

CHARITY AND SOCIAL ENTERPRISE UPDATE

SPRING 2020



In brief



Brexit is now a reality, although its impact remains unclear.

Abbie Rumbold provides our predictions for charities and social enterprises during the transition period and beyond (page 3).

We have a special focus on preventing charity fraud from the Charity Commission's Head of Development, Counter Fraud and Cybercrime, **Alan Bryce** (page 6).

Lucy McLynn advises employers to be very cautious about suspending employees where there are concerns about their conduct (page 8).

Navigating the rules around protecting children's data is not an easy task. **Mairead O'Reilly** outlines some of the headline rules (page 10).

Mindy Jhittay provides the first in a series of articles about transgender inclusion and the questions we are most frequently asked by our clients (page 11).

We review the impact of the Modern Slavery Act with an interview with two experts in the field – **Andrew Wallis OBE** and **Dr Anjali Mazumder**. **Oliver Scutt** and **Yvett Talas** find out more (page 12).

In our regular client focus, we look at the work of Stephen Lloyd Awards winner, Breadwinners (page 14).

Amanda Gray from our Real Estate team takes a look at the key stages of your property life cycle (page 15).

In our fundraising focus, **Emma Dowden-Teale** and **Charlotte Blackburn** remind charities how to deal with complaints in line with the Code of Fundraising Practice (page 16).

We have seen a recent increase in the number of investigations being carried out by HMRC in relation to charities making payments overseas. **Augustus Della-Porta** and **Stephanie Biden** explain (page 17).

Lucy Rhodes highlights what's involved when charities look to change from an unincorporated to an incorporated structure (page 18).

Our governance consultant, **Tesse Akpeki**, explains how best to put behaviour theory into practice within your organisation (page 20).

Bill Lewis writes to the prime minister with a post-Brexit VAT wish list for the sector (page 21).

And finally, there's our usual Charity Commission round up from **Claire Whittle**, **Emma Dowden-Teale**, **Danielle Mawer** and **Katy Sawyer** (page 22).

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Front cover image provided by Breadwinners

Brexit – what's next?

On 31 January 2020, the United Kingdom's membership of the European Union finally came to an end. So, what happens now?

Abbie Rumbold explores the certainties and uncertainties for charities and social enterprises.



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Abbie is recommended by *Chambers UK* as a leading lawyer in the sector. She has a particular focus and expertise in social enterprises and was one of the originators of the CIC.

The implementation of the European Union (Withdrawal Agreement) Act 2020 (the Withdrawal Act) put the seal on the United Kingdom's departure from the European Union on 31 January 2020.

But what exactly has changed? And what's in store in 2020, and beyond? This article explores the key dates and mechanisms and highlights some of the potential short- and long-term implications for charities and social enterprises.

The legal mechanics

The Withdrawal Act, which amended the European Union (Withdrawal) Act 2018 orchestrated the UK's withdrawal from the EU on 31 January 2020 – 'exit day'. Crucially, the legislation provides for a 'transition' (or 'implementation') period until 11pm on 31 December 2020. During this time, most EU law continues to apply in the UK, even though the UK is no longer a party to the EU treaties.

At the end of the transition period:

- EU law that has already been incorporated into UK law will continue to apply – unless it is changed by supplementary legislation. Much EU law is already embedded into UK law – for example, the rules on advertising and marketing contained in the EU Unfair Commercial Practices Directive.
- Other EU law will apply to the extent that it is incorporated into UK law during – or with effect from the end of – the transition period. Ministers have some powers to achieve this by secondary legislation.

Negotiations between the UK and EU during the transition period will determine the extent to which UK law will mirror – or diverge from – EU law once the transition period ends. So, the nature of the UK's trading relationship with the EU remains uncertain, and the medium- and long-term future for charities and social enterprises requires a degree of crystal ball gazing. We asked our colleagues in specialist areas for their predictions.

Data protection

Under regulations that came into effect on exit day, the EU General Data Protection Regulation (GDPR) is now known in the UK as the 'EU GDPR'. The regulations have also generated a new 'UK GDPR' by making hundreds of changes (mainly unsubstantive) to the 'EU GDPR' text.

However, during the transition period, UK organisations are still bound by EU law. The UK GDPR will come into effect at the end of the transition period.

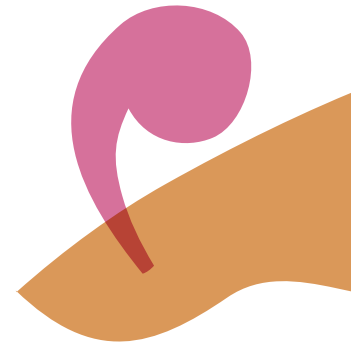
Departure from the EU also has an impact on data transfers where data is transferred from the remaining 27 EU countries to the UK. During the transition period, there is no change and there is no immediate urgency to review arrangements where personal data is being transferred from the EU to the UK. Whether or not organisations need to put in place appropriate safeguards to protect data being transferred from the EU 27 to the UK depends on how the discussions around the UK being awarded 'adequacy' go in the transition period.

In any event there will also be obligations under the new UK GDPR, coming into effect at the end of the transition period, for EU controllers offering services into the UK to appoint a UK representative – and vice versa.

State Aid

During the transition period there will be no change from a legal perspective. Clients who give or receive State Aid (or potential aid) will still need to carry out a legal assessment to ensure compliance.

In the longer term there will be a possible reduction in EU-based grant funding, although the UK government may provide alternative sources of funding to replace EU funds (see more on this below). The State Aid regime (in its current form) may well fall away in its entirety and be replaced by something quite different that regulates UK state funding.



'Many core employment rights will not be affected by Brexit as they arise from domestic legislation. These include rights to protection from unfair dismissal; National Living Wage; entitlement to statutory redundancy payments; and most of our family-friendly rights.'

Competition

There will be little or no impact during the transition period. However, the UK authorities may be less focused on competition law enforcement during this period as they take on the EU authorities' case load that has a UK element and get to grips with how this will be managed post 2020.

Longer term, UK competition law may diverge from EU competition law, subject to what is agreed with the EU as part of the trade deal. But charities and social enterprises should not think competition law will diminish post Brexit. Although based on EU law, the UK regime is well established and will continue independently of it.

Intellectual property and trade marks

The provisions around trade marks and Brexit are complex. A key consideration is that, in principle, no trade mark owner should lose any rights that they held before Brexit, although in some situations additional steps may be necessary to keep those rights in place.

EU Trade Marks will cease to have effect in the UK at the end of the transition period. EU Trade Mark registrations will be automatically cloned onto the UK Register, free of charge, giving rise to two separate trade mark registrations (one covering the UK, the other the remaining EU states). EU Trade Mark applications will not be cloned onto the UK Register.

One longer-term concern relates to the requirement for trade mark owners to show that their mark is in use in order to maintain their rights in force. If a registered (UK or EU) mark is not used for a period of five years, then it may be struck from the register upon application by third parties. Where an organisation has an EU Trade Mark that is currently only (or primarily) used in the UK, there is a real risk that the surviving EU component of that registration will in due course become vulnerable to

cancellation, if not at the end of the transition period, then over time.

VAT

During the transition period the UK remains within the EU VAT regime, Single Market and Customs Union. There are unlikely to be major changes until 31 December 2020, but at that point the UK will leave the EU VAT regime and become a 'third country' for the purposes of EU VAT.

The EU and UK will seek to negotiate a Free Trade Agreement during the transition period covering future tariffs and customs controls on the movements of goods. This will not materially affect the post-2020 VAT changes, which will be significant. Changes will include the ending of zero-rated B2B intra-community supplies and the loss of Distance Selling thresholds for UK e-commerce sellers of goods to EU consumers. UK businesses with a foreign VAT registration in the EU may need to appoint a special VAT fiscal representative.

Please contact our VAT specialist Bill Lewis on b.lewis@bateswells.co.uk for more information on the likely changes.

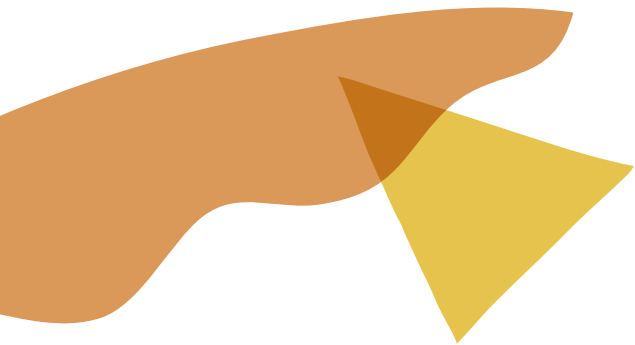
Social finance

Amongst other changes, new regulations will amend retained EU law in relation to the European social entrepreneurship funds, which aim to make it easier for social enterprises to raise funds across Europe, through a designation system and a passporting regime.

Many voluntary sector organisations rely on European funding as part of their income mix. Exactly what will replace some of the major sources of European funding once the transition period ends remains unclear. For example, the government announced that it would create the UK Shared Prosperity Fund (UKSPF) to replace funding from the European Structural and Investment funds, which includes funding that goes to charities and social enterprises in the UK

FIND OUT MORE

You can find a more detailed version of this article, and regular updates, in the 'Navigating Brexit' area of our website at <https://bateswells.co.uk/campaigns/navigating-brexit>. Your regular Bates Wells contact will, of course, be happy to advise on any specific areas of concern.



for projects to create jobs and support economic growth. This commitment was repeated in the Queen's Speech in December 2019 and a consultation on its development, which has been expected for some time, is scheduled for 2020.

Procurement

During the transition period the existing procurement regulations continue to apply to the UK. The UK also remains part of the Government Procurement Agreement (despite not being an EU member state) during this period.

At the end of the transition period, the relevant rules (including EU procurement directives and general principles of EU law) will continue to apply, broadly speaking, to any public procurement procedure launched before the end of the transition period which is not yet finalised, and any call off procedures under framework agreements where the procurement of the framework agreement was launched before the end of the transition period.

From the end of the transition period these regulations can be changed to fit government policy. Fundamentally, although there may be some appetite for a simplification of the detail in the procurement regulations, the current UK government seems unwilling to alter procurement regulations too far as the use of competitive, transparent and fair processes is still considered to be a useful tool to secure best value for public bodies (and the taxpayer) and prevent corruption.

Cross-border disputes

There are no changes to the methods for serving proceedings on defendants in EU countries, and rules for enforcing judgments in the EU during the transition period. Changes after this period will depend on the deal (if any)

that is reached. If you are concerned about the possible impact of Brexit on a particular contractual arrangement, and particularly in relation to any governing law or jurisdiction clauses and the mechanisms for enforcing rights or resolving any disputes that may arise, you should seek advice as early as possible.

Employment

Brexit will not have an immediate effect on UK employment law. However, once the transition period ends the UK will cease to be bound by any new judgment of the Court of Justice of the European Union (CJEU). Old judgments will remain in effect unless and until legislation is repealed or re-enacted. The UK courts may still elect to take account of new CJEU decisions that are relevant to the issue under consideration.

Many core employment rights will not be affected by Brexit as they arise from domestic legislation. These include rights to protection from unfair dismissal; National Living Wage; entitlement to statutory redundancy payments; and most of our family-friendly rights.

Workers' rights that derive from EU legislation may be in line for repeal after the transition period. These include rights under the Working Time Directive. We may see legislation reversing some of the rulings about entitlement to holiday pay that have arisen from decisions of the CJEU.

Immigration

During the transition period, there will be no change to EEA/Swiss nationals' and their family members' right to travel to, live and work in the UK under free movement. EEA/Swiss nationals will continue to be able to enter the UK and evidence their right to work by using their EEA/Swiss passport or national ID card.

Once the transition period has finished, those EEA/Swiss nationals resident in the UK before the end of the transition period who want to continue to lawfully work in the UK will need to apply for status under the EU Settlement Scheme and will need to do so by 30 June 2021. Those arriving in the UK after the transition period ends will need to apply for leave under a new immigration regime that is due to be in place from January 2021.

Right to work checks

All EEA/Swiss nationals can rely on their EEA/Swiss passports to prove their right to work until 31 December 2020. Any new EEA/Swiss national hires joining an organisation between 31 January 2020 and 30 June 2021 will be able to choose to provide either their status under the EU Settlement Scheme or their EEA/Swiss passport as evidence of their right to work: employers will not be able to demand to see the EU Settlement Scheme status for new hires if they are provided with an EEA/Swiss passport.

From July 2021 it will be mandatory for EEA/Swiss nationals to have an additional status to prove their right to work in the UK. But right to work checks are not retrospective and employers will not need to rerun checks on staff they have hired prior to 31 December 2020 on the basis of their EEA/Swiss passport.

It is also worth remembering that it is not necessarily just EEA/Swiss nationals who will be affected. Employers may have non-EEA national employees who are working by virtue of being the family member of an EEA/Swiss national. They may also have British employees who have EEA/Swiss family members and are therefore interested to know what they should be doing in the future.

Preventing charity fraud

Recent research shows that charities are increasingly aware of the risk of fraud and defences are improving, but some charities still have much to do.

In this guest article, **Alan Bryce**, Head of Development, Counter Fraud and Cybercrime at the Charity Commission for England & Wales reports on the work the commission is doing to tackle fraud in the sector.



Alan Bryce Head of Development, Counter Fraud and Cybercrime at the Charity Commission for England & Wales

<https://www.gov.uk/government/organisations/charity-commission>

Changing how charities think about fraud is key to making the charity sector more resilient. The starting point is to accept that every charity will, at some point, be the victim of fraud. In the digital age, with some 70% of frauds now cyber enabled, sadly, this is inevitable. What matters is that charities can demonstrate they have done everything they reasonably can to prevent fraud and have arrangements in place to identify and respond appropriately when a fraud occurs. With all the guidance and good practice that is now available there is really no excuse for any charity not to play an appropriate, proportionate role in the fight against fraud.

Understanding the threat

There has been relatively little sector specific research available to help understand the nature of the threat facing charities. So, last year, the Charity Commission – in partnership with the Fraud Advisory Panel – undertook the largest ever charity fraud survey in the UK, and potentially worldwide.

We asked a representative sample of 15,000 registered English and Welsh charities to complete a voluntary fraud survey. This achieved an impressive 22% response rate – reflecting the increasing importance many charities now place on tackling fraud and reducing the harm it can cause. For the first time we now have statistically significant findings to inform our understanding of the fraud risk faced by charities. It also provides a useful comparison with a similar, although much smaller, survey undertaken by the Fraud Advisory Panel in 2009. So, what were the main findings?

Perceptions of fraud risk

Charities are increasingly aware of the risk of fraud. Acknowledging the threat of fraud is the first step towards adoption of effective fraud prevention defences:

- More than two thirds of charities (69%) think fraud is a major risk to the charity sector (51% in 2009).

- A third (33%) think fraud is a greater risk to the charity sector than other sectors (25% in 2009).
- In general, larger charities (particularly those that have suffered fraud) are more likely to acknowledge the risk of fraud.

However, there is still far more that charities can do to protect themselves:

- 85% of charities think they're doing everything they can to prevent fraud, but almost half don't have any good practice protections in place.
- Less than a third (30%) of charities have a whistleblowing policy (18% in 2009).
- Less than a tenth (9%) of charities have a fraud awareness training programme (4% in 2009).
- Charities believe they are vulnerable to fraud because of a lack of fraud awareness training (28%), and over reliance on goodwill and trust (26%) and/or excessive trust in one or more individuals (22%).
- Just under half (47%) think their charity contributed in some way to the fraud occurring, with nearly a third (30%) stating their charity was too trusting.
- A third (33%) did not report the fraud to any external organisation, such as the police or Charity Commission.

Of greatest concern is that more than a third (34%) of charities think they're not vulnerable to any of the most common types of charity fraud. Charities' recognition of their potential vulnerability is an important step towards ensuring that vital counter fraud defences are in place and operating effectively.

About a third of charities have yet to acknowledge the significant threat that fraud now poses to the sector. And about a third are unaware of the vulnerabilities common to charities that fraudsters seek to exploit and have yet to adopt the good practice arrangements needed to increase resilience.

'About a third of charities have yet to acknowledge the significant threat that fraud now poses to the sector. And about a third are unaware of the vulnerabilities common to charities that fraudsters seek to exploit and have yet to adopt the good practice arrangements needed.'

The good news is that this can be addressed easily. More than eight in 10 frauds are identified as a result of financial controls at the charity, by audit or whistleblowing. So, rigorously applying basic controls can make a huge difference and can be implemented with little or no additional cost.

As part of our research we talked to three charities that had all adopted good-practice procedures, including enhanced fraud awareness training for staff and volunteers, a simplified reporting framework and better whistleblowing arrangements for staff to raise concerns. These resulted in an approximate three-fold increase in the total number of fraud reports in these charities over a five-year period. As a result, a significant number of frauds were uncovered that wouldn't otherwise have been identified.

Analysing charity frauds

- Mandate/Chief Executive Officer (CEO) fraud is the most common type of fraud targeted against charities. This involves impersonation of either legitimate organisations the charity deals with, or senior staff of the charity itself, usually conducted via hoax emails.
- More than half of charities (53%) knew who committed the fraud.
- Nearly two-thirds (60%) of frauds occurred over a six-month period.

Guidance and assistance

The full results of the survey can be found in the Charity Commission report *Preventing Charity Fraud*, published in October 2019 as part of International Charity Fraud Awareness Week.

<https://www.gov.uk/government/publications/preventing-charity-fraud-insights-and-action>

I would encourage charities to download the report and complete the fraud prevention checklist. All charities, regardless of their size and type, can demonstrate their commitment to tackling fraud by adopting *Tackling Charity Fraud: Eight Guiding Principles*. A summary of the eight principles, endorsed by charity regulators in Scotland, Northern Ireland, USA, Australia and New Zealand, can be found in our report.

There's plenty of free information and guidance available to help charities fight fraud. The Charity Commission, together with the Fraud Advisory Panel and partners from the Charities Against Fraud group, have produced a series of resources (including helpsheets, webinars, videos and good practice guides) as part of International Charity Fraud Awareness Week. These are available at:

<https://gateway.on24.com/wcc/experience/elitebba/1917599/2071337/charity-fraud-awareness-hub>

Further guidance is also available at:

<https://www.gov.uk/guidance/protect-your-charity-from-fraud>

<https://www.fraudadvisorypanel.org/charity-fraud/resources>

FIND OUT MORE

If you would like more information about how to protect your charity from fraud or to discuss a specific matter, please email fightingfraud@bateswells.co.uk or call 020 7551 7777 and ask to speak to Rob Oakley or Mindy Jhittay.



Suspension: a bridge too far?

We are often asked to advise charities and social enterprises about whether they can or should suspend employees where there are concerns about their conduct.

Lucy McLynn advises charity and social enterprise employers to be very cautious when considering suspension of an employee.



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Lucy is recognised as a leading employment lawyer in both *Chambers UK* and the *Legal 500* directories. She has a particular interest in employment issues affecting charities and social enterprises, such as the status of volunteers and issues around working time and holiday pay entitlement.

Employers have needed to approach suspension with caution ever since the 2000 case of *Gogay v Hertfordshire County Council*. In this case, a care worker was suspended following what was understood to be an allegation of sexual abuse of a child. In fact, the allegation should not have been characterised in that way and it was held by the Court of Appeal that the council had acted without reasonable care in taking the decision to suspend Ms Gogay. The council had accordingly breached the implied term of trust and confidence in its contract of employment with Ms Gogay, entitling her to damages for loss of earnings and clinical depression.

Last year, the Court of Appeal slightly rowed back from this position in the case of *London Borough of Lambeth v Agoreyo*. Here, a primary school teacher was suspended after allegations of having used excessive force against two young pupils. The Court of Appeal held that the employer had acted with 'reasonable and proper cause' in taking the decision to suspend to allow an investigation into the allegations to be conducted fairly. This was the appropriate test in establishing whether there was a breach of contract, rather than asking whether suspension was 'necessary'. This is a helpful development in the law around suspension, making it more likely that a suspension will be found to be lawful.

There are, however, still many pitfalls for employers in suspending employees. Below are our top tips on the appropriate handling of suspension of an employee.

- Do not suspend as a 'knee-jerk' reaction. Always take time to consider the appropriate course of action (even if the employee needs to be temporarily removed from an immediate workplace situation in the meantime).
- Be clear about the specific reason or reasons for suspension in any particular case. Is it because of the seriousness of the allegation? Is there a risk of recurrence? Would the employee's continued presence at work be prejudicial to a fair investigation?
- Consider alternatives to suspension. Could the concern that is giving rise to consideration of suspension be addressed in another way? Could the employee, for instance, be temporarily redeployed to a different role?
- Be clear with the employee about the contractual terms that apply during suspension. Suspension is always going to need to be on full pay.
- Ideally, have an express clause in your employment contracts setting out your right to suspend an employee from their duties. While this will still be subject to an implied term of reasonableness, it will remove any argument that the employer is contractually required to provide work for an employee.
- If an employee provides a sick note and/or says that they are too sick to attend an investigatory or disciplinary meeting during suspension, consider whether it is appropriate to move them onto sick leave instead of suspension. Depending on their sick pay entitlements, this may result in a saving of the salary to which they would otherwise be entitled throughout suspension, and the employee can still be told that on the expiry of their sick leave they may not return to work without prior notification to the employer (at which point suspension could be reinstated). You cannot decide retrospectively to treat a period of suspension as sickness absence.
- Keep the period of suspension as short as is reasonably practicable. If the employee is suspended in conjunction with a police investigation then consider particularly carefully whether the internal disciplinary process can be progressed separately and more speedily. Criminal investigations tend to be very lengthy. In another recent suspension case last year, *North West Anglia NHS Foundation Trust v Gregg*, the Court of Appeal held that the

trust had been entitled to commence disciplinary proceedings against a doctor in respect of patient deaths while a criminal investigation of the same issue was ongoing, as there was no evidence that the internal investigation would give rise to a danger of a miscarriage of justice.

- Actively review the suspension periodically to be clear that there is still reasonable and proper cause for suspension. If, for instance, the reason for suspension was the seriousness of the allegation, and the subsequent investigation has demonstrated that the conduct was not in fact as serious as it had appeared (although still meriting a disciplinary hearing) it might be appropriate to lift the suspension ahead of concluding the disciplinary process. In a 2007 case (*Camden and Islington Mental Health and Social Care Trust v Atkinson*) the Employment Appeal Tribunal held that a failure by the employer to review the period of an employee's suspension and to lift it at the appropriate time was in itself sufficient to give rise to a successful constructive dismissal claim by the employee.
- Communicate with the employee throughout their suspension. Tell them when you have reviewed their suspension, and let them know that suspension needs to continue and why. Keep them informed about the progress of the investigation and/or disciplinary process that is being undertaken and likely timescales and next steps.
- Do not fall into the trap of regarding suspension as a 'neutral act'. While suspension is, of course, not indicative of any predetermined outcome to a disciplinary process, it is far from neutral. The courts have specifically rejected a 'neutral act' as a proper description of suspension. (This was one of the points that arose in the *Agoreyo* case.)



The reality of most suspensions is that it is a devastating situation for an employee and can have a long-term impact on their career and health. This is why suspension requires careful consideration and handling by an employer, and is not something to be undertaken lightly.

FIND OUT MORE

Please get in touch with our employment team if you are considering suspension and we will be happy to advise you on the best course of action. <https://bateswells.co.uk/services/employment>



Protecting children's data

Navigating the rules around protecting children's data is not an easy task as the law struggles to keep pace with the seismic advances in information sharing in today's online world.

Mairead O'Reilly outlines some of the headline rules that apply to the processing of children's data in the UK.



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Mairead is a senior associate in our Data Privacy team. She has been advising on data protection law for more than 10 years and enjoys working with a wide range of clients in the charity, social enterprise and commercial sector.

DATA PRIVACY

Our Data Privacy team understands that the right approach to data privacy can be a real asset to your organisation. We also recognise the impact that good privacy practices can have on wider society.

For more information and advice, please refer to our Data Privacy pages at <https://bateswells.co.uk/services/data-privacy>

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What does the General Data Protection Regulation (GDPR) say?

The GDPR does not say a lot about children's data. However, a key message is that children 'require specific protection with regard to their personal data as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data...' (Recital 38).

What are the rules around processing a child's information?

In most cases, the same rules apply to the processing of children's data as those relating to adults. Organisations need to be able to rely on a suitable lawful basis for processing. Each lawful basis needs to be considered in the context of the data subject being a child. For instance, if you are seeking to rely on legitimate interests, you need to give extra weight to children's interests and need a more compelling interest to justify any impact on a child's rights and freedoms.

What are the issues with consent?

It is possible to rely on a child's consent as your lawful basis for processing their data. However, reaching the threshold for consent under the GDPR is not straightforward – particularly when it comes to children. For instance, consent needs to be informed and freely given. If a child does not fully understand the implications of their personal data being processed, it will be difficult to demonstrate that their consent is informed. Similarly, there will often be a clear imbalance of power between a child and a controller where, in effect, a child may feel that consent is not really optional and therefore cannot be freely given.

Collecting children's data online

The GDPR is more specific when it comes to the processing of children's data online. Article 8 requires that if you are offering Information Society Services (ISS) directly to a child and you are relying on consent, the consent of a parent or someone with

parental responsibility is needed for children who are under 16. Most online services are caught by the definition of ISS, including online messaging services, sites offering tickets to events and many online news and educational websites.

EU member states are permitted to vary the age below which the consent of a parent or someone with parental responsibility is needed: in the UK the relevant age is 13. However, if you are collecting personal data online about children in other EU countries, this age may vary.

Of course, you won't always need to get consent to process a child's data online, so in most cases it will be easier to seek to rely on an alternative legal basis for processing, such as legitimate interests. However, there will be cases where consent is needed – for instance when processing special category data, dropping cookies or sending electronic marketing messages.

If you are planning to use children's personal data to offer an online service to a child you must do a Data Protection Impact Assessment.

Age Appropriate Design Code

Finally, if you are engaging with children online, it is important to be aware of the Age Appropriate Design Code – a statutory code of practice published by the ICO. The code is aimed at providers of ISS and contains practical guidance about how to ensure that online services safeguard children's personal data.

FIND OUT MORE

ICO guidance on Data Protection Impact Assessments and the Age Appropriate Design Code are both available on the Information Commissioner's website <https://ico.org.uk>

Transgender inclusion

Charities are looking to the law for clarity on how to be inclusive and respectful of all their beneficiaries. Single sex charities and those whose beneficiaries, members or service users are young people often have queries about transgender inclusion.

In the first of a series of articles on transgender inclusion and the law, **Mindy Jhittay** explains some of the legal terminology and answers the most frequent questions our clients ask.



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Mindy is a dispute resolution lawyer and advises charities on contentious matters relating to their transgender inclusion policies.

FIND OUT MORE

If you have any queries about transgender inclusion in your charity, whether legal or practical, please contact Mindy Jhittay on m.jhittay@bateswells.co.uk or 020 7551 7853.

Stonewall and Mermaids are specialist charities which provide support for transgender people and practical resources on transgender inclusion.

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What is gender identity?

Gender identity is a person's innate sense of their own gender, whether man/boy, woman/girl or something else. Many of us never stop to think about this because our gender identity matches our biological sex. For example, I am a woman and I am female. This means that I am 'cis-gender'.

For transgender (or 'trans') people, the gender they were assigned at birth does not match their gender identity. For example, a transgender man/boy is biologically female and was therefore assigned 'girl' at birth.

Gender identity is different to gender, a social construct under which people are expected to behave in a masculine or feminine way according to their biological sex.

Who is transgender in law?

Under section 7(1) Equality Act 2010 (the Equality Act), a person has the protected characteristic of 'gender reassignment' if the person:

- is proposing to undergo;
- is undergoing; or
- has undergone

a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

This is a wide definition. It means that there is protection under the Equality Act for a person who is aligning the outward expression of their gender with their gender identity. Medical supervision is not required and they may simply live permanently as the opposite sex, without hormonal or surgical therapy. This is sometimes referred to as 'self-identification'.

Can a transgender woman join a women-only charity?

The starting point is that it is unlawful to discriminate against someone on the basis of their sex (or any other protected

characteristic) – so a charity's services should be open to all. However, the Equality Act includes provisions permitting the restriction of services or membership to individuals who share a protected characteristic, such as sex.

This means that a charity can restrict its membership to women only, and refuse an application from a man who wishes to join. It is not clear whether these provisions can be read widely to include transgender women, who are biologically male. If they are, and a charity does allow a transgender woman to join, it may find it more difficult to reject applications from other biological males. But if the charity interprets the legislation more narrowly, and doesn't allow transgender women to join, it could face claims of discrimination from them.

Can transgender men and non-binary people join a women-only charity?

A transgender man is biologically female. This means that he falls within the single sex exception in the Equality Act and can join even though he is a man. The same applies to a non-binary person who is biologically female.

A non-binary person who is biologically male would not be included, unless they are part way through a process which might result in them identifying as a woman (as per the definition in the Equality Act discussed above).

Are there any other steps that charities can take?

Yes. Under Section 193(a) of the Equality Act, charities are permitted to restrict the provision of benefits to persons who share a protected characteristic if (among other things) the person acts in pursuance of a charitable instrument that governs the charity.

You may wish to review your constitution and consider whether you need to amend it to clarify the extent to which transgender and non-binary people can join or benefit from your charity.

The Modern Slavery Act

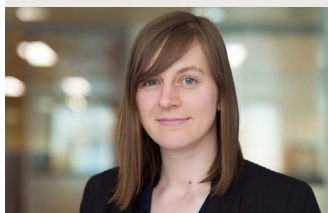
The Modern Slavery Act 2015 has recently been the focus of an independent government review.



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CHARITY AND SOCIAL ENTERPRISE
UPDATE | SPRING 2020

Oliver Scutt and **Yvett Talas** interviewed **Andrew Wallis OBE** (Chief Executive of leading anti-slavery charity Unseen) and **Dr Anjali Mazumder** (AI and Justice and Human Rights Theme Lead at The Alan Turing Institute), to find out what impact the Modern Slavery Act 2015 (the Act) has had to date and the key issues that require urgent attention.

Can you provide a brief overview of the work your organisations do in relation to modern slavery?

Andrew: Unseen focuses on five main areas. We work with survivors of modern slavery found in the UK providing help with accommodation, support, and reintegration; with frontline agencies; and with businesses to improve transparency in supply chains. We also run the UK's modern slavery helpline and work with the government on various anti-slavery initiatives.

Anjali: The Alan Turing Institute (the Turing) recognises modern slavery as a human rights and socio-economic issue, and a research priority. The Turing's focus is to empower government and frontline agencies and enable private sector action by developing and applying data science/AI methods to safeguard vulnerable people, disrupt exploitation and build resilient institutions through multi-sector partnerships.

The Turing and Unseen are working in collaboration on various modern slavery issues, particularly opportunities to enable multisector data sharing and exploring typology specific challenges such as exploring sexual exploitation. We are also working in partnership with the Bingham Centre for the Rule of Law which leads the new Policy and Evidence Centre for Modern Slavery and Human Rights.

How effective would you say the Act has been to date?

Andrew: The Act has had a huge impact, not least because primary legislation has enabled different anti-slavery stakeholders to focus and deliver their work more

effectively. However, the Act must evolve as circumstances change.

Anjali: The Act raised awareness of the issues of human rights violations across a range of typologies and highlighted that this is not only a problem for developing countries. Now it is time to work on transparency and enforceability – there is currently insufficient evidence gathering, and thus few prosecutions.

Did the Act have a significant impact on businesses?

Andrew: It had an impact on businesses and on those who are pushing for more action to ensure consistent good practice. Out of approximately 17,000 companies around 3,700 still have not complied with the legislation. The government must play its part by enforcing the provisions within the Act to ensure transparency reporting is comprehensive. Unseen has worked with a data analytics company to enable 'TISC Report', which is the world's largest open data platform committed to ending corruption, supply chain labour abuses and modern slavery.

Anjali: It certainly led to an increased number of businesses making modern slavery statements. However, the quality and effectiveness of these statements is unclear, which may be due to poor transparency and disclosure from other businesses regarding possible violations.

What role can artificial intelligence (AI) play in tackling modern slavery?

Andrew: Data has a huge role to play in combatting slavery and we need to look at how it can drive both information and practice. Much existing policy practice

and funding is based on anecdotal evidence, so we need to get better at gathering, sharing and analysing data to enhance our understanding of the narratives around modern slavery and drive the quality of our interventions.

The helpline enables us to gather anonymised data and bring bigger data sets together. We are looking for the connections/gaps between an individual's exploitation and their access to key services, which may represent a slavery threat rather than an opportunity. For example, in Uganda the university population is particularly vulnerable due to the need to access the job market.

Anjali: AI gives us the opportunity to interrogate existing data and identify gaps both in the data and in our knowledge. AI also offers the opportunity to make use of multiple and typically non-traditional administrative data sources. Often NGOs and government agencies do not have the resources to harness the data and consider the legal, ethical, social and computational challenges, so we hope that the Turing and AI can start to fill this gap.

What has been the impact of the recent government review of the Act?

Andrew: There are three key takeaways from the review. First, we need to provide better protection and care support for victims. Second, the role of the independent Anti-Slavery Commissioner (ASC) needs to be clarified and its responsibilities better delineated from those of the government – this will raise key questions around the budget and overall capacity of the ASC's role. Third, transparency in supply chains must improve. We can upgrade legislation, but the key issue is not legislative change but the successful policy implementation of any proposed changes.

Anjali: We are waiting to see what the ASC will prioritise and how the government's new Policy and Evidence Centre for Modern Slavery and Human Rights can support that work. The latter is an indication that the government sees it as a priority issue.

What are the biggest challenges that lie ahead and the key issues that require attention?

Andrew: We don't yet know where the baseline is in the UK, Europe and globally. We need to figure out how we can assess something that is fundamentally hidden, look at what the data tells us and the preventive work required – it is about both corporate and policy understanding. Right now, it seems like all actions are reactive, so we need to get to a place in the UK where these practices are socially unacceptable – and we are nowhere near that level.

Anjali: Modern slavery is a vast and complex human rights challenge. It includes those being sexually exploited online, forced labour at sea and on land in both rural and urban areas. Different organisations are collecting data in different ways and are often unable to draw upon each other's data. Data is sitting in siloes and we do not know who has the different pieces of information. We need to enable multisector data sharing and tools to best harness the data in a way that respects legal, ethical and social considerations. This is a priority and a real challenge.

What are the key priorities going forward?

Andrew: First, I would change the way we gather and analyse data and then provide proportionate and strategic funding to tackle the problem. The reported annual costs to the UK economy are between £3.3 billion–£4.3 billion, based on the government's figure of 10–13,000 victims at any one

time. Experts believe that the real figure could be 10 times this, so potentially the impact on the UK is between £30 billion–£40 billion per annum. We need to look at how much and how we are spending. We also need to make sure that resources reach all parts of the world, recognising that, while it is much more expensive to tackle the issue in the developed world, the majority of funding is being directed to the developing world.

Modern slavery has woven itself into the fabric of global society. Big issues such as polity, economic disparity, education and climate change must also be addressed, as they will have the biggest impact on whether an individual will be trafficked.

Anjali: I am often asked whether AI is the silver bullet. I don't think there is one. There are several approaches and each of them require trust, collaboration and partnership. I do think that data and AI methods can open opportunities for better understanding and disrupting this human rights abuse.



Dr Anjali Mazumder



Andrew Wallis OBE

FIND OUT MORE

The TISC report is at:
<http://www.tiscreport.org>

Unseen
<https://www.unseenuk.org>

The Alan Turing Institute
<https://www.turing.ac.uk>

STEPHEN LLOYD AWARDS WINNER



2020 STEPHEN LLOYD AWARDS

Have you stumbled upon a clever idea to solve an existing social challenge? If so, apply to the Stephen Lloyd Awards before 16 March and you could become our next winner. Find out more by visiting www.stephenlloydawards.org

The Stephen Lloyd Awards were founded by the Bates Wells Foundation (registered charity number 1150321) in memory of Stephen Lloyd, the former senior partner and head of Charity and Social Enterprise at Bates Wells. Each year, the awards continue Stephen's passion of developing new ideas by inviting applications from early stage projects focused on delivering systemic social change. Winning applicants receive funding of up to £20,000, along with an opportunity to receive pro bono support from expert leaders in the charity and social enterprise sector.

Breadwinners – supporting refugees one loaf of bread at a time

Breadwinners is a grassroots charity and social enterprise supporting refugees into work, training and mentoring opportunities through selling artisan organic bread across London's best markets. We invest funding to set up market stalls that sustain themselves from bread sales – and we are able to provide newly-arrived refugees with their first jobs.

The transition between seeking asylum, gaining refugee status and finally earning a living is critical. Breadwinners plays two important roles.

Through our Risers Programme we provide early intervention support for young people (16–24 years old) seeking asylum to build transferable skills, grow their networks, and progress through mentoring so they are better integrated and prepared to gain employment when they receive refugee status.

Through our Breadwinners Programme we support refugees who already have status and are struggling to find work. We provide them with their first UK employment, references, networks and opportunities to independently sustain themselves and progress. This takes, on average, six months.

By managing the market stalls, serving customers, working the till, creating marketing campaigns, explaining our mission and attending training and mentoring sessions, refugees gain transferable skills and feel proud and useful, contributing to their wellbeing and integration as active members of society. As a wider benefit, partners, customers and volunteers gain understanding and feel positive about contributing to an end to negative bias against refugees in the UK.

Support from the Stephen Lloyd Awards (SLA)

Up until June 2019 the Breadwinners team consisted of two people – the project director and a part-time programme manager. The award has enabled us

'We believe refugees have extraordinary potential as entrepreneurs, employees and members of local communities. We sell the best artisan organic bread to support them to build a fresh start, providing self-employment, training, and business opportunities – and to become an active part of the community.'

Martin Cosarinsky Campos,
Project Director at Breadwinners

to double our team – adding a core member of the team doing finance and communications, and progressing one of our Breadwinners to the role of market coordinator. SLA has also provided contacts who have supported us with handling photo consent and finding suitable insurance. Above all, SLA has been instrumental in supporting the 15 refugees to secure their first jobs with Breadwinners, and the 40 young people seeking asylum to gain their first UK experience, training and mentoring.

Written by Breadwinners

FIND OUT MORE

Anyone interested in supporting young refugees can find out how to get involved at <https://www.breadwinners.org.uk/get-involved>

Find out more about Breadwinners here:

Video – <https://vimeo.com/257109138/3831080013>

Video – <https://vimeo.com/377038987>

Our Impact Leaflet – <https://drive.google.com/file/d/0B59cuoF2KQfAelBwREI4a3Y3aW1XV1dPTE9YUzN2OWpHQTRv/view>

And stories on our website at <https://www.breadwinners.org.uk>

Life cycle of your property

All charities and social enterprises have property requirements.

Real estate expert
Amanda Gray explains
what to expect at each
stage of your property's
life cycle.



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Amanda is a senior associate in our Real Estate team with more than 14 years' experience acting for a cross section of commercial and charity clients, dealing with a wide range of commercial property transactions.

The beginning

First you should carry out an assessment of your business needs and the location and type of property that would best support them. There are a number of advisers you may call upon to help, for example, commercial property agents.

Once you find a suitable property, you will need to agree terms of the letting or acquisition and carry out due diligence.

Agents usually negotiate and agree the heads of terms. However, it would be advisable for solicitors to be involved at this stage to provide a legal angle and assist the agents to secure you the best deal possible.

Once you have agreed heads of terms, the solicitors will carry out due diligence in respect of the property. This consists of title investigation, undertaking property searches and raising pre-contract enquiries with the landlord's or seller's solicitor. The transactional documents will also be negotiated between the solicitors.

You will need to think about the design strategy for your property. A space planner/architect would be able to discuss your requirements on design, layout, storage and furniture solutions. If your property is leasehold, it is likely that landlord's consent is required for internal non-structural alterations.

At this stage it is also important to establish exactly what your connectivity and data needs are, as your chosen telecom provider may require a wayleave agreement giving them the necessary rights to install their equipment. This can take several months to negotiate.

The middle

It is good practice to continually appraise your property requirements, so that you are able to plan ahead in good time.

If you have surplus space at your leasehold property you may want to consider options such as sharing, subletting, assigning or exercising a break right.

If you are considering breaking your lease, obtain professional advice well in advance of serving the break notice as there are frequently conditions to be met. All break conditions must be strictly complied with and once a break notice is served, it is irrevocable.

You may want to refurbish your offices – turning a traditional office space with individual offices and boardrooms towards a more open-plan styled layout to utilise the space more efficiently. If you are a leaseholder, you will need to check the terms of the lease to find out what types of alterations require landlord's consent.

The end

If your property is leasehold, your lease may end due to the expiry of the contractual term of the lease or via the exercise of a break right.

At least six months before the end of your lease, you should review the yielding up clauses in the lease and any licences for alterations you may have. We recommend instructing a solicitor and a building adviser to assist you in this process.

Open discussions with your landlord and ask them to serve a schedule of dilapidations as soon as possible. This way you can work out whether you will be doing the works yourself or settle with the landlord financially. A pre-action protocol for dilapidations sets out the procedure and what needs to be considered in order to encourage early settlement and avoid litigation.

For freehold properties, the state and condition you leave the property in is usually discussed and agreed with your buyer.

FIND OUT MORE

Our real estate team is able to support you at all stages of your property lifecycle. Please get in touch at <https://bateswells.co.uk/services/real-estate>

How to handle complaints

The Fundraising Regulator continues to emphasise the importance of proper complaints handling.

Emma Dowden-Teale and Charlotte Blackburn remind charities how to deal with complaints in line with the Code of Fundraising Practice.



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Emma is recognised as a Key Lawyer in the *Legal 500* directory. She advises on all aspects of regulatory and public law, both contentious and advisory.



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Charlotte is a solicitor in the Public & Regulatory team. She advises a range of clients including public bodies, regulators and charities on their legal and regulatory obligations.

A clear and effective complaints policy is a must for charities in all fields and of all sizes. But charities also need to have robust internal procedures to ensure the policy is complied with.

Appropriate complaints handling means not only that the individual complainant obtains a resolution, but also that the charity can identify any issues and prevent them occurring again in the future.

Spotlight on fundraising

While complaints may relate to any aspect of a charity's work, charities' fundraising practices are often the subject of criticism. The Code of Fundraising Practice, revised in October last year, requires charities to:

- make sure that 'complaints are investigated thoroughly and fairly to find out the facts of the case, avoiding unnecessary delay'; and
- 'respond to complaints fairly and in a way that is in proportion to the complaint'.

The Fundraising Regulator now publishes decisions in all of its investigations into fundraising complaints (regardless of whether it found a breach of the code) and names the charities concerned. Recently published decisions show that the regulator is as concerned with ensuring that the complaint itself is handled well as it is with investigating the actual subject matter of the complaint. For example, in a decision published in December 2019, the Salvation Army was found to have breached the code by failing to investigate and appropriately respond to complaints about its marketing requests for donations. In response to the regulator's intervention, the charity reviewed its complaints procedure and retrained staff on complaints handling processes.

In other reported cases, there was no substance to the original complaint but the charity was criticised for its poor complaints handling. The regulator has even found breaches of the code where the charity has not learned lessons from the complaint.

So how do we comply with the code?

In essence, to deal with complaints well, you need a clear and effective policy, backed up by internal procedures and well-trained staff.

A good complaints policy should, at a minimum, include the following:

- A clear definition of 'complaint'. This will usually be wide enough to encompass any expression of dissatisfaction about something the charity has done or failed to do.
- An explanation of who can make a complaint, and how. Make sure you provide more than one method for making complaints and ensure that the methods offered are accessible (e.g. if you have an online complaints form, also offer to take calls relating to complaints).
- The steps that will be followed on receipt of the complaint, including clear timescales and possible resolutions. This may also include signposting to other relevant organisations, such as the Charity Commission, Fundraising Regulator, and/or Care Quality Commission.

FIND OUT MORE

Our Public & Regulatory department has a breadth of expertise in advising on all manner of complaints handling issues, including drafting complaints policies and procedures. Please get in touch via <https://bateswells.co.uk/services/public-and-regulatory>

See also our article on dos and do nots for effective complaints handling at: <https://bateswells.co.uk/2019/03/how-to-handle-complaints>

Payments overseas – HMRC investigates

Over the past few months, we have seen an increase in the number of investigations being carried out by HMRC in relation to charities making payments overseas.

Augustus Della-Porta and Stephanie Biden draw on their experience of advising on HMRC investigations to explain what is involved.



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Augustus is recognised as a Key Lawyer in *Legal 500* and leads on advising Muslim charities and not-for-profits in the UK and overseas.



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Stephanie is recognised as a Leading Individual in *Legal 500* and is the joint lead on all our work with faith-based organisations. She also has a particular interest in working with international NGOs.

In our experience, HMRC carries out these investigations to ensure charities are making payments overseas in accordance with its guidance on payments to overseas bodies. Its key test is that 'a charitable payment made to a body outside the UK will only be charitable expenditure for UK tax purposes by the charity provided the charity can clearly demonstrate to HMRC that it has taken steps that HMRC considers are reasonable in the circumstances to ensure that the payment is applied for charitable purposes'.

HMRC goes on to state in its guidance that 'if that condition isn't met, the payment is treated as non-charitable expenditure by the charity for UK tax purposes'. To put it another way, the charity would receive a tax bill from HMRC on that amount.

HMRC may initiate an investigation as a matter of course, but this could also come about due to concerns raised following regulatory action by the Charity Commission. Charities will typically be required to provide information about payments made to overseas bodies over a previous financial year including:

- the amount of each payment, to whom, when paid and on what basis;
- details of the charity's internal financial, management and decision-making procedures and how they were applied in relation to the payment;
- the charity's relationship with the payee, what research and due diligence was carried out and what risks were taken into account before making the payment;
- the terms of any agreement(s) put in place with the recipient (or, if there is no agreement, why none was put in place);
- what monitoring work the charity carried out to confirm that the funds were used for charitable purposes.

HMRC typically asks charities to provide a large volume of supporting documents with their response – including copies of

agreements, correspondence, funding applications, project plans, trustee decisions regarding the payments, due diligence checklists, project updates, records of meetings or teleconferences and financial records. Ordinarily, the information must be provided in hard copy within six weeks of the request, but HMRC will often require further details and the investigation may take over a year to conclude.

If a charity does not have particular records it should consider what other useful evidence it might have. For example, instead of a monitoring report, a trustee may have personally visited a project and reported back to the board. The minutes of that meeting could be included in the response, together with a paragraph explaining how the project was monitored and why it was done in this way.

If you are funding projects overseas you should consider whether you would be able to provide this information if it was ever requested and make sure that policies, processes and documentation could stand up to scrutiny if needs be. You should ensure that you can clearly explain how and why particular decisions have been made and carefully document decision making, due diligence, justification for expenditure and monitoring of how funds have been spent. Doing this now could help to avoid problems in the future.

FIND OUT MORE

HMRC's guidance on payments to overseas bodies is at <https://www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-ii-non-charitable-expenditure#payments-to-overseas-bodies>

See this article for more detail on the guidance: <https://bateswells.co.uk/2017/02/sending-funds-overseas>

We regularly advise charities operating overseas on these and other related issues. Please contact Augustus Della-Porta or Stephanie Biden for further details.

Changing your charity's structure

We often advise clients seeking to change from an unincorporated structure into a corporate charity.

Lucy Rhodes explains what's involved.



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Lucy is recognised as Key Lawyer and rising star in *Legal 500*. She is a charity law specialist with a varied practice, advising on a range of legal issues that affect charities and not-for-profits of all sizes.

Under English law a charity can exist in a number of legal structures, the most common being the trust, the unincorporated association, the company and the charitable incorporated organisation (CIO).

Although there are many charitable trusts (which are unincorporated) and unincorporated associations around, it is unusual to set up a new charity with an unincorporated legal structure today. The advantages of an incorporated legal form – a distinct legal personality and limiting the trustees' exposure to personal liability in respect of liabilities to third parties – have made the company limited by guarantee and the CIO more attractive options.

Many existing unincorporated charities choose to change to one of these incorporated structures to benefit from these advantages. There is no magic button to press to bring about this change. A new incorporated charity must be established and registered with the Charity Commission. It is then a matter of identifying the assets and liabilities of the existing charity through a due diligence exercise and transferring them over to the newly-registered corporate charity.

Although this process can be technically complex and involve some time commitment from trustees and staff (if any) it does provide an opportunity for a 'spring clean' of the charity. In the due diligence and transfer processes, knotty legal, accounting and practical issues that have not been considered for some time will often be untangled. The new charity will benefit not only from the advantages of corporate status, but also from an up-to-date constitution that facilitates compliance with charity law and good governance practice.

So, if you are embarking on this process, what are some of the key things that you should be thinking about?

Choice of legal structure

Your first decision will be to choose a new legal structure for the charity. By far the most common charitable incorporated structures are the company limited by guarantee and the CIO, but the activities, history and status of your charity may make it worth considering other options, such as the community benefit society or the Royal Charter body.

The main distinction between the company limited by guarantee and the CIO is that the company is subject to company law as well as charity law, whereas a CIO is only subject to charity law. A CIO has a single regulator, the Charity Commission, whereas the company is subject to dual regulation by Companies House and the commission.

The company does have its advantages though, particularly if you are looking for a 'tried and tested' legal form that third parties, including overseas partners, will be familiar with. It can also be set up in a day, whereas a CIO is only established on registration with the Charity Commission. The Charity Commission has been known to register charitable companies in the same timeframe, but this is not the norm.

New layer of governance?

The internal governance structure of your charity may need to change if you change your legal structure. Companies and CIOs have two tiers of governance, with trustees (who, in the case of a charitable company, are also directors of the company for the purposes of company law) and members.

The trustees and members can be the same individuals (the 'foundation model'). This is often the simplest governance model from an administrative perspective, as only one group of individuals is involved, albeit making decisions wearing different 'hats'.

Alternatively, the members can be a wider group of individuals (the 'association model'), a sole individual or a sole

corporate entity, providing an additional layer of scrutiny and accountability for the trustees.

Legal authority

Another early consideration will be whether your unincorporated charity has legal authority to make the change. The first place to check is your governing document, which may have an express power. If not, it may be possible to add one through an amendment. Alternatively, small charities with annual income below £10,000 may be able to rely on the statutory powers in the Charities Act 2011, which require a degree of Charity Commission involvement. In some cases it may be necessary to seek a Charity Commission scheme to authorise the transfer if authority cannot be obtained elsewhere.

What to do with the existing charity?

The tidiest option is to wind up and remove the existing charity from the Charity Commission's register of charities after the transfer to the new incorporated charity has taken place, but this is not always advisable. For example, where the unincorporated charity is likely to receive legacy income, keeping the unincorporated charity as a shell charity on the register can prevent any legacy left to the unincorporated charity being lost once the unincorporated charity ceases to exist. Charities that have valuable trust property that they wish to protect (such as collections with historic or artistic value) may decide to keep the charitable trust alive to hold the property and limit its availability to creditors of the incorporated charity.

If the existing unincorporated charity is retained, it is common for the incorporated charity to be appointed as its sole trustee to enable the individual trustees to retire.

Mechanisms to effect transfer

There are a number of mechanisms available to effect the transfer of assets

and liabilities from the unincorporated charity to the incorporated charity. In most cases a transfer agreement can be used, although certain arrangements require bespoke documentation to be put in place.

For example, transfers of registered land must be in a prescribed form and submitted to the Land Registry for registration, and contracts with third parties may need to be transferred by a deed of novation.

Consents and consultation

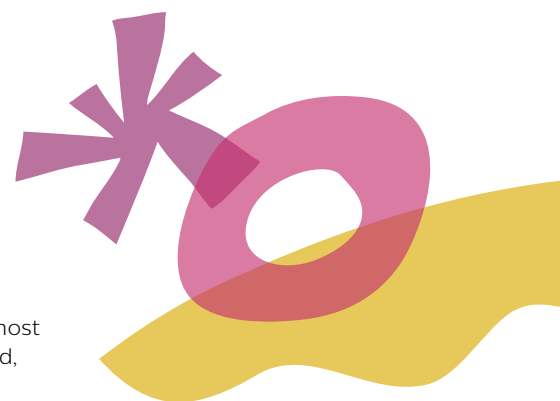
It is essential to factor in plenty of time to obtain any consents and carry out any consultation that may be required.

For instance, Charity Commission approval will probably be needed if there is overlap in the trustees of the original charity and the trustees of the new charity. The charities may also need to obtain consents from third parties before transferring particular assets, for example, from a lender that has a mortgage over land to be transferred or a landlord whose lease contains covenants against assignment. And if the original charity has staff, the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) will apply to the transfer process. Among other things TUPE imposes duties on the charity to inform and, if applicable, consult in relation to the transfer.

FIND OUT MORE

The Charity Commission has recently updated its guidance on changing your charity's structure <https://www.gov.uk/guidance/change-your-charity-structure>

Our Charity and Social Enterprise team has significant experience of advising charities on the pros, cons and process of change and would be happy to discuss your particular situation with you.



Behaviour matters

Understanding the emotional drivers behind behaviours can help chief executives and trustees to lead effectively and make good decisions.

Tesse Akpeki explains how best to put behaviour theory into practice within your organisation.



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Tesse is a consultant, trainer, Centre for Effective Dispute Resolution-accredited mediator and a non-practising solicitor. She has worked extensively with third sector organisations nationally and internationally. Tesse is an accredited coach, specialising in governance development and leadership.

Board-CEO relations can fray if not carefully nurtured. Despite their best intentions, executives and board members fall prey to cognitive and organisational biases that get in the way of good decision-making and effective working.

The Behavioural Insights Team – also known as the ‘Nudge Unit’ – a social purpose company partly owned by the Cabinet Office, draws on behavioural science studies to understand the choices people make and how they behave in the real-world context. Indications are that poor outcomes are more likely to be due to bad processes rather than bad people.

How much information do trustees need, from whom, by when and how is it transmitted? Too little and they will be misinformed; too much, they will be swamped by day-to-day operational issues.

Listen to how board-savvy CEOs talk about their boards and the governing process. They spend 20–25% of their time working on governance matters, developing agendas for committee and board meetings, chairing executive-team meetings and ensuring that materials going to the board are high quality.

Behavioural insights tell us that when stakeholders are separated from an organisation’s operations, they are less likely to fully understand and appreciate the value being created. This reduces satisfaction, trust and loyalty.

Putting behaviour theory into practice

- Identify bias busters. Recognise when short-term tactical needs are prioritised over longer-term objectives. Incentives encourage a focus on the future.
- Apply techniques to reduce conformity. Make it easier to challenge existing views – overcoming power dynamics by speaking up.
- Anticipate what could go wrong by imagining the initiative has already failed and asking – why did this happen?

Pre-mortems help boards and senior managers to pre-empt project failure.

- Agree an approach for the chair to follow if he or she needs to contact senior managers between meetings.
- Increase transparency about the decision-making processes.
- The chair and the CEO should keep on the lookout for ways to foster feelings of ownership among board members. These links can be strengthened with access to peer support networks, coaching and mentoring schemes.
- Independent reviews increase accountability. Facilitators encourage open and honest conversations. Identify useful ways of regulating communication and sharing information. A monthly briefing paper provides a structure for keeping trustees informed. Build leadership excellence through regular assessments, performance evaluations and reality checks of the board, chair and the CEO.
- Provide board members with speaking opportunities and opportunities to meet with key stakeholders. Recognise their efforts for creativity and innovation.
- Board members could periodically attend quarterly management meetings in an observational capacity to better understand the scenarios senior managers have to navigate.
- Employ tact, fairness and diplomacy to shape relationships and implement policies. Emotional and social intelligence cuts through testing situations while building trust and confidence.

Celebrate successes and hope. The chair as chief governance officer and the CEO as chief board developer clarify the board’s governing role, fine-tuning the board’s governance structure and mapping out the processes and behaviours for involving the board in its critical governing functions.

A VAT wish list

Brexit signals an end to the UK's ties with the European Union VAT regime. Our tax expert Bill Lewis asks the prime minister to rationalise some of the VAT anomalies that beset UK charities.

Dear Prime Minister,

I know you are going to be a busy chap this year what with agreeing a trade deal with Brussels and Trump and your ambitious domestic agenda, but I would ask that you spare a thought for our wonderful charity sector and the many VAT travails they have to suffer. Once we've left the Customs Union – assuming we do – and have control of our VAT laws you can implement a cornucopia of changes for good.

Here are my top five requests.

1. The law around when a charity can construct a new building at the VAT zero rate is almost as complicated as a cryptic crossword – the chief problem is the new building has to be used for a 'relevant charitable purpose', which means otherwise than used for a business purpose. A single stroke of Mr. Sunak's pen could remove the word 'relevant' from the statute book, meaning the property would only have to be used for a charitable purpose – much easier to satisfy. Also, could the relief be extended to Community Amateur Sports Clubs please? Mr Cameron got into a spot of bother with that when he was PM – you may recall he tried to help Eynsham Cricket club save VAT on their new club house only to be told they were not a charity and did not qualify.
2. If you buy a book or a newspaper it's VAT zero rated. The same product bought electronically is subject to VAT because electronic publications did not exist when the VAT law around printed materials was created. For years HMRC has blamed the EU for not allowing a change in the rules – but some time ago the EU said if the paper product was zero rated the electronic product could be too. So, the UK law can be changed – an easy populist win.
3. In the same vein – did you know that audio books are subject to VAT? Braille books and paper books are VAT zero rated. Those who listen to audio books are mostly people with restricted vision. Another easy and popular move would be to extend the VAT zero rate to audio books as well.
4. Charity advertising is another easy win. The rules say that the recipient of the advert must not be 'selected' if it is to qualify for VAT zero rating. This was to prevent people being door stepped and phoned by charity agents VAT free. However, since the rules were created, we have seen the rise of electronic media, Facebook, Instagram et al which use clever algorithms to select the recipients so that those most likely to respond to the advert receive it. A brilliant idea. But because they are 'selected' the taxman says no to VAT zero rating. But surely an electronic advert is less intrusive than face-to-face marketing?
5. Finally, please can you align VAT law with direct tax law on areas such as advertising and sponsorship? The corporation tax man allows donors a little advertising in return for their donation; the VAT man allows none, meaning the smallest acknowledgement in return for a payment can lead to an unexpected VAT charge.

All of the above will be easier to do than many of the things on your to do list and will help many charities who could do with some good tax news in a year in which they are dealing with MTD and IR35.

Yours sincerely

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What's new at the Charity Commission?

Commission updates and broadens its safeguarding guidance



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During the past two years, the Charity Commission has had an increased focus on safeguarding and people protection. It expects that all charities – not just those charities working with children and vulnerable adults – will take reasonable steps to protect their staff, volunteers, beneficiaries and those they come into contact with.

In October 2019, the commission updated its safeguarding guidance *Safeguarding and protecting people for charities and trustees*. Despite no advance public consultation or fanfare, the revised guidance requires a number of key changes to safeguarding practices for charities.

First, there's now an even greater emphasis on the importance of safeguarding and protecting people from harm, with safeguarding described as 'a fundamental part of operating as a charity for the public benefit'. While this is not a great departure from previous guidance, the obligations on charities seem to be increasingly onerous.

For example, there's a new section on checking your charity's policies, procedures and practice. The latest iteration of the commission's guidance provides that all policies, procedures and practice must be checked and challenged to ensure they're fit for purpose. They should also be reviewed annually, if there is a serious incident, and/or if there are any changes to how the charity operates (such as the services it offers or the settings it operates in).

In addition, the commission's expectation is that every trustee should have clear oversight of how safeguarding and protecting people from harm are managed within their charity. The guidance stipulates that this means monitoring performance, not just in statistical form, but with qualitative reporting, and suggests that this might include reviewing a sample of past concerns, commissioning external reviews or inspections and/or site visits to carry out checks.

Secondly, there is greater focus on the role a charity's culture plays in safeguarding. The commission emphasises that all trustees must, in relation to their charity, make sure that 'protecting people from harm is central to its culture' and that it 'does not ignore harm or downplay failures'. The guidance now refers to both internal whistleblowing policies and the commission's own whistleblowing procedure for charity staff and volunteers.

Thirdly, the section on DBS checks has been expanded. It now emphasises that many posts are eligible for standard or enhanced level DBS checks, and provides that trustees should risk assess all roles to determine whether they are eligible for a check and that, where available, such checks should be undertaken. It further recommends that trustees consider asking DBS applicants to register with the DBS Update Service, or consider carrying out further DBS checks on a regular basis.

The guidance provides that a charity's partners should be made aware of the charity's safeguarding policies and indicates that this includes delivery partners, trading subsidiaries of the charity (including charity shops), organisations the charity funds, and connected charities.

Finally, the updated guidance signposts charities to additional resources, for example NCVO's guidance on safeguarding and Bond's governance guidance, both of which were prepared with input from Bates Wells.

FIND OUT MORE

The updated safeguarding guidance is at: <https://www.gov.uk/guidance/safeguarding-duties-for-charity-trustees>

See also this new online portal launched by the government to support charities handling safeguarding concerns or allegations – <https://safeguarding.culture.gov.uk>

New Charity Commission guidance on reporting serious incidents involving partner organisations



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In December 2019 the Charity Commission published new supplementary guidance on reporting serious incidents involving partner organisations. This includes an incident involving a charity's delivery partner, funding recipient or trading subsidiary, or indeed any organisation using a charity's brand.

The supplementary guidance elaborates on the existing serious incident reporting guidance, and sets out the commission's expectations for when a charity should report incidents involving partners. The supplementary guidance reiterates that trustees must make a serious incident report if an incident materially affects the charity, its staff, operations, finances and/or reputation.

Of note is that this guidance makes a distinction between three different scenarios:

1. An incident involving the charity's funds, brand, people or an activity that it funds or is responsible for;
2. An incident that does not involve a charity's funds, brand or people, but 'could have a significant impact on the charity' – for example, if it causes material reputational damage to the charity, raises material issues around due diligence on the partner, or is a trigger event in a funding agreement; and
3. An incident that does not involve the charity's funds, brand or people and 'has little or no impact on the charity'.

A report is more likely to be required for incidents falling within the first two categories, but this is always a decision for the trustees. A number of factors must be considered in each case – including the charity's relationship with the partner and the nature and severity of the incident.

This will likely remain a vexed area for charities to navigate, particularly because:

1. This guidance introduces a new focus on whether an incident impacts a

charity's 'brand'. This may be wider than the previous focus on reputation.

2. The second category has the potential to significantly widen the range of incidents that trustees must now consider.
3. There is a significant gap between an incident which 'could have a significant impact on the charity' (under the second category) and an incident which 'has little or no impact' (under the third category), creating a wide grey area.

Helpfully, the guidance clarifies that in a federated structure, if an incident happens in one local charity, the commission would generally only expect the local charity and the umbrella body to consider whether to report. Other members of the federation will not generally be expected to make a report. The umbrella body may need to submit a report, depending on the circumstances.

Ultimately, it is the responsibility of the trustees to determine whether an incident is sufficiently serious to report. We recommend that charities revisit their practices to ensure trustees are considering all relevant incidents involving partners, if and when they arise, and are documenting the reasons for decisions about whether to make a report about particular incidents or categories of incidents. If a decision is made to not report an incident, charities should keep good records of the rationale for that decision and be prepared to justify their approach to the commission if they are ever challenged on this.

FIND OUT MORE

The new supplementary guidance is at: <https://www.gov.uk/guidance/reporting-a-serious-incident-in-your-charity-when-it-involves-a-partner>. The main guidance is at: <https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity>



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

