot reasonably be expected to perform.

This model does not offend principles of English and Welsh charity law, although Charity Commission consent is likely to be required for an existing charity wishing to adopt it. It would, however, be more difficult for charities registered in Scotland, because Scottish legislation prohibits payment of a majority of trustees without court approval.

FIND OUT MORE

The Assured Unitary Governance model has received some attention in the charity press.

<https://www.civilsociety.co.uk/news/broken-governance-model-for-large-charities-needs-radical-reform-says-lawyer.html>

<https://www.thirdsector.co.uk/recognise-reality-pay-trustees-large-charities-says-charity-lawyer/governance/article/1526340>

The impact economy

Who's making the impact economy happen, and how?

Luke Fletcher and Phillippa Holland explain the impact economy and the role that charities and social enterprises can and do play.



Luke Fletcher Partner

T: 020 7551 7750
l.fletcher@bateswells.co.uk

Luke co-leads the firm's Impact Economy practice and advises clients seeking to have a positive social impact through their business and other activities.



Phillippa Holland Impact Economy Knowledge Lawyer

T: 020 7551 7895
p.holland@bateswells.co.uk

Phillippa has spent most of her career working with charities, social enterprises and mission-led businesses. She supports our Impact Economy practice and clients by sharing know-how, market developments and sector intelligence.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | AUTUMN 2019

In its simplest form, 'impact economy' refers to commercial activity that takes a 'triple bottom line' approach, with the aim of benefitting society and environment at the core of commercial strategy, alongside financial success.

Like any tool, business can be used recklessly without regard for negative impacts, or it can be used constructively as a force for good. The global movements of social enterprise and B Corps are testament to the potential of impact business.

In fact, it's not possible to address the biggest challenges the world faces without businesses on board. To achieve the UN Sustainable Development Goals and address the threat of serious environmental degradation, much greater investment and innovation will be required from all corners.

In the impact economy there are different types of businesses, including certified B Corps such as Bates Wells, benefit corporations, social enterprises, cooperatives, and other businesses that have made a substantive commitment to creating positive social and environmental impact.

However, the impact economy is about more than business operations, and there are many other actors involved, including public sector entities, charities, investors and their intermediaries. They may engage in impact economy activity through the provision of products and services; for example, many charities or their trading subsidiaries provide goods and services designed to further their public benefit purposes.

Some civil society organisations are strong advocates on impact economy issues. For example, the Ellen MacArthur Foundation works to stimulate development of a circular economy, which eschews linear resource consumption in favour of regenerative models. The Blueprint Trust helps business to be guided by a purpose that benefits society, through its 'Blueprint for Better Business' principles

and framework. And the Ethical Trading Initiative is a membership body working with companies to promote workers' rights and ethical supply chains.

Other organisations support innovation and the development of impact economy participants. For example, UnLtd and School for Social Entrepreneurs provide significant support to develop social entrepreneurs, Bethnal Green Ventures incubates and invests in tech-for-good start-ups, and Nesta promotes innovation for some of the biggest social challenges by offering expertise, funding and help with impact measurement.

Impact investment

Impact investing is a driving force within the impact economy; this refers to investments made with the intention of creating specific social or environmental impact. Charities are engaged in developing this space; for example, CAF (Charities Aid Foundation) provides investment into social enterprises and charities, and helps charities to develop their own investment practices.

Schemes such as donor-advised funds help philanthropists and trusts provide capital for impact investment. And there is a growing number of financial institutions and intermediaries, and private organisations such as family offices, channelling investment into impactful organisations and projects.

Fundamentally, it should be recognised that, while business has a big role in developing the impact economy, charities and social enterprises are the original impact organisations, with social purpose at their core, reflected in their governance and by which they are held accountable. They have a long history of learnings and unique capacities and insights, with which they contribute to our understanding, across the impact economy, of what it means to be an organisation with impact.

For information on Bates Wells' work in this area see <https://bateswells.co.uk/sectors/impact-economy/>

The new wave of climate activism

The climate crisis has gone mainstream, with many charities now seeing this as a priority. But the tactics of some campaigners have raised questions for charity leaders about the risks of supporting climate change campaigns.

Mark Abbott looks at how charities can get involved.



Mark Abbott Associate

T: 020 7551 7714
m.abbott@bateswells.co.uk

Mark is an associate in our Charity and Social Enterprise department. He has a broad practice aimed at charities and social purpose organisations, spanning governance and constitutional advice, charity law, political campaigning activity, company law, trusts and information law.

For many years, environmental charities have campaigned tirelessly to build public awareness of the challenges faced by humanity as a result of climate change. But during the past year the civil disobedience campaigns of Extinction Rebellion and the school climate strikes instigated by Greta Thunberg have helped to generate the mainstream public recognition that this existential crisis deserves.

Climate change isn't just a priority for charities with environmental purposes. Trustees of other charities might reasonably believe avoiding climate catastrophe is essential to relieve poverty, protect health, save lives and advance human rights, for example. But charities may be concerned about the extent to which they are able to support organisations and movements whose tactics are rooted in civil disobedience.

Campaigning and political activity

As Jess Collings explains in the article on page 8 of this Update, it's well established that charities can engage in campaigning and political activity, aimed at securing or opposing changes in law or government policy, to further a charitable purpose (such as protecting the environment).

The position is more complicated where a charity wants to support any activity that may be seen as contrary to public policy, or is even unlawful (such as blocking roads, or permitting children to take unauthorised absence from school). These actions can be an intrinsic part of peaceful civil disobedience.

To what extent can charities support civil disobedience?

It is commonly accepted that unlawful activity may well result in reputational or other risks to a charity. Direct support for civil disobedience is particularly likely to be high risk and charities considering this approach would be wise to take advice.

However, there will be various other ways that charities might engage with this

new wave of environmental activism. For example:

- A public expression of support can be very helpful and costs little. Support can be expressed in ways that limit reputational risk to the charity – for example, tweeting about the school protests, Jeremy Corbyn stated that 'it's inspiring to see them making their voice heard today': expressing support for the children's activism while stopping short of being seen to advocate truancy.
- Similarly, charities may decide that publicly declaring or recognising the climate emergency is an effective way to lend support to the movement, with little implication for the charity's resources. They would, of course, need to be able to justify how such an action furthers their charitable purposes.
- If a charity wishes to provide financial support, this could be provided on a restricted basis, to support lawful campaigning activities. Or funds could be provided indirectly – by providing transportation, accommodation or training for activists, for example. In this way, the charity can retain control of the support it is providing and avoid allegations that it has supported more controversial, unlawful activities.
- Some charities are affiliated with other, non-charitable campaigning organisations, which might be willing and able to provide more active support for higher risk activism.

With any of these actions, trustees will need to consider the potential reputational implications of being associated with campaigns that involve civil disobedience. But trustees of environmental charities may naturally be equally concerned by the reputational risks of failing to engage with grassroots movements that have captured the public imagination.

Bates Wells' response to climate and ecological breakdown



David Hunter Consultant

T: 020 7551 7684
d.hunter@bateswells.co.uk

David's focus is on the social economy, spanning everything from how businesses can flourish while acting more responsibly, to how the state can improve procurement of services for the public good; from how investors can achieve social as well as financial returns from their investments, to how civil society organisations can prosper. In the midst of the climate emergency, the sixth extinction and imminent soil and water crises, David is committed to working with organisations actively looking to implement paradigmatic change, not just modest amelioration of the current system.

And so, we find ourselves living the parable of *The Emperor's New Clothes*, with a young Swedish girl speaking truth to power and shattering the social convention that while climate change might be grudgingly acknowledged, it does not demand we make significant changes to how we live – yet.

Of course, it is not just a case of clear-sighted youth. The Intergovernmental Panel on Climate Change spelt the position out starkly in their report of October 2018: we have 12 years to reduce our carbon emissions by 45% or we fail to contain temperature increases to 1.5 degrees and risk moving into the territory of feedback loops causing accelerating climate breakdown and all the social consequences that will flow from that.

2030 is not far off. It is about as far into the future as the financial crisis is in the past – and that does not feel long ago at all so, to use a legal phrase, time is of the essence.

Bates Wells is committed to positive impact: supporting our clients and colleagues to achieve it and to deliver it ourselves. It was quickly apparent to us that failure to respond urgently to the climate emergency would undermine any positive impact we might be creating in other ways. We did ask ourselves who are we to presume we can make a difference? We also asked whether it is possible to adopt meaningful and consistent positions on this issue when so much of our lives is already driven by energy sources, technologies and behaviours which are contributing to the problem we are seeking to address?

Our answer to the first of these was that we won't make a significant difference on our own, but if we wait for others to take the lead we are sleepwalking to disaster. If we do what we can – with humility, but with an invitation for others to do likewise – the collective impact may matter. On the second, we have to acknowledge that it will not be possible (in the short term) always to be consistent, but engaging with these challenges with good intent

is preferable to avoiding them, given the consequences.

In either case, if we consider what we want the world to be like in 2030, there is an overwhelming preference for somewhere that has clean air and water, flourishing flora and fauna, sufficient food and healthy people, and peace and harmony. So, what can we do to help that happen?

Bates Wells' answer is the commitments contained in our Climate Emergency Declaration. This includes reducing our own carbon emissions to net zero in 2019; using the law to deliver positive change; and actively collaborating with others to have greater impact. We will involve all our people in decision making, support them in making changes in their personal lives and report on how effective we are being. Underpinning all of this is a recognition that business as usual is the road to failure and we have to seek actively and be open to new ways of living and working.

The Emperor's New Clothes moves swiftly from the child's intervention to a happy ever after. It won't be so straightforward in real life, but already we share the sense of relief and a weight lifted that comes across in the story that now we can engage seriously with the reality we face.

Bates Wells' Climate Emergency Declaration can be seen here <https://bateswells.co.uk/2019/09/bates-wells-formally-recognises-climate-emergency/>

Supporting political activity

With the recent wave of environmental activism and the turbulent political climate, charity leaders need to be aware of the rules for charity grant-funders looking to support political activity.

Jess Collings provides a useful overview of this complex area of charity activity.



Jess Collings Solicitor

T: 020 7551 7649
j.collings@bateswells.co.uk

Jess works across both the Dispute Resolution and Charity teams, with a particular focus on all things political. She advises political parties, candidates and campaigners on election rules, internal disputes, regulatory issues and getting their message across effectively while complying with the legal frameworks that apply.

While 'political activity' is not the monster it is often made out to be – and can be an effective and legitimate way for a charity to pursue its charitable purposes – charity law does impose some constraints on political activities and campaigns. These can apply even where a charity is not carrying out political activity itself, but is considering whether to provide funding to a third party (whether a charity or another organisation) that may be doing so. So, what do charitable grant-funders need to watch out for?

What 'type' of activity is involved?

In spite of myths to the contrary, charities most certainly can both carry out and support political activity. Having said that, there are some restrictions. So, the first step, when presented with a funding proposal that might involve political or advocacy work, is to identify whether or not the activity is permissible. Charity Commission guidance *CC9 Campaigning and political activity guidance for charities* sets out the different types of activities in this area and whether a charity can undertake them – these principles apply equally where a charity is not carrying out the activity directly, but is providing funding or other support to another body to do so:

- i) **'campaigning'**: more helpfully referred to as 'non-political campaigning', this is advocacy activity which is aimed at influencing public attitudes or understanding or influencing the behaviour of private bodies (e.g. lobbying a large drinks manufacturer to use less plastic and running a campaign to encourage the public to use alternatives to plastic);
- ii) **'political activity'**: more helpfully referred to as 'political campaigning', this is advocacy and influencing activity which is aimed at securing or opposing a change in the law, policy or decisions of public bodies, governments and political figures in the UK or abroad (e.g. lobbying the government to impose a tax on large plastics manufacturers); and

iii) **'party-political activity'**: e.g. supporting or advocating against a political candidate, politician or political party. Charities must never engage in this type of activity (e.g. running an advertising campaign encouraging people not to vote for a political party because it does not support a tax on large plastic manufacturers).

It might be difficult to work out whether a funding proposal falls within (i) or (ii) above. The main differences between the two are that the Charity Commission is likely to view political activity as higher risk (for example, there might be a risk of reputational damage or being perceived as crossing a line into party-political activity) *and* a charity has to make sure that political activity is not the sole or main way in which it supports its charitable objects.

Does funding the activity further our charitable purposes?

The basic principles that apply to charitable grant-funding do not change just because you might be funding political activity. As always, you need to ensure that the proposed activity will further your charitable purposes. And you need to be particularly careful if the recipient organisation is not a charity: there are a number of additional considerations here, such as a need to restrict the grant so that it can only be spent on activities that a charity could carry out. Remember that you cannot fund another organisation – charitable or not – to do something that you couldn't do yourself.

Is there an election coming up?

What's often referred to as the 'Lobbying Act' is actually the Political Parties, Elections and Referendums Act 2000 (PPERA) and it can impact on charitable advocacy activities in the run up to an election.

- In a 'regulated period' ahead of an election (usually 12 months for a General Election) PERA imposes controls and transparency requirements on



spending in the UK by any individual or organisation whose activities could be 'reasonably regarded' as intended to influence voter choice. Charities carrying out legitimate, lawful, political or campaigning activities can fall within the scope of this broad, objective test (even though a charity's activities can never actually be intended to influence voter choice, as this would be prohibited party-political activity). The restrictions include limits on how much can be spent on these so-called 'regulated activities' in the run up to the election and certain transparency requirements.

- The requirements apply to the organisation actually carrying out the regulated activities – not generally to the funder. But in rare cases a charitable grant-funder might be caught – for example, if it provides a grant for a very specific activity that it had strategic input in choosing and managing.
- Charities and other organisations that undertake regulated activities must ensure that the funds they receive towards those activities are from 'permissible donors'. This broadly means from a UK source – such as a UK company operating a business in the UK, or an individual on the UK electoral register. It can include UK charitable companies and other types of charitable entities (although the rules applying to trusts and unincorporated associations are more complex).

So charitable grant-funders should ensure that they only fund anything that could qualify as a 'regulated activity' if they are a 'permissible donor' under election law. Although the regulatory responsibility usually falls principally on the recipient and not on the donor, it will generally be in the interests of the grant-funder to avoid being party to any breach of the rules. Funders may also need to consider the source of their own funding – for example, where it has been provided by an associated overseas funder and passed on to the recipient.

Charitable companies and political donations?

Charitable companies that are grant-funding another organisation's political activity might need to check whether their company law members have authorised the company to make political donations. This requirement – imposed by the Companies Act 2006 – should only apply to charities when the company will be funding what would be viewed by company law as a 'political organisation' – essentially an organisation that carries on, or proposes to carry on, activities capable of being reasonably regarded as intended to affect public support for a political party, candidate or referendum proposition. The requirement is subject to a 'de minimis' threshold of £5,000.

ELECTIONS

Bates Wells is one of the few UK firms to specialise in electoral law.

We are happy to advise you on any areas of concern, both generally and in the run-up to an election or referendum. We will also provide regular updates on our website on issues as they arise.

For any queries on any aspect of the law affecting politics, elections and campaigning, please contact our Politics, Elections and Campaigning team <https://bateswells.co.uk/services/politics-elections-and-campaigning/>

FIND OUT MORE

Charity Commission guidance CC9 Campaigning and political activity guidance for charities is at <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9>

The high performing board – better connections, enhanced connections

Among the many challenges of charity leadership, it is critical to ensure that you have the right people in place.

Here our governance expert, **Tesse Akpeki**, outlines key governance and recruitment strategies, while on the following pages **Victoria Cook** looks at how to investigate challenging situations when they arise.



Tesse Akpeki Lead Onboard Governance Consultant

T: 020 7551 7702
t.akpeki@bateswells.co.uk

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.

The basis of a good leadership relationship is sharing the same values, purpose and goals. Governance players won't always agree, but they must accept that to reach the same destination they have got to follow the same roadmap. Like house builders they need to work from an agreed-upon set of blueprints, principles and practices to govern the organisation. Codes of conduct and practice provide the clarity to address problems as and when they arise and can be a source in seeking solutions and strengthening commitment.

Incurious boards risk losing their position in meeting their mission. The curious board assesses its risks, manages them, focuses on a generative agenda and seizes opportunities. The board asks the critical questions, answers them and decides what expertise, experience and perspectives it needs to understand its challenges better, achieve better results and maintain clarity of expectations.

Matching talent to value

Organisational research by McKinsey & Company stresses the importance of mapping talent to values, strengthening the board through appropriate recruitment strategies, utilising diversity, prioritising and actively shaping the organisational strategy. Key to this is role cards – a hybrid between a role description and annual objectives. A role card captures the mission for the role, the role to be done and the value the role accomplishes.

'Getting the right people in critical seats can turbocharge performance. Systematically assess roles, deliver value, define the work that needs to be done in those roles and find the right talent to get it done' says McKinsey.

<https://www.mckinsey.com/business-functions/organization/our-insights/matching-talent-to-value>

Practical steps

1. **Explore, research, identify options and resources.** Identify roles that are

going to matter over the next few years. Focus on value drivers, talent needed to understand the organisation's dynamic and mission.

2. **Agree the role trustees play** in the digital environment.
3. **Implement processes and procedures** designed for periods of exponential change and disruption. This will entail setting time aside for board retreats and deep dive conversations.
4. **Board recruitment.** Design role cards linked to the value agenda and the critical board roles. Induction and board development should focus on individual as well as collective perspectives.
5. **Governance reviews** stress-test execution of the organisation's strategy, assess governance functionality and evaluate team competence.
6. **Consider any implications for the chief executive and the leadership team.** What role does the chair play in providing strategic leadership and ensuring appropriate engagement with governance players to meet the mission of the organisation?

THE CHALLENGE OF DIGITAL

The board of the future is now. Digital technology is transforming organisations at every level – from service delivery, management and governance to how people engage with each other. But technology is not a substitute for substance. The high-performing board will look inwards and outwards to assess the impact of digital on the organisation, looking at how it may need to change to implement a digital strategy aligned to the Charity Digital Code – <https://doit.life/charity-digital-code>.

It really is adapt or die!

Independent investigations – getting it right

There will be occasions for any organisation when a particular matter requires an impartial examination by an independent eye.

Victoria Cook explains what to bear in mind when appointing an independent investigator.



Victoria Cook
Senior Associate

T: 020 7551 7856
v.cook@bateswells.co.uk

Victoria is a dual-qualified barrister and solicitor, advising mainly employer clients on the full range of employment law and HR issues.

In particular, she advises on employment status and volunteers, disability issues, employment matters involving safeguarding and all forms of discrimination.

Victoria has conducted a number of independent investigations for organisations concerning disputes at senior levels.

An investigation may be prompted by a specific complaint, difficult relationships or a broader organisational issue. It may arise in the context of an employment dispute, conflict at board level or concerns about the organisation's culture and practices. In times of increasing scrutiny by regulators in the not-for-profit sector and the omnipresent importance of reputation in a digital age, never have independent investigations been a more valuable way to resolve conflict or demonstrate an organisation's commitment to its values and principles.

Appointing an independent investigator should not of itself be regarded as a universal panacea. And it needs careful thought. A poorly planned investigation can lead to a number of consequences: the investigation not properly addressing the issue; the organisation not having access to valuable material unearthed in an investigation; having to repeat an investigation for a different purpose. An organisation should therefore ask three questions before instigating an investigation: Should we? Who should? How should we?

Should we?

Organisations should first consider whether the particular issue requires an external investigation or whether an internal investigation would suffice. There will be some instances when it is clear that an independent investigation will be appropriate, for example where a complaint or relationship breakdown involves the most senior individuals in the organisation or where the investigation will examine assertions of a particular endemic culture. In such circumstances an internal investigation is unlikely to be regarded as providing an impartial assessment.

In other circumstances you should consider the appropriateness of an external approach: does the matter require an understanding of the organisation that can only be gained from within? Does moving to an outside investigation at the first stage send the right message

internally or externally? If the first stage of a process is external, who would hear any appeal?

Who should?

The choice of investigator is equally important. Independent investigations can be obtained from a number of sources including HR consultants, governance experts, equality specialists, mediators, board members of a similar organisation and lawyers. Each will bring a unique experience or skill to the investigation. You should consider the issue that requires investigation carefully before determining what type of investigator would be appropriate. For example, does the investigator need to analyse a broad range of complex material, or is the heart of the issue interpersonal relationships and whether they can be rebuilt?

How should we?

Next, it's important to give careful consideration to the appropriate scope of any investigation, particularly when preparing the terms of reference.

- **The main contact:** This is not always straightforward. You will need to identify who within the organisation will be the main contact for the investigator and who will have the ability to make any process-related decisions as the investigation progresses.
- **Time scales:** While it is important that investigations are thorough, it is also important that they are timely and proportionate. The anticipated time scales and any key deadlines should be clear from the outset.
- **Remit of the investigation and outcome:** You should consider whether it is intended that the investigator will investigate and reach a final decision that will be binding on the organisation or whether the investigation is only a fact-find on which the organisation will make a final adjudication. If the investigator will be reaching the final decision you should consider whether it would be appropriate to include any

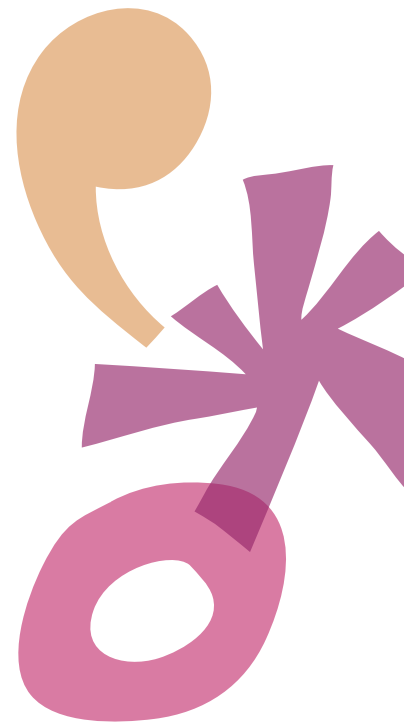
'A poorly planned investigation can lead to a number of consequences: the investigation not properly addressing the issue; the organisation not having access to valuable material unearthed in an investigation; having to repeat an investigation for a different purpose.'

interim review stages before the final decision is made (see below).

- **Breadth of the investigation:** Consider whether the investigator will have full discretion to interview anyone they consider appropriate to the matter and review any material. Or will you prepare a defined list of witnesses and scope documents, ensuring that the investigator refers to the organisation if they believe they need to broaden the investigation? Are there any other parameters that should be put in place to determine the breadth of evidence?
- **Confidentiality of investigation material:** It is often the case that evidence obtained in one investigation may be relevant for future processes. For example, evidence obtained in an investigation into a particular complaint may need to be used in subsequent action against an alleged perpetrator. The organisation should have the right to view all of the material collated as part of the investigation. Witnesses should not be given any assurances that their evidence will be either anonymous or given entirely in confidence and they should be informed that their evidence may need to be considered as part of potential future processes. In rare circumstances it may be appropriate for witnesses to provide evidence anonymously, but the organisation should be informed about any requests for anonymity and may need to take advice on whether anonymity can or should be offered.
- **Copies of the investigation evidence:** It should be specified that the organisation will be provided with copies of all of the evidence obtained as part of the investigation and that it may retain and use all those materials.
- **Review of draft report and ability to comment:** You should consider whether the organisation will wish to review a draft of the investigation report and comment, for example, on areas of investigation that may not yet have been explored, or any other procedural

issues, before the report is finalised. The opportunity to review and comment is likely to be most important when the organisation is commissioning an independent adjudication rather than an independent fact-finding exercise.

If your organisation gives careful thought to these considerations at the outset, you will be well placed to achieve solutions to the issues investigated – and may also gain valuable information to fuel wider initiatives in furtherance of the organisation's purposes.



International expansion

One of the most complex decisions a charity's leaders may face is whether overseas expansion is necessary to further the charity's objectives.

Ben Thomas and Augustus Della-Porta look at some of the important considerations involved in that decision.



Ben Thomas Solicitor

T: 020 7551 7642
b.thomas@bateswells.co.uk

Ben advises organisations within the charity and social enterprise sectors, ranging from large international grant-giving organisations to small sports clubs. His particular focus is on sports-related clients.



Augustus Della-Porta
Partner

T: 020 7551 7607
a.della-porta@bateswells.co.uk

Augustus advises charity and social enterprise clients on commercial, contractual, governance and charity law matters. He works with a broad range of not-for-profit clients, particularly Muslim and other faith-based organisations.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | AUTUMN 2019

Do we really need a presence overseas?

The first thing for a charity to consider when looking to expand internationally is whether it really needs to establish its own base overseas. It may not always be necessary to go this far.

It could, for example, fund overseas activity via an existing local organisation, rather than setting up its own overseas presence.

In some cases, the drive behind establishing a base abroad is to enable individuals situated in the relevant jurisdiction to donate to the organisation tax-efficiently. In these situations, rather than setting up a new overseas entity, some charities encourage overseas donors to use donor-advised funds such as Charities Aid Foundation's international network. Here the donor gives to the locally registered fund to obtain local tax relief and that fund makes a grant to the UK charity.

Structures

If the charity does need a presence in another jurisdiction, the options will depend on the laws of the country concerned. Some jurisdictions allow UK charities to register a 'branch' of the UK charity without incorporating a separate local entity. This is helpful, as it avoids the expense of setting up a completely separate legal entity and the risk that the 'mission' of the foreign entity becomes divorced from that of the UK charity.

In other cases, the UK charity may need to establish a separate local entity. A common solution is to set up a local subsidiary with the UK charity as sole member. This usually allows the UK charity to appoint and remove trustees and to require those trustees to take or not to take certain decisions.

However, it may not always be possible for the UK charity to exert such a significant degree of constitutional control. Some jurisdictions require more than one

member (and sometimes these must be residents of the jurisdiction). Some only afford tax-exempt status to organisations that are not a mere conduit of funds to the UK charity; the UK charity's level of control over the foreign entity will be relevant in deciding whether this is the case.

It is also possible to set up group structures, involving the establishment of a new international body that has relationships with both the UK charity and one or more foreign entities. The new body may be the sole member of the UK and foreign entities (a 'federal' model), or the UK and foreign entities may be the members of the international organisation (often referred to as a 'social franchise' structure).

Sometimes it is necessary to consider the peculiarities of an individual donor's situation. For example, a US citizen (or taxpayer) resident in the UK who wishes to donate to a charity that is registered in either the US or the UK will find it difficult to claim tax breaks in both jurisdictions. It might be necessary to adopt what is known as a 'dual registered' US/UK structure to cater for this.

Local law

Complications in the relevant foreign jurisdiction can dictate the viability and structure of a charity's operations there. Charities shouldn't assume that even the fundamentals of English company or charity law apply, particularly if the jurisdiction doesn't have a legal system based on the common law.

For example, different countries may have:

- different interpretations of what it means to be a charitable organisation;
- only unincorporated charitable structures;
- a requirement for a significant start-up endowment;
- a one-tier rather than two-tier governance structure; or



'In some cases, the drive behind establishing a base abroad is to enable individuals situated in the relevant jurisdiction to donate to the organisation tax-efficiently. In these situations ... some charities encourage overseas donors to use donor-advised funds.'

- restrictions on foreign control.

Governance

It will invariably be a good idea to put in place an affiliation agreement between the UK charity and the local entity, particularly where the UK charity does not have sufficient constitutional control. The agreement will likely cover areas such as:

- the licensing of intellectual property and the conditions upon which it may be used;
- strategies, standards and policies each party will adhere to; and
- how data will be shared.

Conflicts of interest should be addressed either in the affiliation agreement or in the constitutional documents of each entity. This is particularly important if the entities are to have trustees in common.

The UK charity should read the Charity Commission's recent guidance on charities with a connection to a non-charity which sets out what the regulator expects in relation to arrangements with overseas entities.

FIND OUT MORE

The Charity Commission's guidance for charities with a connection to a non-charity is at <https://www.gov.uk/guidance/guidance-for-charities-with-a-connection-to-a-non-charity>

There is a summary of the key points of the guidance in our Summer 2019 Update at <https://bateswells.co.uk/2019/07/charity-social-enterprise-update-summer-2019/>

Grants and policies

It will often be necessary for entities to grant funds to other entities within the group. Note that the Charity Commission will regard foreign-registered entities as non-charities. UK tax legislation also imposes specific requirements – backed up by HMRC guidance – where UK

charities make payments to overseas bodies, which will apply where a UK charity is granting funds to a local entity (even within the same corporate structure). Proportionate due diligence and monitoring need to be undertaken and an appropriately robust grant agreement should be entered into.

If the foreign entities will pay funds to third parties by way of grant it can be advisable to have an overarching grant-making policy spelling out what is expected of each entity in terms of the grant-making process. This will include requiring a due diligence exercise to be carried out for each grant, proportionate to the risk profile of the grant in question.

Be aware that anti-bribery and terrorism legislation is extremely broad in scope and it is therefore common practice to have anti-bribery and other policies (often referred to in the affiliation agreement) to ensure a consistent approach in these areas.

Safeguarding

The recent focus on safeguarding – particularly at international NGOs – means that it goes without saying that charities working with children or vulnerable adults must be wary of the safeguarding risks of operating internationally. The trustees should not think that creating a foreign entity significantly reduces the need for the UK charity to ensure that robust safeguarding procedures are in place (see our Charity Commission update on page 22).

Conclusion

International expansion is a significant step requiring consideration of a number of issues. This article outlines just some of them. We have significant experience of the options available and of advising on overseas operations, including investigations into charities working overseas. We would be happy to advise on your charity's particular situation.

Unlocking charitable funds

In our focus on the challenges of financial governance for charity leaders, we start with a recent initiative that encourages charities to revitalise dormant or inactive funds.

Laura Soley and Charlotte Blackburn explain how charities can respond.



Laura Soley Partner

T: 020 7551 7768
l.soley@bateswells.co.uk

Laura has a broad practice covering general charity law and governance matters, with a particular focus on dealing with technical charity law issues and structures.

Laura regularly advises on charitable trusts, restricted funds and endowments, including setting up new endowments and releasing out-of-date funds.



Charlotte Blackburn
Solicitor

T: 020 7551 7667
c.blackbourn@bateswells.co.uk

Charlotte is a newly-qualified solicitor in our Public and Regulatory department. She completed her training contract with Bates Wells and has a broad range of experience across our practice areas.

As many will be aware, the Charity Commission, teaming up with the Department for Digital, Culture, Media and Sport and United Kingdom Community Foundations (a registered charity), embarked on a programme last year, the 'Revitalising Trusts Programme', targeting charities with small levels of expenditure.

The aim is to encourage 'dormant, ineffective or inactive' charities to close down or revitalise – the concern being that there are substantial charitable funds held by these charities that are not currently being spent on charitable activities.

The project is contacting those charities which, in the last five years, have spent less than 30% of their income, or have not spent any money at all. It encourages them to consider transferring their funds to a Community Foundation, wind up or revitalise the charity's activities by changing its purposes.

There are of course many reasons why charities may not be spending all of their income in any given year. These include difficulty identifying appropriate beneficiaries, trouble finding the time and resources to devote to administering the funds or being hampered by out-of-date purposes. We still come across many charities which have purposes that are archaic ('relief of distressed gentlewomen') or unworkable (relief of poverty of employees of a company that no longer exists) or are otherwise in urgent need of modernising or updating. The commission recognises these issues, but warns that it may take regulatory action against trustees who do not engage with the programme; we are aware that the commission has been actively following up with charities contacted under the project.

The problems identified by the Charity Commission can apply equally to charities holding restricted and endowment funds that they are struggling to spend.

What can you do to revitalise dormant or inactive charitable trusts or restricted funds?

There are different ways that trustees can seek to unlock charitable funds. One option is to transfer the funds to another charity, such as a Community Foundation.

But there are other ways forward. The legal powers contained in the Charities Act 2011 empower the trustees of small charitable trusts and trustees of charities that hold smaller restricted and endowment funds to make changes to those funds to enable more effective use.

Where the charity's income (or, in relation to a restricted/endowment fund, the income of the restricted fund) was £10,000 or less in the last financial year and certain conditions are met, the trustees – subject to Charity Commission consent – can use these statutory powers to:

- resolve to change the purposes of the charity; and/or
- resolve to transfer the funds to another charity and wind up.

Regardless of the size of the charity/restricted fund, there are also powers for trustees to decide – again, if certain conditions are met – to spend permanent endowment. Charity Commission consent is only needed for larger permanent endowment funds (broadly, where the fund is worth more than £10,000 and its annual income exceeds £1,000).

If these powers are not available for any reason, there are other routes available to help you.

A way forward

We have helped numerous clients to revitalise and unlock their charity's funds, including restricted funds and endowments. Please feel free to get in touch if you are facing any of these issues and would like advice on your options.

What's new in fundraising?

Charity fundraising is far from simple, with recent high-profile cases raising the prospect for charity leaders of needing or wanting to refuse donations from certain sources.

Rachael Southern reports on the issues raised by recent developments at the Fundraising Regulator and the Charity Commission.



Rachael Southern
Solicitor

T: 020 7551 7894
r.southern@bateswells.co.uk

Rachael advises charities, non-profits and social enterprises on a wide range of legal and commercial issues. As a former secondary school teacher, she has a particular interest in working on safeguarding issues and advising charities working with children and young people.

Revised Code of Fundraising Practice in effect from October 2019

As we reported in our Summer 2019 Update, the Fundraising Regulator's revised Code of Fundraising Practice is due to come into force in October 2019. The revised code is the result of a 'plain English' review by the regulator to make the code more accessible.

It should not be necessary for your charity to make any significant changes to its policies and procedures as a result of the revised code taking effect, because the regulator has been clear that the updates are aimed at aiding clarity rather than making substantive changes to the standards. However, the code looks rather different so you should take time to familiarise yourself with the new layout. You may need to tweak your policies, procedures and training materials to update the provisions of the code to which they cross refer. The regulator has published guidance on 'Mapping the new Code' on its website to help you work out where you can find specific standards in the new code.

Updating the code was a huge undertaking and it is understandably possible that there may be teething problems. If you spot any instances where the new code appears to conflict with the previous version, the Institute of Fundraising is collecting examples that it intends to share with the regulator. If the provision is relevant to your organisation's fundraising activities, we recommend contacting the Fundraising Regulator directly.

FIND OUT MORE

The Fundraising Regulator's guidance on 'Mapping the new Code' is available at: <https://www.fundraisingregulator.org.uk/node/23587>

Our briefing on the new Code is at: <https://bateswells.co.uk/2019/06/revi-sed-code-of-fundraising-practice/>

Upcoming Charity Commission toolkit on returning and refusing donations

In the wake of stories such as The Presidents Club Charitable Trust dinner and the negative publicity surrounding the Sackler Trust, the question of when it is appropriate for charities to refuse or return donations has been a hot topic for the sector.

In June 2019, the Charity Commission published a blog titled 'Thanks but no thanks: when should charities refuse donations?' in which it stated that it wants to empower trustees to make decisions in their charities' best interests when they are confronted with the question of whether to refuse or return a donation.

The commission announced that it is working on additional support for trustees when considering these issues. The commission says that it is open to whether this should be in the form of a practical checklist, guidance or a legal policy document. It has asked charities to send their thoughts on what they would find most helpful to guidanceandpractice@charitycommission.gov.uk.

We are also putting together some suggestions to send to the commission. If you have any thoughts you'd like to share with us, please contact Christine Rigby at c.rigby@bateswells.co.uk.

FIND OUT MORE

The Charity Commission's blog is at <https://charitycommission.blog.gov.uk/2019/06/06/thanks-but-no-thanks-when-should-charities-refuse-donations/>

Our Charities Legacies team blogged for Civil Society on how this issue relates to legacies here: <https://www.civilsociety.co.uk/voices/when-to-look-a-gift-horse-in-the-mouth-legacies-and-ethical-and-reputational-risks.html>

Trust and transparency

Two recent consultations that focus on the registration of trusts and companies will have implications for all charitable trusts, no matter what their size, and for charitable companies.

Lucy Rhodes and Pippa Garland report on the continuing drive towards transparency.



Lucy Rhodes Associate

T: 020 7551 7604
l.rhodes@bateswells.co.uk

Lucy advises on a range of legal issues that affect charities and not-for-profits including models of philanthropy, governance and constitutional issues. She has a particular interest in technical charity law issues, and regularly engages with policy initiatives and legal changes in this area.



Pippa Garland
Senior Associate

T: 020 7551 7779
p.garland@bateswells.co.uk

Pippa has experience of working with a range of charities and social enterprises on legal and commercial issues, including corporate structure, governance and fundraising. She specialises in working with high profile individuals and family foundations on their philanthropy and giving.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | AUTUMN 2019

In recent years we have seen a number of significant new measures aimed at increasing transparency around those who control corporate and other legal entities to deter and detect those who hide their interests for illicit reasons.

In 2015, the UK introduced the People with Significant Control (or PSC) regime which requires companies to keep a register of people with significant control over the company and make that register public. Another initiative, prompted by the EU's Fourth Money Laundering Directive (4MLD), was the Trust Registration Service (TRS), which HMRC set up in 2017 for trusts which incur UK tax liabilities.

Trust Registration Service

The Fifth Money Laundering Directive (5MLD), which was adopted by the EU in 2018, expands the scope of 4MLD to require registration of all express trusts, regardless of whether or not they incur a tax liability. All charitable trusts fall within the scope of this requirement, irrespective of their size.

Despite Brexit, the UK government has committed to implementing 5MLD and earlier this year, HM Treasury consulted on the transposition of 5MLD into UK law. The key features of the proposals are:

- Registration of all charitable trusts. The government has proposed a deadline of 31 March 2021 for existing trusts. Trusts created after 1 April 2020 should be registered within 30 days of creation;
- Provision of information on the trust's 'beneficial owners' – the settlor, trustees, protector (if any), the beneficiaries or class of beneficiaries and any 'other natural person exercising effective control of the trust'; and
- Various obligations to share information on the trust and its beneficial owners.

Bates Wells responded to the consultation, noting the consequences for the many small charitable trusts which are not currently required to register with any

regulator. We also explained how this could impact charities (including incorporated charities) that hold charitable trusts such as restricted funds and endowments.

There is limited scope to alter the trust registration requirement in the Directive, but the Treasury has indicated that it is open to suggestions of how to apply it proportionately. We therefore suggested incorporating the registration of charitable trusts within the existing registration framework for charities to avoid the need for registered charities to register with both the TRS and the Charity Commission. We also suggested reopening abandoned proposals for a joint Charity Commission/HMRC registration portal, establishing a single registration mechanism for charities with multiple restricted funds, and providing detailed and well-communicated guidance on how the requirement will affect charities. In the absence of this, it is likely that many charity trustees will be unaware of the new regime and fail to comply with their obligations.

Corporate transparency and register reform

The government is currently consulting on proposals to increase the transparency of corporate entities, billed as the most significant reform of the company registration framework since 1844. As the majority of the proposals require legislation to enact, we do not expect them to be put in place until after 2020.

The principal proposal is to bring in identity checks for individuals with a key role in companies, including directors, PSCs and, potentially, shareholders and company members. Companies House would also have a greater role in querying information filed with it. Although the consultation is light on the detail, there are also proposals for Companies House to share more information proactively with law enforcement agencies.

We will keep clients informed as these proposals progress.

Charities and corporation tax

HMRC is asking 3,000 charities and a random sample of community amateur sports clubs to send in a corporation tax return, likely motivated by its concerns over the extent of incorrect Gift Aid claims.

Susan Shi explains the background and how affected charities and CASCs should respond.



Susan Shi Associate

T: 020 7551 7902
s.shi@bateswells.co.uk

Susan is an associate in our Charity and Social Enterprise department, working on a mix of charity and charity tax matters. She completed her training contract at another city firm and qualified in their Tax department in September 2016. She joined Bates Wells in February 2018.

Earlier this year, HMRC officials stated that they would be writing to 3,000 charities to request that they complete a Company Tax Return for the tax year running from 6 April 2018 to 5 April 2019. HMRC will be targeting the 3,000 charities with the largest Gift Aid claims, in order to assess whether to conduct a Gift Aid audit. It will be sending the same request to a random group of several hundred CASCs (community amateur sports clubs).

Some charities have already received this letter, and the Charity Tax Group has provided an example on its website (<https://www.charitytaxgroup.org.uk/news-post/2019/charities-notified-hmrc-future-tax-return-requests/>).

The effect of the letter is to notify the charity that it should expect to receive a formal request for a Company Tax Return from HMRC in the near future. The letter is not a formal request in itself.

Charities do not often pay tax, as their income streams are generally tax exempt. However, charitable companies, charitable unincorporated associations and charitable incorporated organisations (CIOs) are required to complete and submit corporation tax returns if: (1) they have non-exempt taxable income on which corporation tax would be due, or (2) HMRC issues a request for a Company Tax Return.

In the tax return, the charity will need to state what tax exemptions they currently claim, and whether they have any non-exempt income on which corporation tax is due. Any income that has not been applied for qualifying charitable purposes will also need to be disclosed.

The deadline for filing this tax return will be the later of:

- the date which is 12 months after the end of the charity's accounting period for corporation tax; or
- three months after the date on which HMRC sends the formal request for a tax return.

Background

While HMRC has not given detailed reasons for making these requests, the likely background is HMRC's general concerns over Gift Aid. HMRC estimates that £180m of Gift Aid is being incorrectly claimed in respect of non-taxpayers.

We also have a number of recent examples of HMRC writing to charities to query their overseas expenditure. HMRC seems to be focusing in particular on religious charities with operations overseas. Under tax legislation, charities which spend money overseas must ensure that they have taken steps that HMRC would consider are reasonable in the circumstances to ensure that those funds are spent for exclusively charitable purposes. Failure to do so means that the charity stands to forfeit charity tax reliefs on an equivalent amount of its income, for which the trustees can be personally liable. HMRC's guidance on this point is at <https://www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-ii-non-charitable-expenditure#payments-to-overseas-bodies>.

What this means for your charity

We would recommend that if your charity receives a letter about the Company Tax Return from HMRC, you should speak to your advisers.

FIND OUT MORE

Guidance on how to complete the Company Tax Return is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799330/CT600_Version_3_guide_19_V3.pdf.

The Charity Commission also provides useful guidance here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/353108/Charities_and_corporation_tax_returns.pdf.

Prisoners of Conscience

Keeping the voices of human rights defenders alive

People around the world are tirelessly challenging injustice and defending human rights to change the world for the better. Yet their efforts to ensure that the human rights of all are respected often come at a high cost. Oppressive regimes around the world are relying on intimidation, threats and violence to silence those who have been brave enough to stand up for what they believe.

Prisoners of Conscience's mission is to protect and advance human rights across the world by helping to positively transform the lives of brave people who have exercised a non-violent act of conscience for their and others' human rights. An act of conscience can be the start of an uncertain and isolated existence. Without financial help, those who have bravely made a stand for human rights are often left indigent, separated from their families, in exile and without any resources for their basic human needs.

PoC provides rapid financial assistance by way of grants to ensure immediate relief and resettlement at the time of greatest need. Grants cover everyday expenses, costs of family reunion applications, subsistence while in hiding, in exile or fleeing danger, fees for academic studies and professional requalification. Since its inception in 1962, PoC has provided support to more than 10,000 prisoners of conscience and their dependants and distributed more than £4 million.

The case of Eric, a PoC beneficiary is instructive:

Eric – a Rwandan journalist and father of four – bravely stood against the suppression of independent reporting by the government and paid a high price for it. His family received threats and were regularly harassed by the government. The situation became so dire that they were forced to flee the country to a refugee camp in Uganda. PoC helped them relocate to a safe house and funded



their living costs while they were in hiding, as well as their subsequent travel costs until they reached safe refuge in Australia. The children are now at school and Eric got his driving licence. He will be undertaking a diploma in nursing, a new career path that he is excited to embark upon.

PoC's recent research indicates that at any one time there are tens of thousands of human rights defenders who are persecuted and in need of our support. PoC's strategy is to raise the level of its activities and income to begin to meet this need.

In its efforts to drive sustainable change and to truly empower beneficiaries, PoC has also launched an Employability Panel of specialist organisations to assist their beneficiaries to find meaningful, skills-related employment.

Bates Wells has given the charity invaluable legal assistance over the years, including incorporation of its trustee board and access to the regular Bates Wells briefings.

www.prisonersofconscience.org

Zuckerpunch: another data privacy body blow for Facebook

Facebook Custom Audiences may be the latest aspect of the beleaguered social media giant's platform that lands it in hot water.

Lucas Atkin advises that there are risks to using the audience programmes and that charities and social enterprises should tread with care.



Lucas Atkin Associate

T: 020 7551 7600
l.atkin@bateswells.co.uk

Lucas is a specialist data privacy lawyer, advising on all aspects of data privacy law at national, EU and global levels. He assists a wide range of clients, including charities, public bodies, sports clubs and institutions, media outlets, activist organisations, schools and universities, property owners, IT specialists, legacy professionals and private individuals. Lucas also regularly provides specialist training and advice on data privacy law.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | AUTUMN 2019

Social media is vital for charities and social enterprises. Platforms offer a quick and cost-effective way to raise funds, engage with existing supporters, attract new supporters and understand supporters' interests.

Facebook Custom Audiences and Lookalike Audiences

The Facebook audience programs are popular with charities and social enterprises, allowing them to send promotional material and fundraising requests to existing and prospective supporters. They are easy to use: a person simply uploads a list of existing supporters' information to Facebook – which identifies whether those supporters have Facebook profiles – and profiles of other individuals who may have similar interests, before serving those profiles with targeted advertising.

What do the regulators say?

The Bavarian Data Protection Authority (BDPA) recently ruled it unlawful to use the Facebook audience programs without affected individuals' prior consent, and raised concerns about Facebook's own use of the data. It said that: 'custom audience data reveals... granular insights' that Facebook may use to sell individuals' personal data to interested advertisers, and that 'Facebook adds this information to existing profiles and continues to use it, without notifying users or giving them a chance to object'.

Several European regulators have asked the BDPA for more information. The ICO has not yet reached the same conclusion, but in its July 2018 publication 'Democracy disrupted: personal information and political influence', it made clear its 'significant fair-processing concerns' about Facebook Custom Audiences and Lookalike Audiences, primarily concerning 'the information available to users and the nature of the profiling taking place'. This does not mean that the ICO will definitely go as far as the BDPA: German authorities are notoriously conservative.

Should charities and social enterprises still use these tools?

The legal situation is not black and white. While regulators are clearly concerned, and supporters may have reservations, it is not clear that current e-privacy law applies to social media advertising tools. This means that consent is arguably not required (although the more intrusively the tools are used, the harder it is to argue that relying on the legitimate interest ground is fair). In addition, regulators are likely to aim their enforcement arsenal at Facebook first, giving users the opportunity to change course.

If charities and social enterprises continue to use the programs, they should consider risks such as:

- **Transparency:** Does your privacy notice explain your use of the programs (and how can you realistically explain that use to prospective supporters)?
- **Control:** Do you give supporters any choice over their personal data being uploaded to Facebook?
- **Special category data:** Does the nature of your organisation mean you will allow Facebook to process, for example, health or political opinion data?
- **Profiling:** There are restrictions on profiling individuals for the purposes of serving them with targeted advertising.
- **Supporters' attitudes:** Some people find targeted advertising convenient, others find it privacy-intrusive.
- **Facebook's standard terms of use** seek to make organisations liable for data privacy law compliance when using the programs (although regulators may not uphold the Facebook terms).
- **Consent:** If other regulators side with the BDPA, how do charities obtain supporters' (especially prospective supporters') consent to use the programs?

Charities and social enterprises should proceed with caution.

Taking your name in vain

When another organisation has a similar name to your charity, this can raise reputational and financial risks that need careful consideration.

Catharina Waller explains how a charity can respond if it finds that a non-charitable company is using an identical or similar name.



Catharina Waller Trade Mark and Patent Attorney

T: 020 7551 7701
c.waller@bateswells.co.uk

Catharina's specialities include trade mark clearance, registration and enforcement, as well as management of large international trade mark and patent portfolios.

In the charity world we fairly frequently come across non-charitable companies that have been registered with names that are quite similar to charities' names, whether deliberately or not. This can be problematic. It may mean that donations or legacies are mistakenly sent to the unrelated company. And there can be confusion as to the source or quality of the company's activities and potential damage to the charity's reputation.

The first step for the charity will be to consider its legal position and whether it can encourage or force the company to change its name. There are a few different mechanisms to consider. Relevant factors include whether the charity is incorporated, what working names the charity uses, how similar the two names are, whether there is any evidence of opportunism, how the company's name is being used, whether the charity has a trade mark registration protecting its name and whether the charity's name has a strong reputation. Options include administrative actions such as complaints to Companies House or the Company Names Tribunal, legal actions such as an action for trade mark infringement or passing off, or practical solutions such as blocking use of the name online or on social media.

In many instances the parties can come to an agreement, whether for the company to change its name or for the parties to co-exist. However, in preparing such agreements care must be taken to consider all of the relevant issues.

A recent court case between the well-known car manufacturer BMW and an individual by the name of Benjamin Michael Whitehouse, and his company BMW Telecommunications Limited, highlighted the importance of ensuring that both the company and its director(s) are bound by the settlement agreement.

Mr Whitehouse, whose initials were clearly 'BMW', had initially registered a company called BMWAssociates – which he referred

'In many instances the parties can come to an agreement, whether for the company to change its name or for the parties to coexist.'

to as his 'little one-man band telecom railway company'. A co-existence agreement was reached between BMW (the car manufacturer) and BMWAssociates, under which BMWAssociates agreed to limit its use of the initials 'BMW'. Mr Whitehouse later registered a different company, called BMW Telecommunications Limited, but the court found that this was not in breach of the co-existence agreement, because Mr Whitehouse himself had not been party to that agreement.

At this point BMW brought a further action for trade mark infringement and for passing off, in which it was successful. However, had it obtained undertakings from Mr Whitehouse at the same time as the co-existence agreement had been signed, the expense associated with bringing an action for infringement and passing off could have been avoided.

In a climate where judicious use of charitable funds is key, this is a valuable lesson in ensuring that agreements are drafted robustly and suitably for the situation.

FIND OUT MORE

If you have any concerns about the protection of your charity's name and reputation, please contact a member of our Branding, IP and Trade Marks team: <https://bateswells.co.uk/services/intellectual-property-and-trade-marks/>

What's new at the Charity Commission?

Keya Advani and Jess Neville report on recent developments at the Charity Commission.



Keya Advani Solicitor

T: 020 7551 7764
k.advani@bateswells.co.uk

Keya joined Bates Wells in 2019 after working with a variety of non-profit and civil society organisations in India, Jamaica, the United States and the UK, and subsequently spending five years training and practising as a banking solicitor in London.



Jess Neville Solicitor

T: 020 7551 7692
j.neville@bateswells.co.uk

Jess joined the Charity and Social Enterprise team in March 2019. She advises charities and not-for-profits on a range of issues from incorporation to campaigning and political activity. She has a particular interest in advising mental health, homelessness and campaigning organisations.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | AUTUMN 2019

Charity Commission Annual Report 2018/19

The Charity Commission published its annual report in July 2019, noting that it had had its 'busiest year'. The commission reported a significant increase in its use of formal investigatory and enforcement powers; 83% more reports from whistleblowers, of which 48% related to safeguarding concerns; and a 38% increase in the number of serious incident reports, of which 64% were related to safeguarding. The report also reiterated the commission's new strategic priorities and its vision for 2023 (first published in October 2018 in the Charity Commission Statement of Strategic Intent 2018–2023) and noted that future reports will measure the commission's success in meeting the new strategic priorities and vision for 2023.

The report analyses the commission's performance against its five statutory functions, set out in the Charities Act 2011:

- identifying and investigating apparent misconduct or mismanagement in charities – including increasing the commission's safeguarding caseload, improved guidance on whistleblowing and the use of new powers including the power to disqualify trustees and to issue official warnings;
- encouraging the better administration of charities – including issuing new guidance on charities connected to non-charities, new guidance following changes to rules on automatic disqualification, the launch of a new trustee welcome pack, and a new digital guide for those considering setting up a charity;
- maintaining the online register of charities;
- working with government – including a joint project to release charitable funds (see the article on page 15 of this Update for more details) and partnerships with government to improve safeguarding; and
- corporate accountability – including

complaints procedures and reporting on Freedom of Information requests.

Regulatory action: Oxfam GB

In June 2019, the commission published its final report into Oxfam GB and issued an official warning to the charity on the same day.

This follows a 16-month statutory inquiry into Oxfam GB, focused on two main areas: safeguarding concerns about the actions of Oxfam staff in Haiti in 2011 and how the situation there was handled; and Oxfam GB's wider approach to safeguarding.

In recent years safeguarding has been a key regulatory focus for the commission and should be a priority concern for charities of all sizes. The inquiry report sets out a number of safeguarding learning points for all charities, as well as wider points in relation to governance issues and trustees' oversight of their charities. In summary:

- a. trustees retain ultimate responsibility and should be both carrying out effective oversight of the executive, and leading the way in setting organisational culture;
- b. strategic and operational commitments should be adequately resourced;
- c. the commission believes that charities share a responsibility to uphold not only their own reputations but also the reputation of charity as a whole;
- d. protecting people from harm should be a governance priority for all charities, in line with a given charity's size and operations; and
- e. part of safeguarding is ensuring that individuals are held to account, and that incidents are reported to the appropriate authorities.

Serious incident reporting – new online form

Since June 2019, all serious incidents, both

new and updates, must be notified to the commission via a new online form. It is no longer possible to file serious incident reports by email.

The new online form categorises serious incidents into six different incident types: protecting people and safeguarding incidents, suspicious donations, financial crime, other significant loss, terrorism or extremism and other significant incidents. Each incident type triggers different questions for trustees to answer, many of which have multiple choice answers, or character-limited response boxes.

We are raising some practical concerns about the new form with the commission. For example, there is no option to attach documents or to print out and review a draft before submitting it. If you come across other issues, please do feel free to let us know so that we can share your concerns with the commission: please contact your usual Bates Wells contact or email h.morphet@bateswells.co.uk.

<https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity>

Trustee disqualifications

The commission is continuing to exercise its new powers to disqualify trustees and senior managers, with some long periods of disqualification being imposed. In a recent case, the CEO of the Busoga Association was disqualified from being a trustee or senior manager for a period of 10 years. The commission concluded the CEO had acted as a de facto trustee, without sufficient oversight from the other trustees, and had used charity funds to settle his own salary and make payments from restricted funds to a private consultancy firm. In another case the commission disqualified a trustee of the Rigpa Fellowship from trusteeship for eight years, on the grounds that he had knowledge of instances and allegations of sexual and physical abuse against students at the charity but failed to take appropriate action.

Regulation of higher educational institutions as charities

The Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019, which came into force on 1 August 2019, enable any higher education provider registered with the Office for Students (OfS) to become an 'exempt charity' by an order issued by the Privy Council. This means that they will fall outside the Charity Commission's direct regulatory remit. However, this does not exempt such institutions from principles of charity law and the commission retains a degree of oversight. In the wake of the Regulations, the CEOs of the commission and the OfS have written a joint blog post clarifying the respective roles of the commission and the OfS in regulating higher education institutions as charities. The blog post reminds university board members to familiarise themselves with both commission and OfS guidance and encourages them to subscribe to the OfS's charity regulation mailing list.

Whistleblowing

The Charity Commission has launched a new advice line for charity whistleblowers, which is operated independently by the specialist whistleblowing charity Protect. The advice line can guide whistleblowers on the types of wrongdoing that can be reported, legal rights on reporting, and next steps. Contact information for Protect is included in the commission's guidance on whistleblowing: <https://www.gov.uk/guidance/report-serious-wrongdoing-at-a-charity-as-a-worker-or-volunteer#get-independent-advice>





10 Queen Street Place
London EC4R 1BE
Tel: +44 (0)20 7551 7777

www.bateswells.co.uk

© Copyright Bates Wells & Braithwaite London LLP September 2019

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



FS 598046



EMS 598047

