

CHARITY AND SOCIAL ENTERPRISE UPDATE

SUMMER 2020

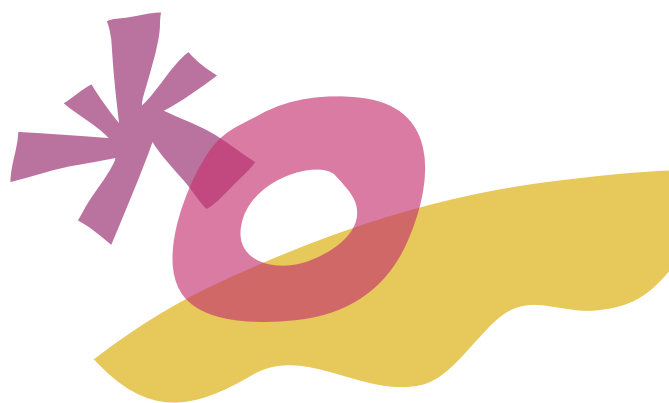


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In brief



In this issue of our update – as you’d expect – we focus on how clients can respond to the critical challenges facing the sector due to the coronavirus pandemic and the lockdown, but with additional coverage of other key issues.

The current crisis has hit charity income hard. In our fundraising focus **Molly Waiting** and **Mairead O’Reilly** review the likely impact of changes to the Direct Marketing Code on online charity fundraising (*page 4*); **Hannah Lyons** and **Jess Neville** outline changes to lottery income limits (*page 6*); and **Bill Lewis** and **Susan Shi** look at the technical aspects of offering refunds for visitor attractions (*page 7*).

Continuing the finance theme, in our finance focus **Laura Soley** and **Lucy Rhodes** cover releasing restricted and endowment funds (*page 8*); there’s an update on VAT on e-publications from **Bill Lewis** and **Susan Shi** (*page 9*); **Simon Steeden** and **Livia Cullens** advise how to respond if you are facing financial difficulties (*page 10*).

With changes to the way we work, **Sophie Cass** explores some of the key principles of good trustee decision-making (*page 12*); our governance expert **Tesse Akpeki** discusses approaches to the new normal (*page 13*); and **Leona Roche** and **Oliver Hunt** look at how to address the issues arising from virtual board and members’ meetings (*page 14*).



Our client focus this edition is In Kind Direct (*page 16*); there’s advice on agile working in a discussion between **Amy O’Gorman** and **Sue Cleverdon** (*page 17*); and **Chetal Patel** and **Lara Blanco Olarte** consider immigration for charities post-COVID-19 and post-Brexit (*page 18*). **Mindy Jhittay** continues her series on transgender inclusion (*page 19*).

Finally, our regulation focus includes a reminder from **Suhan Rajkumar** and **Jennifer Chong** of when and how to make a serious incident report (*page 20*); the Charity Commission’s **Alan Bryce** discusses the impact of cybercrime (*page 21*); and there’s our regular roundups on Charity Secretarial (**Cecile Gillard** (*page 22*)) and the Charity Commission (**Danielle Mawer** and **Jack Michaels** (*page 23*)).

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Front cover image provided by In Kind Direct.

Introduction



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

I particularly enjoy the challenge of finding the best ways to implement my clients' great ideas. And I like to find the paths around and through what seem to be difficult problems.

Over the past few months, the charity and social enterprise sector has faced extraordinary challenges. The coronavirus pandemic has seen increased demand for services, at a time when most in the sector are suffering from severe financial restrictions and a shortfall in volunteering.

In putting together this update, we have tried to keep our articles as up to date as possible, but they won't represent the last word. The situation is changing all the time, with the restrictions on the way we live our lives altering week to week – and practical and legal initiatives designed to address the pandemic developing every day.

We've tried to focus not only on the legal issues currently affecting our clients, but also on issues that will remain relevant over the coming months.

As charities seek to fundraise to make up for lost income, for example, what will they need to think about as they step up online fundraising in place of face-to-face fundraising opportunities? Will they be able to take advantage of new limits on society lotteries?

Are there additional ways to raise income? Can charities access restricted funds and endowments? Can they take advantage of the new VAT zero rate on e-publications?

As we have all embraced new ways of operating, is this an opportunity for charities to review their governance structures? Might more flexible constitutional powers to hold online meetings be the way forward?

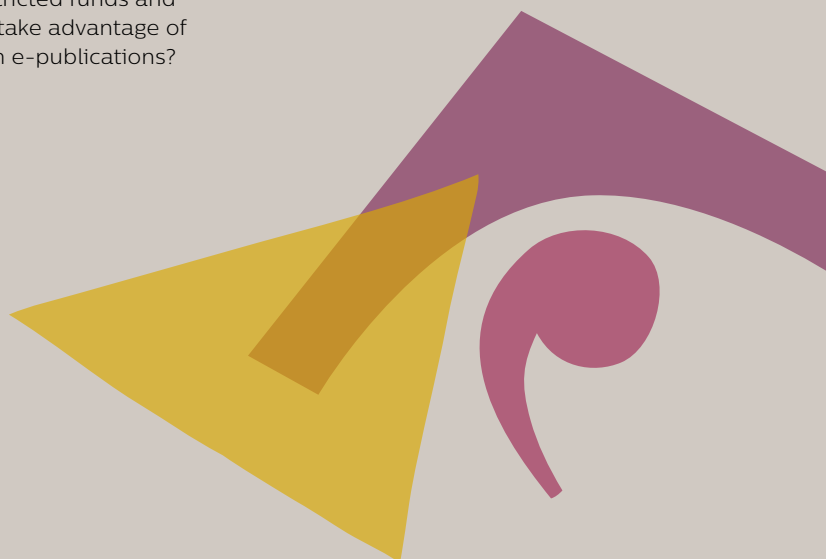
We understand the issues you are currently facing and are focused on supporting you at this difficult time. Our teams are continuing to deliver a business-as-usual service and are available to give bespoke advice.

We are also updating our website regularly with news updates, information and details of online events – just head over to our **Insights** page to see all of our latest content. Please also keep an eye on our **LinkedIn** and **Twitter** feeds for latest news and information.

Please do get in touch with us, or check our **Coronavirus Hub** for our latest guidance on the impact of the pandemic.

Above all, we hope that you and your colleagues, beneficiaries, friends and families stay safe and well.

Philip Kirkpatrick



Moving fundraising online

Charities are increasingly making use of digital fundraising; particularly as social distancing restrictions continue.

Molly Waiting and Mairead O'Reilly review the likely impact of changes to the Direct Marketing Code on online charity fundraising.



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I'm in the Data Privacy team at Bates Wells, having first worked for a number of years with my brilliant colleagues in the Corporate and Commercial team. I help organisations take a practical approach to the often-intimidating area of data privacy.



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I'm a Senior Associate in our Data Privacy team. I've been advising on data protection law for more than ten years and enjoy working with a wide range of clients in the charity, social enterprise and commercial sectors.

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As charities face the full weight of the financial impact of the coronavirus pandemic, reaching out to donors and supporters will become more important than ever. However, as social distancing restrictions are expected to remain in place – in some form – for the near future, charities are increasingly turning to digital fundraising avenues.

As many organisations will have experienced, moving any or all of your business operations online can present new issues, particularly in relation to privacy. The rules around electronic direct marketing are likely to come into the spotlight in the coming months as we await the finalisation of the ICO's new draft Direct Marketing Code of Practice.

Once finalised, the code will be a statutory code of practice, which must be taken into account by the ICO when assessing compliance with direct marketing obligations under the data privacy laws, including the General Data Protection Regulation 2016 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The code can also be used as evidence in court proceedings. It applies to all organisations that process personal data for direct marketing purposes and so covers charity fundraising, as well as the commercial promotion of goods and services.

A consultation on amendments to the code ended at the beginning of March. Here are some key points from the consultation draft that apply to fundraising:

1. Asking for consent = marketing

The code confirms that processing for 'direct marketing purposes' includes not only the sending of direct marketing communications, such as marketing emails, but all processing activities that lead up to or enable the sending of the communications. This includes trying to generate leads by sending mass messages even if these messages do not contain any promotional material – so an email to

contacts asking them to consent to future marketing will count as a direct marketing communication.

2. Service messages will be interpreted narrowly

The code discusses the boundary between 'service messages' (communications sent for administrative or customer service purposes) and direct marketing messages. This is relevant because a genuine service message is not a marketing message and therefore falls outside the scope of the rules on direct marketing.

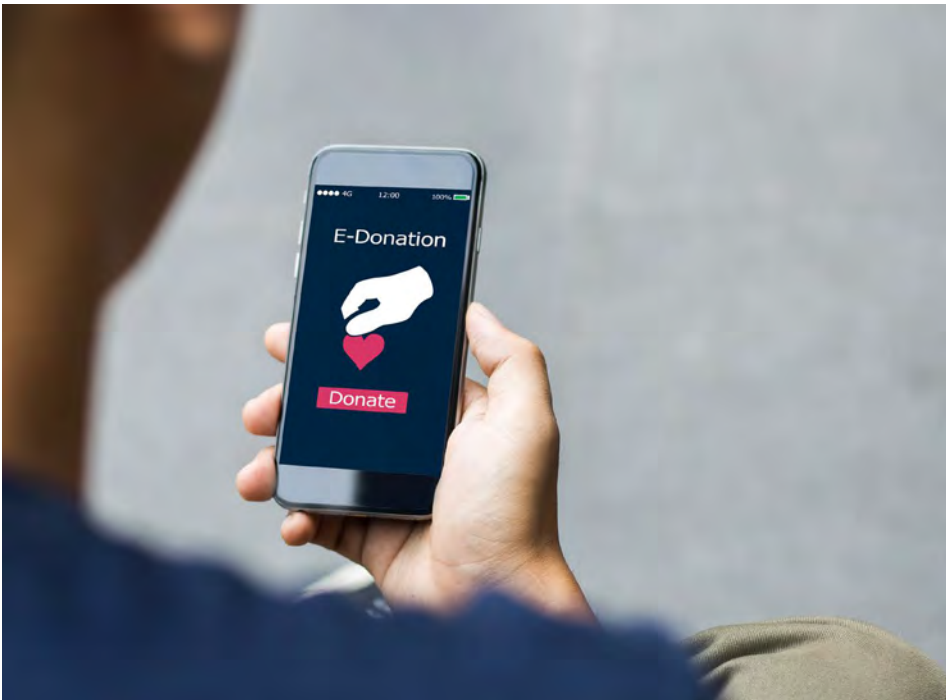
In determining which side of the line a communication falls, the code states that a key factor is likely to be the 'phrasing, tone and context'. A message that actively encourages a person to make use of a new service is likely to be direct marketing, whereas a more factual communication that 'has a more neutral tone' is more likely to be seen as a service message.

3. Joint marketing campaigns may prove more difficult

Unhelpfully for charities and others involved in joint fundraising promotions, the code adopts a wide interpretation of the remit of the PECR for joint marketing campaigns. It cites the example of a supermarket supporting a charity by sending out a marketing email to its customers promoting the charity's work. In this case, the supermarket is not passing the contact details of its customers to the charity, but it will need to have obtained consent from its customers to receive direct marketing promoting the charity. This interpretation would require corporates working with charities to ensure that they have consent from their customers to receive electronic marketing in connection with their corporate social responsibility activities.

4. Be careful with online advertising and new technologies

When targeting individuals through the use of 'audience' tools (tools that allow



'A message that actively encourages a person to make use of a new service is likely to be direct marketing, whereas a more factual communication that "has a more neutral tone" is more likely to be seen as a service message.'

you to display direct marketing to users of a social media platform) it is likely that you will need the consent of the individuals whose data is being processed. You will also need to tell them about your use of audience tools on social media in your privacy notice.

If you are marketing to a 'lookalike audience' (that is, an audience made up of individuals that you have not previously engaged with, but who look like your list-based audience, perhaps because of similar interests or characteristics) you need to ensure that the social media platform has provided individuals with the necessary transparency information. The

code stops short of saying that consent is needed here, reflecting the practical difficulties of obtaining such consent.

While it is yet to be seen how closely the final version will resemble the original draft, the code, once it comes into force, is likely to become a heavily-thumbed guide for those engaged in marketing and fundraising activities.

FIND OUT MORE

Further information on the draft code is at: <https://bateswells.co.uk/2020/01/direct-marketing-code-of-practice/>

Bates Wells responded to the consultation raising concerns about the restrictiveness of the code and its potential impact on the fundraising capabilities of the charity sector.

If you would like to discuss the contents of this article or our response to the code consultation, please contact either Mairead or Molly.



Lottery income limits set to boom

After much anticipation, the Gambling Commission has announced that increased lottery income limits for society lotteries will come into force on 29 July 2020.

Hannah Lyons and Jess Neville outline the new rules.



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The new regime increases the cap on annual income from society lottery licences from £10 million to £50 million and increases the maximum individual prize limit from £400,000 to £500,000. This is a welcome change for charities that are nearing the current £10 million limit and are looking to expand their lottery fundraising activity. This fundraising activity is particularly important during the current crisis as charities are exploring remote fundraising opportunities to support their income as other sources have decreased.

Society lotteries will only be able to benefit from the increased limits once the Gambling Commission has made the necessary changes to the Licence Conditions and Codes of Practice (LCCP). The Gambling Commission has recently announced that these changes will come into effect on 29 July 2020, at which point society lotteries will be able to benefit from the increased cap on a pro-rata basis.

As part of the changes, the Gambling Commission also looked at the current regulatory requirements set out in the LCCP to ensure that issues relating to the 'fair and open licensing objective', and in particular transparency for consumers, are addressed in light of the higher income and prize limits.

'Lottery fundraising is particularly important during the current crisis as charities are exploring remote fundraising opportunities to support their income as other sources have decreased.'

The Gambling Commission has now announced that the LCCP will include new requirements (and supporting guidance) on what information must be made available to consumers in order to tighten the licensing framework for society lotteries. This will include requirements to provide players with information on how the proceeds of lotteries are used for good causes, as well as the odds of winning a prize. The Gambling Commission has not yet issued a final draft of these new requirements and guidelines – so for now, society lotteries will need to hold tight and wait for further information on these changes.

FIND OUT MORE

We will update our clients on new developments: please contact Jess or Hannah for further advice in this area.

Gift Aid and refunds of advance entry fees

The COVID-19 pandemic has prompted charities to consider refunding donations that allow entry to visitor attractions. Gift Aid rules mean that this needs to be handled carefully.

Bill Lewis and Susan Shi explain the finer points of entry refunds.



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I advise on all aspects of taxation affecting charities (VAT, PAYE, corporation tax) using my experience from a 34-year career that has included HMRC, big 4 accountants and industry. For the last 21 years I have specialised in charities.



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I am a solicitor in Bates Wells' Charity and Social Enterprise team. I completed my training contract and qualified into a tax department in another city firm in September 2016, before moving to Bates Wells in February 2018. I work on a mix of charity and charity tax matters.

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Fees charged for viewing charity property (such as a day entry fee of £10), are not gifts and do not qualify for Gift Aid. However an entry fee can be converted into a donation by either of the following routes:

- the visitor is asked to pay at least an extra 10% above the normal admission fee (so £10 + £1). The visitor must be given clear information and a clear choice whether or not to make the additional donation; or
- the visitor is paying for an annual ticket, which allows admission for at least 12 months.

In both instances the full amount paid by the visitor can become a donation eligible for Gift Aid. The charity will need a Gift Aid declaration from the visitor. The right to view charity property is ignored as a benefit for Gift Aid purposes. These options create pricing structures that are separate from the standard entry fee.

If your charity has received advance payment of the entry fee for viewing a property, which is no longer possible due to the COVID-19 outbreak, you may be considering making refunds of the entry fees collected. This is possible for any entry fees that were not converted into donations. However, if any of the fees were converted into Gift Aid donations, then it will not be possible to refund the payments. Gift Aid donations must not be paid under any condition of repayment.

'Refunds are possible for any entry fees that were not converted into donations. However, if any of the fees were converted into Gift Aid donations, then it will not be possible to refund the payments.'

HMRC takes this point very seriously. If refunds are made this could provide HMRC with an opportunity to pounce and seek to deny Gift Aid on all donations made – they could take the view that all donations must have been made under a condition of repayment.

A charity might be able to fend off HMRC if it can prove there were no terms and conditions that explained refunds would be made in adverse or any other circumstances.

As an alternative to a full refund, you might want to consider other options, such as keeping the payment and allowing visitors to come back in future, at a date of their choice. This will help the charity's cash flow and many visitors may be keen to support charities at this exceptionally difficult time. This can be sweetened by providing the visitors concerned with another benefit that does not affect Gift Aid, such as a book/literature concerning the charity's work.

FIND OUT MORE

If you would like any advice on tax, including Gift Aid, or VAT, then please get in touch with Bill Lewis at b.lewis@bateswells.co.uk.



Unlocking restricted funds: common themes

Charities are in urgent need of alternative sources of funding.

Laura Soley and Lucy Rhodes outline the scope for charities to release restricted funds and endowments to support their activities.



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I have a broad practice covering general charity law and governance matters, with a particular focus on dealing with technical charity law issues and structures. I regularly advise on charitable trusts, restricted funds and endowments, including setting up new endowments and releasing out-of-date funds.



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The COVID-19 crisis has had a catastrophic impact on charity sector income. This has created a real risk to the solvency of some charities at a time when many face an increased demand for their services.

Charities are looking carefully at the financial resources available to them. We are aware that many charities have been considering whether their restricted funds and endowments might be used to support the charity's activities during the crisis. Can restrictions over these funds be changed or released so that they can be used to boost the charity's finances?

Here are three common themes we have encountered when advising charities in these circumstances:

1. Incorrect treatment of funds

In a recent review for a health charity, we identified that funds which, for many years, had been accounted for as restricted funds – which trustees are legally obliged to use in a particular way – were in fact 'designated' funds that the trustees could re-prioritise at any time at their discretion and use for the general purposes of the charity.

Often, funds incorrectly treated as restricted funds have come from legacies made subject to an expression of wish that the funds be used for a specific project or activity. This does not generally create a binding legal obligation, but it is not unusual for these funds to be incorrectly treated as being legally restricted in the charity's accounts.

We recommend that charities reanalyse the terms on which restricted funds have been established. They may find that they have more funds available for core activities than they thought.

2. Out-of-date purposes

When considering making changes to restricted funds, trustees will want to consider the donor's intentions as well as the potential for reputational damage if

the charity seems to be overriding them. However, trustees have a responsibility to make sure that funds are put to effective use – so where funds cannot be used according to their existing terms, they have a positive duty to seek to change them.

By modernising the purposes of the funds – and possibly merging them with other funds – the monies can be put to good use. Charities can seek to use powers in the governing document, or in the Charities Act 2011, to free up the funds for immediate use.

3. Income insufficient to achieve purposes

We regularly work with professional membership associations and educational institutions that hold multiple restricted and permanent endowment funds that have been established through appeals, lifetime gifts or legacies for the provision of specific annual lectures, awards or prizes. If the fund is permanent endowment – where the charity can only spend the income generated by the fund and not the capital – difficulties can arise where it no longer generates enough annual income to meet the costs of the lecture, award or prize. Releasing the permanent endowment restrictions from all (or a portion) of these funds (using powers in the Charities Act 2011) can unlock funds that may have been dormant for many years.

FIND OUT MORE

For more information on unlocking your restricted funds please see <https://bateswells.co.uk/2020/03/releasing-restricted-funds-and-endowments/>

VAT on electronic publications

The VAT zero rate has finally been extended to electronic publications.

Bill Lewis and Susan Shi welcome the news, which they say is long overdue.



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I advise on all aspects of taxation affecting charities (VAT, PAYE, corporation tax) using my experience from a 34-year career that has included HMRC, big 4 accountants and industry. For the last 21 years I have specialised in charities.



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I am a solicitor in Bates Wells' Charity and Social Enterprise team. I completed my training contract and qualified into a tax department in another city firm in September 2016, before moving to Bates Wells in February 2018. I work on a mix of charity and charity tax matters.

The sector has for many years lobbied government for the VAT zero rate on printed publications of books, newspapers, magazines, journals and leaflets to be extended to their electronic equivalents. The law has not kept pace with technology – and there was a VAT disincentive from going green.

In October 2018, the Council of the European Union adopted a directive that allowed member states to use the same VAT rate for electronic publications as for the printed versions. This meant that it was no longer mandatory for member states to exclude e-publications from any reduced or zero rates allowed on publications printed on paper. The UK took no action following this directive; electronic publications remained subject to the standard rate of VAT.

However, in a significant ruling in December 2019, the Upper Tier Tribunal determined in *News Corp UK & Ireland Limited v HMRC* that digital newspapers constitute 'newspapers' within the meaning of Item 2 Group 3 Schedule 8 of the Value Added Tax Act 1994. This means that they qualify for the VAT zero rating.

The case was brought by the publisher of *The Times* and *The Sunday Times* (print and digital editions). Both the publisher and HMRC agreed that a newspaper's essential characteristic is that it is produced in periodic editions (that is, not rolling news, such as the Guardian website or BBC news). The publisher produced its digital newspaper in e-reader, tablet, website and smartphone editions. All were either exact copies of the print edition, or contained small updates made during the day (three updates during the day, compared to two editions of the print version). The digital editions also contained some extra content (short news videos, interactive puzzles, links to podcasts and some different photos).

The court had to decide whether the digital editions were still 'newspapers',

and if the existing legislation (dating from 1972) should be interpreted in keeping with technological developments. It decided that 'in the round', the digital editions were 'essentially' the same as the newsprint editions. The collective factors it considered were:

1. the digital editions were also periodic editions (three updates during the day);
2. the written content of the print and digital versions was 'fundamentally the same or very similar';
3. the updates to the digital versions were relatively minor; and
4. the additional content that could not be provided in newsprint was a 'relatively minor' aspect of the digital editions.

The *News Corp* case was a victory for the taxpayer, and HMRC stated it would appeal to a higher court. However, in the March 2020 Budget, the government decided it was time the law was modernised and announced it would change the UK law with effect from December 2020 to extend the VAT zero rate on paper publications to the electronic equivalent. In April 2020, in response to the coronavirus pandemic, the government announced that the implementation date would be brought forward to 1 May 2020, with a view to reducing the cost of access to online publications at a time when many people were confined to their homes and schools were closed.

This is very good news for charities, which need no longer feel forced to maintain printed versions of their newsletters or other publications; they can switch to electronic versions without suffering a VAT penalty.

Financial difficulties: considerations for charities

Charities are facing unique financial challenges.

Simon Steeden and Livia Cullens summarise the warning signs and advise how to respond.



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Whether influenced by unique global factors (like the coronavirus pandemic), a loss of funding, unexpected expenditure or otherwise, charities, like other organisations, are vulnerable to financial difficulties. By having an awareness of the warning signs and how to respond, boards can ensure that they are in a position to navigate the organisation through these difficulties, while complying with their legal duties.

Legal form

It is vital to know whether an organisation is incorporated or not. The board of an unincorporated organisation may well be personally liable for its debts. An incorporated structure, on the other hand, has its own 'legal personality' and therefore its own debts and liabilities.

Warning signs

In normal circumstances, it is unusual for an organisation to deteriorate immediately from being in a financially healthy position to being in serious distress – insolvency or the need to wind up the organisation will typically follow a longer period of financial decline.

By way of example, an organisation may first notice broad underperformance, leading to the board having to reduce costs or – if those are insufficient to plug the gap – undertake broader organisational restructuring. It may then look at financial restructuring, including negotiating with creditors. As a last resort the organisation may have to consider winding up.

Boards should be alert to any preliminary warning signs that finances are taking a downturn – for example, the organisation owing increased amounts to suppliers, or decreasing income compared with the organisation's budget – and act accordingly.

The coronavirus pandemic has brought unique challenges, with many organisations seeing a dramatic change in their financial position in a very short

space of time. This means that boards need to be particularly alert to warning signs and be prepared to act very quickly.

Trustees/directors should be equipped with all financial information necessary to take fully-informed decisions. The outcome of any decision making (and the rationale behind it) must be properly recorded. The board should formulate a crisis plan and update it as circumstances change. Other useful tools include a statement of affairs, cash-flow forecast and risk analysis.

Insolvency – charitable companies and charitable incorporated organisations (CIOs)

The boards of charitable companies and CIOs need to be aware of the point at which their charity is at risk of insolvency. The Insolvency Act 1986 provides two tests for solvency for these organisations:

- **The balance sheet test:**
A charitable company or CIO is solvent if the value of its assets exceeds its liabilities. Liabilities must include any contingent or prospective liabilities.
- **The cash-flow test:**
A charitable company or CIO is solvent if it can pay its debts as they fall due. If it does not have enough cash to pay its creditors on time, then it will be insolvent.

If the charitable company or CIO fails either of these tests it is insolvent. There is a significant change in the board's duties on insolvency.

For example, for as long as a charitable company or CIO is solvent, its trustees must safeguard any assets in order to further the purposes of the charity and must ensure that they are, among other things: acting in the best interests of the charity; managing the charity's resources responsibly; complying with the charity's governing document and the law; acting with reasonable care and skill; and ensuring that the charity remains accountable.

If insolvent, boards of charitable companies or CIOs should avoid:

Wrongful trading

The board must ensure that the organisation does not continue incurring credit at a time when they knew or ought to have known that there was no reasonable prospect of the organisation avoiding being wound up insolvent. The consequence of wrongful trading is that the board could be required to contribute personally to the organisation's liabilities.

Note, however, that it is expected that the Corporate Insolvency and Governance Bill 2020, which is passing through Parliament at the time of writing, will diminish the threat of personal liability should the organisation ultimately fail to avoid an insolvency procedure. Liquidators and administrators will not be able to take account of any losses incurred during the period from 1 March to 30 June in any wrongful trading action that might be brought against the board. Please check our [coronavirus hub](#) for the latest on the status of the legislation.

Preferring some creditors over others

Boards must not prefer one creditor over another. However, an organisation could continue to pay a creditor whose support is vital to the organisation's survival. The organisation can also pay for professional advice relating to the situation.

Transactions at an undervalue

If the board sells the organisation's assets for less than they are worth or for no consideration to the detriment of creditors, this will be considered a transaction at an undervalue.

The consequence of making a preference or entering into a transaction at an undervalue is that the liquidator or the administrator can apply to the court to have the transaction set aside.

Fraudulent trading

Trustees/directors also need to ensure that they do not engage in fraudulent trading – deliberately defrauding creditors. Fraudulent trading is a criminal offence, as well as carrying civil liability.

'The coronavirus pandemic has brought unique challenges, with many organisations seeing a dramatic change in their financial position in a very short space of time. This means that boards need to be particularly alert to warning signs and be prepared to act very quickly.'

If the charitable company or CIO becomes insolvent, the duties of the trustees may change: trustees are no longer holding charity money but, instead, dealing with creditors' money. This means that their first and primary duty may now be to the charity's creditors. In this case, the trustees' main aim is that of improving the creditors' situation (or, at the very least, stopping it from worsening).

A board reaching this point would be strongly advised to take professional advice. This will help them explore the options and plan a way forward.

Role of the Charity Commission

Charity boards also need to be aware of when to inform the Charity Commission of any difficulties. For instance, where

financial issues stem from a 'serious incident' in the charity – such as a loss of the charity's assets, or damage to the charity's reputation that results in a loss of income – the trustees should consider whether a serious incident report ('SIR') should be made to the commission. Further information on this can be found in the commission's SIR guidance and the article on page 20 of this update.

The Charity Commission also has useful guidance for charities facing financial difficulties that can be circulated to trustees to assist in informing or guiding any discussions. There is bespoke guidance relating to financial difficulties caused by coronavirus which includes guidance on when a serious incident report may be required.

FIND OUT MORE

Our experience is that prompt professional advice can make a significant difference to an organisation facing financial problems, particularly where insolvency is a risk. Please get in touch with your usual Bates Wells contact for more information about the issues in this article.

See our coronavirus guide to charity insolvency and rescue mechanisms here <https://bateswells.co.uk/2020/03/charity-insolvency-and-rescue-mechanisms-a-coronavirus-guide/>

See our latest update on the Corporate Insolvency and Governance Bill 2020 <https://bateswells.co.uk/2020/05/corporate-insolvency-and-governance-bill-2020/?hub=coronavirus>

Trustee decision making

Trustees grappling with the challenges of the coronavirus are being required to make difficult decisions quickly.

Sophie Cass explores some of the key principles of good decision making.



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My practice is wide and covers the full range of charity governance matters, specialising in trusts and permanent endowment; faith-based organisations; and charity legacies as part of the Legacies team.

As the coronavirus crisis unfolded, more and more people found themselves working and volunteering remotely. With difficult decisions needing to be taken, often urgently, it became particularly important for charity trustees to have a clear grasp of how to make good decisions.

For trustees making decisions during these current circumstances, a reminder of some key points may be helpful. The Charity Commission has indicated that it will be understanding where, due to coronavirus restrictions, trustees are unable to follow their usual decision making processes (for example, holding virtual meetings or making a decision by email). But decisions will need to stand up to scrutiny.

Here are some of the issues that can arise:

An informed decision

The Charity Commission's helpful guidance '**It's your decision**' is a useful checklist for trustees to follow. The guidance highlights the importance of trustees making sure they are sufficiently informed, and take all relevant factors into account.

A recent pre-coronavirus case illustrates the importance of making an informed decision. In 2019 the trustees of St Margaret's Hospice Care made the difficult decision to close an in-patient unit, which triggered complaints to the Charity Commission. As part of the decision-making process, the trustees had taken various steps including consulting with staff and volunteers, undertaking research, and taking advice from experts in palliative/end of life care. The Charity Commission opened a regulatory compliance case to assess the decision-making process, reviewing relevant documents and information. The commission concluded in January 2020 that the trustees had acted appropriately. It said that their decision was 'properly made and within the range of decisions that a reasonable trustee body could make'.

Can you delegate decision making?

The key thing to remember about the

delegation of trustee decision making is that no matter who is making the decision, the trustees will always retain ultimate responsibility and accountability for all decisions made. Many charities will have power to delegate decision making to staff, committees, or individual trustees – the first port of call will always be to check your governing document and make sure that you follow any process set out within it for delegation.

When delegating, trustees should make sure that there are clear and robust reporting procedures and lines of accountability; best practice would be to set out the scope of a delegation (and how the trustees can end such delegation) in writing.

Power of the chair

You may hear reference to 'chair's action', which is where a chair of trustees has wide-ranging discretionary powers that can be exercised between trustee meetings. However, tread with caution. Such powers do not exist as a matter of course, and the chair of your trustee board will have very few powers other than those specifically given in your charity's governing document.

The importance of minutes

The Charity Commission has always emphasised the importance of minuting trustee decisions – and there is useful practical guidance on what minutes should cover in the commission's 'It's your decision' guidance. Where, as mentioned above, trustees are unable to follow their usual decision-making processes, the minutes should record the reasons for taking alternative approaches to decision making, and record that this has been done to ensure continuing good governance of the charity during the crisis.

FIND OUT MORE

You may find these guides to **Charity Trustee Duties and Coronavirus**; and **Charity Trustee Meetings and Coronavirus** helpful.

The emerging normal

The impact of COVID-19 presents challenges and opportunities for charity governance.

Governance expert **Tesse Akpeki** suggests steps your board can take to embrace the new normal.



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I am a founder of the Well-being and Resilience Leadership initiative and I serve as a mentor to members of ICSA: The Chartered Governance Institute. I am an accredited coach, specialising in governance development and leadership and I have worked extensively with third sector organisations nationally and internationally.

The current crisis represents an opportunity for the board to adopt a proactive approach and refocus on good governance practices. The board has a crucial role to play in achieving effectiveness, efficiency and impact. Taking practical steps now can achieve balance, bring reassurance and greater stability, and shape a new normal.

Here are nine steps your organisation can take.

1. Check in regularly with your Chief Executive. Ask him or her what is needed and make sure she/he is assured of your support. Times such as this call for quick responses, experience, wisdom and sight. Board members can play a vital role in assessing how the CEO and senior staff are holding up.
2. Manage scenario planning and financial implications. Re-evaluate organisational and strategic plans and priorities. Agree what meaningful results look like. It may be useful to have strategic discussion as a standing item at board meetings, to ensure that the strategic plan continues to be aligned to the needs and expectations of the current times. Some aspects of the plan will need to be updated to take on board the new reality, while others (such as programmes and services) may need to be dropped or put on the back burner.
3. Revisit how the board's capacity and competence can add value to the organisation. Is the board composed of trustees who are fully engaged and able to maximise their contribution? The skills and experience matrix should be up to date and match current trustees to what is required in the future.
4. Pay attention to greater clarity, structure and communication. Set out what specific roles the board will fulfil and what activities and tasks will be delegated to staff.
5. Put in place an ongoing board development programme that will keep the board members updated

about developments. What are the trends, emerging patterns, touch points or current issues confronting the organisation, its networks and related communities? These can be integrated into short slots at the board meeting or during feedback slots designed into the agenda.

6. Solicit feedback through a range of channels such as annual assessments, quarterly feedback sessions or as part of board conversations. Feedback is helpful in building trust, confidence and commitment, and encouraging growth. What are people learning at this time that can be taken on board to strengthen the organisation? What is not working? Where do you need to make adjustments?
7. Observe how the virtual environment and virtual ways of working are shaping the organisation and its culture. What are you doing to ensure that the right technology is being used and that meetings are well run, well chaired and support the organisation to achieve its goals? The Chartered Governance Institute (ICSA) has produced excellent **guidance** on this (and see also our article on virtual meetings on the following page).
8. Support all of these steps with a code of practice that has appropriate and accessible protocols. **The Charity Governance Code** helps in this journey.
9. Agree an action plan – frame it to highlight what needs to happen for the short, medium and long term. Given the fast-changing nature of the emerging normal, the plan needs to be updated regularly.

These steps will enable board members, staff and volunteers to use their skills to make the impact of their work even greater.

Virtual meetings

In the current crisis, charities have had to adapt rapidly to ensure decisions can be made without face-to-face meetings. It is the ideal time to future-proof your governing document so you can meet virtually.

Leona Roche and Oliver Hunt highlight the key issues to consider so that your trustee board and (if applicable) your members can hold virtual meetings.



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One of the best things about being at Bates Wells is the inspiring mix of clients I get to work with. I have trained many on their duties, on essential charity law, and how to comply with company law in practice.



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CHARITY AND SOCIAL ENTERPRISE UPDATE | SUMMER 2020

2020 has been an extraordinary year. It has seen boards and organisations across all sectors having to quickly adapt how they meet and make decisions. In the charity sector, it's likely that there have been more trustee meetings held virtually or electronically than ever before. And in many cases, those meetings will have been called to make crucial decisions in response to the crisis.

Thankfully the government, Charity Commission and other regulators have taken a helpful and pragmatic approach, recognising that trustees have needed to meet urgently in the best way they can, even where, in some cases, virtual meetings may not have been strictly permitted by the charity's governing document – see the commission's **guidance** and the latest on new **legislation**.

In the longer term, the commission will expect charities to comply with the procedures set out in their governing documents for holding trustee and members' meetings. Many charities are now reviewing their procedures and governing documents to give them more flexibility to meet online if it's impossible to meet in person. Organisations are also discovering the benefits of the extra flexibility of meeting virtually, so it is important that governing documents catch up.

In this article, we highlight some important considerations to ensure you can hold valid virtual meetings. Our focus here is on charitable companies, but the broad principles may still be relevant for charities with a different legal form.

Virtual trustee meetings – charitable companies

Telephone meetings

Most modern governing documents are likely to permit trustees to hold a telephone-only meeting. If yours doesn't, we recommend including clear wording for the whole board to meet via telephone.

Video meetings

It's probably less common for governing

documents to refer to visual or video meetings. Provided your governing document doesn't prohibit video meetings, the general law does allow your trustees to meet via video conference (for example, via Skype or Zoom) so long as they can all see and hear each other. Of course, it's much better for your governing document to clearly state that your trustees can meet in this way. It can also set out any specific requirements that you want your trustees to comply with.

Normally, the usual requirements for calling and holding a physical trustee meeting (notice period, quorum, voting) will apply equally to a telephone or video meeting.

Decisions without a meeting

To allow maximum flexibility in times of crisis or urgency, it can be very helpful to allow your trustees to make a board decision outside of a meeting. For example, trustees can indicate their agreement to a proposed decision by telephone, text and/or email. You may wish to require these decisions to be unanimous because they are being made without the usual discussion and debate that would take place at a board meeting.

Virtual members' meetings – charitable companies

In the short term, the Corporate Insolvency and Governance Bill ('the Bill'), which was published at the end of May, is due to give more flexibility to charitable companies (and charitable incorporated organisations) wishing to hold virtual members' meetings, even if they have no express provisions in their Articles of Association. These relaxations are expected to last until at least the end of September 2020.

However, in the longer term charitable companies may well wish to review their Articles with a view to ensuring that they have scope to hold members' meetings remotely even after the crisis is over. The temporary flexibility afforded by the Bill provides a helpful opportunity for organisations to make the necessarily

'Organisations are... discovering the benefits of the extra flexibility of meeting virtually, so it is important that governing documents catch up.'

permanent changes to their governing documents.

In terms of what is permissible, virtual members' meetings are more complicated than virtual trustee meetings. For starters, there is some doubt, under company law, as to whether a 'fully-virtual' members' meeting is valid (although this is likely to be allowed temporarily, under the Bill). The safest route is to allow for a 'hybrid' meeting – where a physical meeting is still held in an actual place, but other members can also attend remotely using electronic means. Of course, even holding a very small physical meeting during lockdown has proved difficult.

Hybrid meetings throw up various legal and practical issues, especially for those charities with a large membership:

Notice

As well as giving details of the physical venue, a notice of a hybrid meeting should give the details for members to attend the meeting remotely, such as a dial-in number or internet address, and a password or access code. It is also wise for the notice to inform members that the trustees may need to change these details to ensure the effective conduct of the meeting, for example if a technical or security failure occurs.

We also recommend that the notice tells members that if they attend the meeting remotely, and there are unforeseen technical issues that make it impossible for the remote participation to begin or continue,

the meeting may continue without any remote participation. In effect, the members attending remotely will do so at their own risk.

Quorum

It's more flexible if your governing document makes it clear that members attending remotely count in the quorum. However, practical problems could still arise if you have a very large membership and the chair isn't able to see those members attending remotely. How can the chair be confident that the quorum is being maintained throughout the meeting?

Some governing documents only require the quorum to be present at the start of the meeting, while others require a quorum throughout the entire meeting. Another alternative is to require a quorum when each item of business is being voted on.

Voting

Depending on the size of your membership, you may need to use poll votes at a hybrid meeting if a vote by a show of hands would not be possible, or too difficult to count. You'll want to think about encouraging members who plan to attend remotely to submit proxy votes – so that they can still vote if a technical problem means that remote participation needs to be cut short.

Communicating at the meeting

How easy will it be for those members attending remotely to communicate with all the other members, and put comments or questions to the board? This will need to be thought through in advance. How will remote members indicate that they wish to ask a question? Will the electronic facilities enable them to speak so that all attending can hear their question? Or will questions be submitted in writing and displayed on a screen?

There are concerns that hybrid meetings could be a less effective

way of members having dialogue with trustees and holding them to account. During lockdown, temporary legislation in various countries has allowed listed share companies to hold virtual AGMs online (in a similar way to what is now proposed in the UK, under the Bill). Some reports have indicated that these virtual meetings are much quieter and quicker than physical meetings, and make it much easier for boards to not answer member questions. However, giving your organisation the potential to hold electronic meetings in the future is still something worth exploring.

You will have a sense of whether your members will see the introduction of remote participation as a good thing, or as a potential threat to their ability to dialogue with the board and ask challenging questions. It is important that any changes to your governing document take their views into account – we recommend consultation with your members in advance.

FIND OUT MORE

See our briefing on the Corporate Insolvency and Governance Bill and our Coronavirus Guide to Charity Members' meetings.

<https://bateswells.co.uk/2020/05/corporate-insolvency-and-governance-bill-2020/?hub=coronavirus>

<https://bateswells.co.uk/wp-content/uploads/2020/06/Charity-Members-Meetings-A-Coronavirus-Guide.pdf>

In Kind Direct – providing life’s essentials and caring for those in crisis



‘We see the relief on parents’ faces when you give them some soap powder, baby wipes or toiletries. This just means they will have that extra bit of money for food and rent.’

Winlaton Centre, Gateshead

In Kind Direct believes that everyone deserves access to life’s essentials and that no usable product should go to waste. We distribute products that companies have donated – such as toiletries, cleaning supplies, education, office and craft materials – to other UK charities. Since our founding in 1996 by HRH The Prince of Wales, more than £249m of products have been donated by over 1,200 manufacturers and retailers to more than 10,500 charitable organisations.

In Kind Direct works with thousands of registered charities and community groups; together we reach 7.7 million people each year. Our budget-stretching service means organisations can secure goods with huge savings. And as 60% of our network has an annual income under £100k, this frees up valuable funds to help local groups do more for less.

The products distributed help mitigate poverty and hardship in some of the most disadvantaged communities across the UK. With high-quality products, essential practical support to restore dignity and self-esteem to people in crisis becomes possible. This might be a woman arriving at a domestic violence support project in Walsall being given a towel, toiletries and sanitary products; a young person leaving care in Birmingham provided with a decent shirt and shoes for a job interview; or toothpaste and essential household products provided to a newly-arrived refugee family in Kent.

During the coronavirus pandemic, the need to stay clean, safe and connected has never been greater; it has created a huge surge in demand for essential supplies that many struggle to access locally. In the first ten weeks of UK lockdown, In Kind Direct worked with over 1,900 charity partners and distributed over £3.1m worth of essential goods. This included almost a million feminine hygiene products, 429,000 toilet rolls, 81,000 tubes of toothpaste and 89,000 bottles of handwash. Those that were in crisis before March 2020 have been disproportionately



affected by the consequences of lockdown. Charities are vitally needed to support society in the immediate crisis and longer recovery period.

For companies, the shift in public opinion on waste has driven new consumer trends. Recent research highlighted the public interest in product giving, with most feeling strongly that spare goods should be donated on. In Kind Direct works with companies to ensure consumer products end up being used as they were intended – extending their lifecycle and reducing unnecessary waste and associated carbon emissions.

Bates Wells has provided valuable insight on data protection and privacy and clear advice with new contractual endeavours to support In Kind Direct deliver its work. As societies around the world start to recover from the coronavirus pandemic and begin to rebuild their communities, In Kind Direct will deliver its long term strategy of scaling up support and championing the role of product giving in the global economy, to continue to meet the needs of its network and the millions they support.

Charitable organisations can register for free, companies can donate goods and you can support our work at www.inkinddirect.org.

The agile office – building on the COVID experience

COVID-19 has forced many businesses, some almost overnight, to embrace home working.

Our real estate expert **Amy O’Gorman** talks to **Sue Cleverdon** of Cleverdon Associates about opportunities for future resilience through agile working.



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Sue Cleverdon, Director
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Sue Cleverdon established Cleverdon Associates Ltd in 2002 specialising in the effective use and management of charity property, unlocking potentially under-used existing charity space and resources.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | SUMMER 2020

With the projected £4bn loss of income due to the coronavirus crisis, charities may need to review their property options to reduce overheads or in some cases generate income. Sue Cleverdon answers our questions about agile working.

Q: You have helped many charities move towards agile working. What are the main reasons for charities making this choice?

A: Cost and organisation of the workplace is a core issue for all charities large and small. Agile working is about doing the right task in the right space from a wider choice of work settings in the office, at home or on the move. Cleverdon Associates has helped many organisations to reduce costs through flexible working within a smaller property footprint. Far-sighted charities have freed up whole floors for income-generating activities such as subletting, serviced desks or conference hire businesses; others have downsized or managed a charity merger within the existing space. Agile working brings resilience and flexibility to grow or shrink the workforce without costly office moves and consequent disruption.

Younger staff and those with caring commitments are particularly attracted by greater flexibility in how, when and where they work. Organisations which manage this change well are seeing improved productivity, increased staff satisfaction, less silo working and more common purpose.

Q: What factors will make the move to agile working most successful?

A: Four factors have emerged as critical to success from our experience.

- Consider and clarify future business plans so that property decisions support the business requirement rather than the other way around.
- Consult both employees and experts – timely expert advice can result in substantial benefits and often pays for itself in cost savings.
- Change the way people work – this requires careful planning and there is no

‘one size fits all’. Senior leadership and staff representatives need to be deeply involved in developing the plans and championing the change.

- Communicate the plan, crunch the decision and make it happen, investing and training staff in the best IT and communications technology.

Q: So, what are the implications for the physical offices run by the charity sector?

A: It seems doubtful that we will return to the arrangements of the past. But enforced lockdown has highlighted that we are social animals and the office is unlikely to be completely replaced by home working. Now is the moment to review your future plans and assess whether the office space and layout still serve your organisation’s needs. If you have surplus space, consider options such as sharing, subletting, assigning, exercising a break right or negotiating a surrender of your lease back to your landlord. Alternatively, using your space more productively with greater agile working for staff might be what is required.

When reviewing the best options for your organisation, it is important to check the terms of your lease to understand your rights and obligations – this will have an impact on which route you choose. In particular, landlord’s consent will often be required for alterations and dealings (assignments, underlettings or sharing) and there may be specific conditions that you need to comply with in advance.

Bates Wells’ expert advice will ensure that all conditions and obligations within your lease (and any Charities Act 2011 disposal requirements) are complied with in a timely and efficient manner.

FIND OUT MORE

There’s more information on reviewing your property needs in the Winter 2019/20 edition of our Real Estate update at https://bateswells.co.uk/wp-content/uploads/2019/12/BW_RelEstUp_PropertyNeeds_Winter2019.pdf

Immigration post-COVID and post-Brexit

The impact of the coronavirus pandemic on immigration related matters has been extensive.

Chetal Patel and Lara Blanco Olarte consider how the global pandemic has affected immigration for charities and how the third sector can prepare for the post-Brexit economy.



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I help clients with their UK business-related immigration matters and provide pragmatic solutions to often complex situations. My particular interests lie in sponsor-related matters and the government's 'hostile environment' policies.



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I am a senior paralegal working on a wide range of immigration matters, I support the Corporate Immigration team at Bates Wells, with sponsor licence applications, and compliance and applications under Tiers 2 and 5.

CHARITY AND SOCIAL ENTERPRISE
UPDATE | SUMMER 2020

The coronavirus pandemic has highlighted the essential work of charities during times of crisis, but also how charities are particularly vulnerable to the impact of a crisis on their operations, including the international mobility of workers. Charities that operate internationally have faced huge disruption to operations as they are unable to repatriate employees or send workers overseas to provide critical support in the field.

Further challenges have been sharp drops in income and immense strain on charity services, particularly in areas such as social work and residential care. These charities have the highest concentration of EU workers in the sector and are likely to face increased labour demand shortages in the coming years. The post-Brexit world poses huge challenges for these and other charities – how can you prepare?

From 1 January 2021, under the new Points Based Immigration System, the sponsored work visa category will be expanded to cover roles skilled to RQF level 3 (A-level) and above, as opposed to the current minimum of RQF level 6 (graduate level). However, the Home Office has confirmed there will be no specific route for 'low skilled' workers, despite this crisis highlighting just how vital 'low skilled' key workers are.

How can the sector prepare?

Assess future recruitment needs

Consider the roles your organisation is likely to face shortages in once free movement ends and whether you are likely to require people from outside of the UK labour market to fill these roles. Are these skilled to RQF level 3?

Apply for a sponsor licence

If you can show that you can offer a genuine role at a minimum of RQF level 3, consider applying for a sponsor licence now. This will ensure your organisation has the flexibility to sponsor non-UK nationals in time for the new immigration system.

Review HR systems

Applying for a sponsor licence isn't just a tick-box exercise. Organisations need to have the correct systems in place to comply with sponsor duties; this includes checking right to work documents and monitoring immigration status, reporting absences and changes to roles. If you begin preparing now you will have enough time to review and implement the correct systems before applying for a sponsor licence.

If you already have a sponsor licence, consider the impact of coronavirus on sponsored workers

Will there be long-term changes to your working practices with employees working remotely more regularly? If so, consider how you will continue to meet your sponsor duties. Will your sponsored workers' future indefinite leave to remain applications be affected by their absences during the pandemic? It's important to retain evidence of excess absences.

Identify recruitment options for 'low skilled' roles

Are there alternative immigration options available to individuals? Are you able to recruit any necessary EU workers in advance of the new system?

We may see delays in introducing the new immigration system in light of the coronavirus pandemic, but, regardless, charities should begin preparing in good time. These tips are the key to ensuring charities can continue recruiting and operating as seamlessly as possible in the new climate.

FIND OUT MORE

Read Chetal's commentary on the new Points Based Immigration System at <https://bateswells.co.uk/2020/02/government-reveals-new-points-based-immigration-system-leading-immigration-lawyer-comments-on-changes/>

Transgender inclusion and beliefs

Some employees, volunteers and beneficiaries who object to a charity's transgender inclusion policies say that their objections are based on their 'gender critical beliefs'.

In the second of our series of articles on transgender inclusion and the law, **Mindy Jhittay** explores the relationship between transgender inclusion and beliefs.



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CHARITY AND SOCIAL ENTERPRISE
UPDATE | SUMMER 2020

What are 'gender critical beliefs'?

A belief that 'transwomen are not women' or that 'there is no such thing as gender identity' is a gender critical belief. If a charity seeks to investigate or sanction someone for acting on such a belief, they may claim discrimination on the grounds of their belief.

Are gender critical beliefs protected by law?

Section 10 of the Equality Act 2010 protects people who belong to a religion or hold a religious or philosophical belief, as well as those who don't. Gender critical beliefs are not a religious belief, and in order to qualify for protection as a philosophical belief, the belief must (among other things) not be incompatible with human dignity and not conflict with the fundamental rights of others (*Nicholson v Grainger plc* [2010] IRLR 4).

At the time of writing, there have been two reported cases on gender critical beliefs and in each case the court held that these tests were not met because the belief conflicted with the human dignity and fundamental rights of transgender people. This meant that neither claimant could rely on their 'gender critical beliefs' to bring a claim for discrimination. One of the claimants has sought permission to appeal and, if she wins, the law in this area could change.

What happens when belief and policy collide?

The law draws a distinction between a belief, which is protected, and the manifestation of the belief, which is not.

The leading case concerns a registrar who refused to conduct same-sex civil partnership registrations (the case predates same-sex marriage) because she said this was incompatible with her religious beliefs. She was dismissed by her employer and at first the court found that this amounted to direct discrimination. However, on appeal this

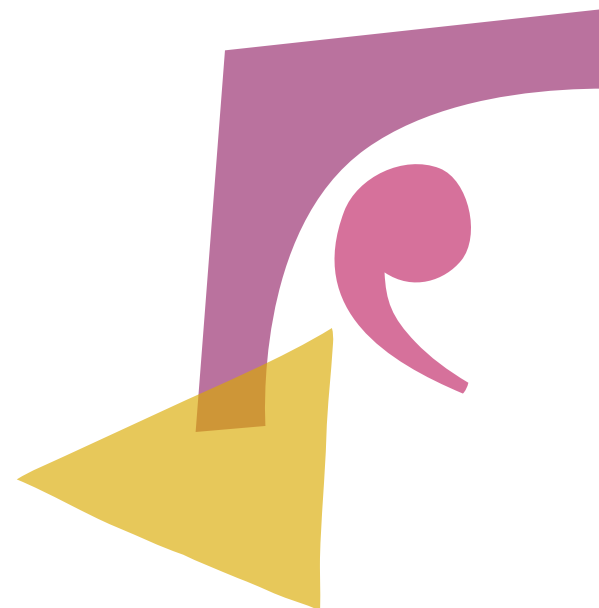
finding was overturned because the reason for dismissal was not the fact that she held the belief as such, but rather the consequences of the belief – that is, the fact that she refused to do part of her job (*Ladele v London Borough of Islington* [2009] EWCA Civ 1357).

If the law changes and gender critical beliefs do become protected under the law, then a claimant would also need to show that any unfavourable treatment they have suffered (for example, being investigated or dismissed) was due to their belief, and not the way they had chosen to manifest those beliefs.

FIND OUT MORE

The first article in this series is at:
<https://bateswells.co.uk/2020/03/charity-social-enterprise-update-spring-2020/>

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.



Serious incident reports and global events

The Charity Commission requires trustees to report all serious incidents.

Suhan Rajkumar and Jennifer Chong remind charities when and how to make a report.



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CHARITY AND SOCIAL ENTERPRISE
UPDATE | SUMMER 2020

The international coronavirus crisis, and the stringent UK government guidelines adopted to deal with the pandemic earlier this year, prompted many charities to consider what a 'serious incident' is, in such exceptional circumstances, and when to file a serious incident report, or 'SIR'.

Reminder: what is a serious incident?

Serious incidents are defined in the commission's SIR guidance (found [here](#)) as 'an adverse event, whether actual or alleged, which results in or risks significant:

- harm to your charity's beneficiaries, staff, volunteers or others who come into contact with your charity through its work [...];
- loss of your charity's money or assets;
- damage to your charity's property; or
- harm to your charity's work or reputation.'

'Significant' is taken to mean significant in the context of your charity, so it will depend on your charity's size, staff, operations, finances and/or reputation.

The trustees of a charity hold ultimate responsibility for ensuring that the charity makes an SIR when applicable, therefore it is in the trustees' discretion and judgement as to whether they consider an actual or alleged incident a serious incident.

Could a global event trigger a serious incident 'significant' enough to file a SIR?

The commission's position evolved throughout the early stages of the coronavirus pandemic. Initially, the commission released guidance (on 12 March 2020) reminding trustees that coronavirus could give rise to reportable serious incidents, with a number of examples. The next day, following feedback that this guidance was unhelpful and burdensome, the commission withdrew it, acknowledging that it 'was not as helpful as [it] would have liked'.

In subsequent guidance issued on 19

March 2020 the commission confirmed that charity trustees should continue to report serious incidents using the usual guidelines. More recently, on 3 June 2020, the commission issued supplementary **guidance**, with an accompanying examples table, to help trustees in deciding whether they need to report an incident related to the pandemic. This clarifies, for example, that it is the impact of any pandemic-related reduction of services or operations on the charity that is key in determining whether a SIR should be reported.

In practice, although there are some differences from the main guidance – for example, the usual thresholds for reporting a financial loss do not apply where the losses are related to the coronavirus crisis – the commission continues to expect trustees to exercise their own judgement as to what is 'significant' for a charity, with the effect that the pandemic may give rise to reportable incidents for many organisations.

What should we think about when filing an SIR?

The SIR regime aside, trustees should always deal with any serious incident appropriately, minimising harm to the charity, and its beneficiaries, staff, assets and reputation, in order to comply with their legal duties.

SIRs should detail what happened, and the approach that the charity is taking to deal with the serious incident. Although the commission recommends that reports of both actual and alleged incidents are filed promptly, it will often be the case that trustees will need to take some initial steps to deal with a serious incident before filing an SIR. The SIR guidance is clear that, through the regime, the commission is looking 'for assurance that the charity has taken steps to limit the immediate impact of the incident and, where possible, prevent it from happening again'.

Charities and cybercrime

In recent weeks we have heard much about the threat to the public and private sectors from COVID-19-related cyber-attacks. Charities face the same threat.

Alan Bryce, Head of Development, Counter Fraud and Cybercrime at the Charity Commission for England & Wales highlights the commission's work in this area.



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

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

CORONAVIRUS AND CYBERCRIME

The commission has published new fraud and cybercrime guidance specifically focused on the risks emerging from the COVID-19 pandemic, including links to a webinar. <https://www.gov.uk/government/news/coronavirus-covid-19-increased-risk-of-fraud-and-cybercrime-against-charities>

For practical guidance on how to spot – and stop – coronavirus-related fraud, see our Bates Wells checklist: <https://bateswells.co.uk/2020/04/beware-coronavirus-fraud-top-tips-for-protecting-your-organisation-from-opportunistic-scams/>

CHARITY AND SOCIAL ENTERPRISE UPDATE | SUMMER 2020

In October 2019 the Charity Commission published findings from our research into cybercrime targeted against charities. Although this research pre-dates COVID-19, the prevention lessons that can be drawn remain valid and provide timely insights into how COVID-19 cybercrimes can be tackled.

Changing how charities think about cybercrime is key to making the charity sector more resilient. The starting point is to accept that every charity will, at some point, be targeted. What matters is that charities can demonstrate they have done everything they reasonably can to prevent the cybercrime. This means putting procedures in place to identify and respond appropriately when cybercrime does occur. With the guidance and good practice now available, charities should feel increasingly empowered to play an appropriate, proportionate role in the fight against cybercrime.

Understanding the threat

There is relatively little charity-specific cybercrime research available. That is why last year we undertook, in partnership with the Fraud Advisory Panel, the largest ever charity cybercrime 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 and cybercrime survey. This achieved an impressive 22% response rate, higher than many similar surveys in the private and public sectors. This reflects the increasing importance that charities now place on tackling cybercrime. For the first time we now have statistically significant, representative findings that inform our understanding of the cybercrime risk faced by charities. The results are generally encouraging.

Perceptions of cybercrime risk

Cybercrime is a relatively new issue. Perhaps unsurprisingly our survey showed that charities' perception of the threat is still developing:

- Just over half of charities (58%) think cybercrime is a major risk to the charity sector.
- Almost a quarter (22%) believe cybercrime is a greater risk to the charity sector than other sectors.
- In general, large charities are more likely to appreciate the risk of cybercrime.

Analysing charity cyber attacks

- Phishing and malicious emails are the greatest cyber threat (39%), followed by hacking/extortion (15%).
- Over a third of charities (36%) don't know which type of cyber-attacks they're most vulnerable to.

Reporting by charities remains low, with just less than a third reporting to the police, a quarter to their bank and only 13% to the Charity Commission. Of most concern is that nearly a third did not report to any external body when they'd fallen victim to some form of cyber-attack. Without timely reporting, prevention warnings and other forms of intervention to help protect the wider charity sector will have limited impact.

Encouragingly, two-thirds of charities took action to strengthen their defences after a cyber-attack, principally with revised IT security arrangements and new or updated training.

FIND OUT MORE

The full results of the cybercrime survey can be found in the Charity Commission report **Preventing Charity Cybercrime**.

Additional guidance and a range of free online resources are available at: <https://www.gov.uk/guidance/protect-your-charity-from-fraud>

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

Rising to the challenges together

Charity and company regulators have relaxed some of their procedures in response to the coronavirus pandemic.

Cecile Gillard, our Company and Charity Secretarial Department Manager, explores new opportunities to help deal with your organisation's legal administration.



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I lead our Company Secretarial services, aiming to support your charity, social impact or commercial organisation in its effective core legal administration. I love seeing organisations thrive and bring benefits to the wider community in which they operate.

CHARITY AND SOCIAL ENTERPRISE
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Charities, CICs and other companies are addressing the challenges of the current situation, with key regulators helping them rise to the task. The Charity Commission and CIC Regulator assure trustees and directors their approach to regulation during this time will be as flexible and pragmatic as possible. That is balanced with protecting the public interest and the legal, regulatory and reporting responsibilities of regulators, charities and CICs.

Charity reporting – trustees' report

As you prepare trustees' annual reports, consider how you explain the operational and financial impact of the national control measures for coronavirus. Guidance and suggested solutions, if reporting on the usual 'going concern' basis is not appropriate, are available from the body responsible for the Charities SORP reporting standard [here](#).

Filing deadlines and document delivery – annual accounting and related reporting

Companies, including CICs, can extend their accounts filing period up to twelve months. That maximum prevents any further extensions. Applications must be made during the current period (not retrospectively). Retrospective applications are not allowed. **Companies House** is automatically granting the extension if the reason is coronavirus related.

CICs can use the **CIC Regulator's web-based online accounts filing service** to file their accounts and Community Interest Report, paying the report filing fee (£15) by card. The report should explain any changes to their services or other changes to the community benefit they are able to deliver.

Charitable companies usually need to file paper-based annual accounts and reports with Companies House, to comply with applicable reporting standards. Some auditors and independent examiners will

have specialist iXBRL standards software they can use to carry out the filing.

Most other non-charitable companies can file legally compliant micro-entity or dormant annual accounts via **Companies House WebFiling**.

Charity Annual Returns

If your Charity Commission filing deadline for the Charity Annual Return (with accounts) is imminent and the trustees believe it cannot be met because of the emergency, you can contact the commission at filingextension@charitycommission.gov.uk. Generally, charities are still expected to meet the deadline.

Filing commonly-required notifications

Changes to charity details can be notified online to the Charity Commission.

The Companies House WebFiling system can be used for quick and easy reporting of commonly-required notifications by companies, especially:

- company name changes;
- director appointments/cessations, changes to personal details.

New joiners to WebFiling will need the hard copy letter Companies House uses to verify the application and issue the authentication code.

Support from Bates Wells

The regulators are constantly updating their guidance and the Corporate Insolvency and Governance Bill currently passing through Parliament proposes further relaxations to company filing requirements. Please contact us or see our **coronavirus hub** for the most up-to-date position.

Our team can support your organisation, now and beyond the current crisis. Contact us for a conversation companysecretary@bateswells.co.uk.

What's new at the Charity Commission?

Danielle Mawer and Jack Michaels report on recent developments at the Charity Commission.



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CHARITY AND SOCIAL ENTERPRISE
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Coronavirus guidance

The Charity Commission has published a suite of guidance entitled 'Coronavirus (COVID-19) guidance for the charity sector' to help charities during this time.

Notably, the guidance sets out the commission's supportive approach during the crisis:

'We want to assure charities that our approach to regulation during this uncertain period will be as flexible and pragmatic as possible in the public interest, whilst helping trustees to be aware of and think about the wider or longer impact of their decisions on their charity.'

This should help provide some comfort to charity trustees who have been making very difficult decisions in complex and rapidly-changing circumstances.

The guidance, which is updated regularly, sets out the commission's answers to commonly-asked questions and includes practical tips on topics such as whether a charity's objects permit it to help with corona efforts (and when a charity may be able to amend its objects to enable it to assist with such efforts, if appropriate), accessing government funding, using reserves and restricted funds, holding AGMs and trustee meetings, keeping people safe and serious incident reporting.

<https://www.gov.uk/guidance/coronavirus-covid-19-guidance-for-the-charity-sector>

Regulatory action: Save the Children UK

In early March 2020 the Charity Commission published its report following its statutory inquiry into Save the Children UK. The inquiry investigated the handling of allegations of harassment made by staff against the former chief executive officer and other senior staff.

The report acknowledges some aspects of good practice in the way the charity dealt with the complaints, but found that

it did not handle these staffing issues as well as it should have. In particular, the charity failed to consistently follow its own processes and dealt with the complaints informally rather than investigating them fully. Further, the full trustee board was not informed about the complaints relating to the chief executive officer as early as it should have been – this amounted to a finding of mismanagement.

The commission was also critical of the extent and frankness of the charity's reporting to the commission and what it described as an 'unduly defensive' response to media reports. The commission felt this created an impression that the charity was downplaying the seriousness of the allegations and not dealing with them responsibly and openly. Furthermore, inconsistencies between the information given to the commission, and that reflected in public statements, resulted in a warning to the charity about the accuracy and integrity of its assurances to complainants and of some of its public statements.

The commission noted that it cannot enforce healthy internal cultures in charities or adjudicate staff complaints, but hopes this report and the wider lessons will help other charities learn from this case, and place appropriate priority on the culture and behaviours modelled by those in senior leadership positions.

Read the full report here: <https://www.gov.uk/government/publications/charity-inquiry-the-save-the-children-fund-save-the-children-uk>

FIND OUT MORE

The Charity Commission website is at <https://www.gov.uk/government/organisations/charity-commission>.



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



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