Responding to the war in Ukraine

Charities across the sector have been taking action to respond to the war in Ukraine and have been encountering some common legal questions in the process. Your charity may also have been grappling with similar issues when responding to crises in other areas, such as Afghanistan and Gaza. We've outlined some points to think about here.

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Expressions of support

Organisations across society have been quick to express public support and solidarity for Ukraine and its people, as a small, simple way to lend some moral support. But what are the implications for charities, who, by definition, cannot have political purposes?

Charities can carry out a degree of political activity and campaigning - provided that is aimed at furthering their charitable purposes. The Charity Commission would typically expect any public policy statement issued by a charity, including any statement on the conflict in Ukraine, to be linked to the charity's charitable purposes.

Of course, the scale and nature of the conflict in Ukraine is unprecedented in Europe in recent times and is both already having and expected to have very wide ranging consequences. In the UK, for example, this could include the settlement of refugees, the cost of living crisis and the impact of sanctions on charitable funding flows.

In that context, it's not unreasonable to take the view that very many charities may be able to draw a reasonable link between the conflict and the ongoing pursuit of their charitable purposes, and so to justify making public statements of support.

Indeed, the Charity Commission itself has added a banner in the colours of the Ukrainian flag to its LinkedIn page, which is perhaps an indication that they are willing to be flexible around charities showing support, and to accept that simple public expressions of solidarity and support should not be viewed as inappropriately political.

Of course, it's important to ensure that any statements are factually accurate with a legitimate evidence base, and that any risks associated with the specific statement are justified and managed – such as whether the statement might be controversial and address the risks of that in relation to the charity's reputation (and potentially its future fundraising capability).

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Fundraising appeals

We're seeing a huge outpouring of generosity from across society. Charities need to ensure they are meeting this generosity with fundraising campaigns that are not too narrow in the terms of their appeals but still within the charity's objects.

We'd advise making sure the terms of the appeal are set widely enough to cover the possibility that you may not raise enough – or you raise more than you can use for immediate needs. Be particularly careful about representing that funds will benefit people in Ukraine (or Russia) given the impact of the war and sanctions regimes, which make transferring funds very difficult.

If you can't use the funds for the purposes for which they are raised, the Charity Commission has guidance on failed appeals and may need to be involved to resolve the situation. Although the new Charities Act 2022 will simplify the process for dealing with failed appeals, it's better to avoid this happening in the first place.

We've had some queries about fundraising for the situation in Ukraine when this does not fall within a charity's objects. It may be possible to interpret objects quite broadly – for example, faith-based charities established to advance a religion can usually engage in relief of need even if this is not expressly stated in their objects, as this is seen as an expression of the faith.

You might also consider supporting other charities if your charity's objects aren't wide enough. Charity Commission guidance is that members of a charity can still give directly or organise collections in a personal capacity, but should be careful not to do so in the name of the charity and not to use the charity's bank account. Be clear you're fundraising for a third party, rather than raising funds for your own charity to distribute.

You could also apply to the Charity Commission for permission to widen the charity's objects. Think about your organisational capacity to deliver – and whether this is an appropriate long-term move - or whether it would be better to direct support to other organisations with the capacity to respond.

The CC guide on emergency appeals can be read here.

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Fundraising with commercial partners

Charities are seeing a high level of donations and engagement from corporates in fundraising initiatives for those affected by the war. Some of these businesses may not be familiar with fundraising regulation.

Keep an eye out for organisations that are fundraising for your charity, especially if they are keen to publicise their donations. Consider the reputational risks around corporate partners.

Some businesses and charities are getting into commercial participation arrangements for the first time. If a company or person is carrying on a for-profit business, which is not a fundraising business, and in the course of that business, engages in a promotional venture where they represent that charitable contributions are being made, they will be a commercial participator.

This kind of fundraising is regulated under the Charities Act 1992. Key points to note include that it's a legal requirement to have a written agreement between the charity and the business. There are certain things the agreement must cover, including very specific requirements about disclosing the name of the charity (or charities) benefiting; details on how the funds will be split if more than one charity is involved; and the 'notifiable amount' by which the charity will benefit.

The notifiable amount is effectively how much of the purchase price or the total donations will be given in connection with the sale of goods or services of the promotional venture – 'all profits' or 'all proceeds' won't be enough.

There are little used provisions in the 1992 Act which allow charities to prevent unauthorised fundraising.

There can also be tax issues if you're making your charity's logo available for this fundraising – we recommend seeking advice before you go ahead.

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Refusing or returning donations

Charities should be alert to the reputational risks associated with their donors (both individuals and corporates), but bear in mind the threshold for refusing donations is fairly high – it must be in the charity's interests to do so.

Trustees can generally only refuse a donation where accepting it would be more detrimental than rejecting it in terms of the charity being able to achieve its purposes. A conflict with your charity's values may not be enough reason to turn down the donation - unless it's likely to lead to loss of other financial support for the charity, loss of volunteers or staff, or if the source of the funding is inimical to your objects.

This raises tricky reputational issues. In the last few years, there has been heightened sensitivity around how charities may benefit from funds where there may be questionable ethical issues around the source of the funds.

You also need to be aware of sanctions regimes. If an individual donor is sanctioned or a corporate donor is owned or controlled by someone who is, it is against the law to receive their funds, goods or other economic resources. You'll need to look carefully at the ownership and control of corporate donors or grant makers, especially if not already known to you.

This is a fast-moving area and there have been a number of situations where wealthy and high-profile individuals with connections to Russia, or businesses which have associations with these individuals, have been looking to make large donations.

If you have already received funds, bear in mind that returning funds to a donor may also not be straightforward. Generally, it is more difficult than refusing to accept them in the first place. Also bear in mind how quickly the sanctions regime is expanding – it may have been possible for an individual or business to make a donation, but if they have subsequently been sanctioned, you won't be able to return it without breaching sanctions.

Refusing or returning donations

You might consider returning a donation if:

- It's expedient in the interests of the charity on reputational grounds. It may be harder to make this case if you don't act promptly or for historic donations.
- You were contacted by a donor's relative to say the donor was vulnerable and could not afford the donation – there is possibly a higher risk of this given the extensive and compelling media coverage around the crisis. Gather your evidence and try to resolve complaints directly so they're not escalated to the Fundraising Regulator.
- A donor claims that they have made a mistake, or even can no longer afford the donation. Apart from fact you may have spent the money in an emergency response situation, this should be raise alarm bells to consider money laundering risks and will likely be something that needs Charity Commission consent – which may be hard to get.

Our top tips:

Keep an eye on incoming funds and on fundraising being carried out for your charity's benefit. It's easier to resolve any issues or return unwanted donations if you act promptly, rather than accepting funds or allowing a campaign to build online.

If you don't have a fundraising committee or crisis response committee or similar, you may want to designate a small sub-group of trustees who can be available quickly to make decisions on any tricky funding issues.

It's helpful to ensure you have comprehensive policies covering acceptance and refusal of donations, return of donations and corporate partnerships.

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Sending funds overseas: the regulatory view

When spending funds overseas in an emergency situation, it's crucial to be aware of the regulatory framework – and practical considerations like due diligence, monitoring, record keeping and policies.

The Charity Commission has detailed guidance for charities operating internationally (primarily its compliance toolkit). Its guidance starts from first principles – trustees have a duty to safeguard the charity's assets, including its reputation. They must have measures in place to ensure that the charity's assets (which includes the charity's reputation) are used only to support or carry out its charitable purposes, and avoid exposing the assets to undue risk or abuse.

They must comply with the law (for example, financial sanctions) and have proper and adequate procedures in place to ensure compliance and which are properly implemented.

They must be able to demonstrate they have considered the risks their charity will be exposed to through a particular activity, and whether the benefits of the activity make that risk acceptable. For example, the risk of failure of a project where a delivery partner has an insufficient or patchy track record.

The Commission requires charities to report 'serious incidents' to it through an online reporting tool. Breach of the sanctions regime or counter-terrorism legislation would be considered by the Commission to be a serious incident.

HMRC also takes a close interest in charities sending funds overseas. It requires charities to take reasonable steps to ensure that the payment will be applied for charitable purposes. If it deems such steps have not been taken, it can claim back tax relief and trustees may be personally liable for this sum.

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Sending funds overseas: our top tips

1. Carry out thorough (but proportionate) **due diligence** on recipient organisations. Where specific projects are being funded, you should have sight of the due diligence processes and procedures of those organisations

2. Put in place **grant agreements** that contain some **minimum provisions** such as:

- What the funds are being used for
- What the funds cannot be used for
- Whether funds can be on-granted and if so on what conditions
- Requiring accounts, records and documents to be kept
- Requiring regular monitoring reports on progress and expenditure of funds
- Warranties that organisations will use the funds for lawful purposes on not breach bribery or terrorism laws (and that comply with your policies)
- Provisions allowing the funder to require the return of unspent funds

3. Check **what donors are requiring of you** – for example, US donors will often require grant recipients to comply with US sanctions and counter-terrorism law – and seek appropriate legal advice.

4. Where distributing funds other than through banks (for example, through delivery partners), **ensuring due diligence is undertaken** and appropriate agreements put in place around monitoring and reporting.

5. Find appropriate ways to collect **evidence of expenditure appropriate to the context**, ensuring staff and/or beneficiaries are not put at risk, such as photographic evidence and use of third parties to audit on their behalf.

6. Ensure the recipient organisation has adequate procedures in place to **safeguard** security of staff and volunteers

7. Put in place and implement **policies and procedures** (and ensure your staff are trained in these)

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Sending funds overseas: policy checklist

Some key policies we would recommend you put in place before sending funds overseas to high risk areas such as Ukraine include:

- A grant-making policy: which draws on the Commission's guidance on grant funding and working with non-charities, setting out the framework for due diligence, reporting, monitoring and key terms the charity will implement in grant agreements
- An anti-terrorism policy and / or a money laundering policy which identifies risks and practical tools to mitigate risks such as complying with financial procedures, due diligence (including checks against lists), monitoring, training of staff, having a nominated officer to report any suspicions or knowledge of offences
- An anti-bribery and corruption policy: defining bribery and corruption, identifying risks (including common scenarios) and mitigating against these
- A risk-management policy which sets out how risks are identified and managed, drawing on the Commission's expectations in its guidance
- A serious incident policy setting out how the charity will deal with and report serious incidents
- A safeguarding policy which reflects the Charity Commission's wider definition of what constitutes safeguarding
- Financial procedures which include procedures to verify end use of funds and to report any suspicion or knowledge of money laundering offences.

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More information

For a more in-depth look into all of these issues and more, take a look at our recent webinar.

The session covered all of the previous topics in detail, as well as talks on duty of care, safeguarding, the immigration considerations when helping refugees, and insights from Richard Thomas QC on the sanctions regime.

To access the recording, visit our website here.

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