

Managing investigations: A guide for charities



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Introduction



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Introduction

Investigations and inquiries are a difficult fact of life for charities, social enterprises and other public interest organisations.

They can start in many ways – perhaps in response to a complaint, a staff grievance, a report from a whistle-blower, a regulatory inspection, or a concern raised by the board. They can be internal or carried out by a regulator such as the Charity Commission, Ofsted, the Care and Quality Commission, the Information Commissioner’s Office, or the Fundraising Regulator. It’s not uncommon for several regulators to be involved at the same time and many of them have far-reaching investigatory powers.

Common to all is that they throw up complexity and can pose risk both to the organisation and to individuals involved in it. And very often they concern issues that are extremely sensitive. We are well used to guiding our clients through this sort of complexity, avoiding pitfalls, and helping them to put in place and operate policies and procedures to ease the way.

In this guide, we’ve gathered together our experience from across the firm to give you a quick overview of the big issues to address and how we can help you. We hope you find it useful in preventing problems from arising and in managing them when they do.

Last autumn we published a guide to *Managing in a Crisis*, which includes information and advice that may also be useful to you if dealing with investigations. We looked at how to deal with your regulators, making serious incident reports and robust governance as well as crisis communications.

You can download a copy here:
<https://bateswells.co.uk/2021/11/managinginacrisis/>



What's in this guide?

Focusing on investigations – both internal and external – we ask:

- What's the best way to respond to an external investigation? **page 6**
- How should you navigate an internal investigation? **page 14**
- What are our top tips for avoiding a regulatory investigation in the first place? **page 24**

The guide draws on the experience of colleagues from across the firm – with multi-disciplinary expertise covering public and charity law, dispute resolution, defamation and reputation management and information governance. We hope it's a useful reference for you and your organisation.



Handling external investigations by regulators



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Regulators normally have extensive powers of intervention and enforcement where a breach of regulations is suspected, regardless of the sector you are operating in. So navigating through an external investigation can be a complex process with high stakes.

If faced with an external investigation, you can expect significant disruption. An investigation will routinely include interviews, sometimes under caution, and even, in the most serious cases, dawn raids. The investigatory process is time consuming at best and invasive at worst, not improved by the fact that external investigations can take many months to conclude.

The ramifications can be far reaching. Regulators may have powers to issue formal notices imposing conditions on an organisation or sometimes prohibiting activity altogether. They may impose penalties or refer a matter for criminal prosecution. The organisation risks facing reputational and commercial damage.

Consequently, the management of the investigation process is critical.

“The investigatory process is time consuming at best and invasive at worst... and an external investigation can take months to conclude.”

What might prompt an investigation?

Events leading to an investigation may take many forms, including:

- An accident, or other unexpected event;
- A routine financial or procedural audit that reveals a regulatory breach;
- A report from a whistle-blower or a complaint;
- A regulatory visit;
- Publication of the findings from an internal investigation.

However it starts, there is often not much warning before an organisation has to make critical decisions.

How should you respond?

Co-operate and communicate!

Early and transparent co-operation with a regulatory investigation is generally the most productive way of ensuring regulatory intervention or sanction is kept to a minimum. Opening good lines of communication from the start will greatly assist in handling reputational risk and in creating goodwill within the process.

That said, you may need to defend the organisation's position and should be careful not to concede points unnecessarily.

Although there is almost always an express or an implicit obligation to co-operate with regulatory investigations – and potentially significant penalties for failing to do so – co-operation should be balanced alongside other factors, for example, the organisation's rights and obligations to third parties, particularly in terms of information sharing.

Whom do you notify?

There is a range of parties who should be notified, such as:

Stakeholders. This includes statutory authorities, commissioners, funders and other relevant regulators. Charities, in particular, may need to make a serious incident report to the Charity Commission. For more on this please refer to our guide to *Managing in a Crisis*.

Insurers. An early approach is essential to check the scope of your policy and ensure you are covered. You may lose cover if you fail to notify your insurers and it may be necessary to obtain their approval for communications. You'll want to check whether legal representation and public relations support are covered by your policy.

You should consider your communications strategy carefully, including how any communications may affect others – particularly in view of the possibly competing interests of different stakeholders.

Legal issues

Some of the main issues that we come across when advising on an investigation relate to document management, confidentiality and data protection compliance.

Documents and record keeping

Ensure that relevant documentation is stored appropriately and that records are up to date. Under no circumstances should documents be deleted (either hard or soft copies). You'll also need to take care when creating documents in the context of an internal investigation which might be requested by the regulator.

Confidentiality and legal privilege

All documentation or communications created for the purpose of giving legal advice are generally protected from onward disclosure by 'legal advice privilege'. Communications about the investigation – advice, opinions, etc – are privileged between lawyer and client but not when circulated internally. It is essential to restrict circulation to a limited and defined group

that is responsible for receiving legal advice. Giving the management of the internal investigation to external lawyers may assist with the problem of privilege and save management time because in general the demarcation lines are clearer.

However, this does not always work in cross-border investigations, where the law of another jurisdiction about disclosure may be different, and therefore may not attract privilege.

New: Crisis Management training

Our new crisis training product helps your trustees and senior management pre-empt crises – and deal with them if they happen.

We'll cover the wider regulatory and political environment, as well as discussing the practical steps you'll need to take.

The session includes:

- Decision-making, urgent meetings & record-keeping.
- Regulatory obligations.
- Stakeholder management.
- Crisis communications.
- Fraud and cyber-security.

Cost:

From **£2,500 + VAT** for this two-hour session.

[Click here to find out more](#)

Data protection

It is important to note that when facing an investigation from an external regulator, an organisation is still required to comply with its obligations under the UK GDPR and Data Protection Act 2018.

Transparency

The UK GDPR requires organisations to inform individuals about the recipients (or categories of recipients) of their personal data. As an initial and pre-emptive step, it would be prudent to include language in any privacy notices to reflect that the organisation may share individuals' personal data to the extent required to do so by regulators or by law. If an organisation needs to share personal data with a regulator and this is not already covered in its privacy notice, it will likely need to notify the relevant individuals, unless an appropriate exemption applies.

Lawful Basis

When an organisation does become subject to an external investigation, it must still have a lawful basis under Article 6 of the UK GDPR to share any personal data with the regulator as part of that investigation. The most appropriate lawful basis is likely to be that providing the data is in the organisation's legitimate interests.

If the organisation is required to share any special category data or data relating to criminal convictions, it must have a lawful basis and also satisfy one of the specified conditions under the legislation. This will need to be determined on a case-by-case basis.

Data Minimisation

A key data protection principle is that organisations only use personal data to the extent necessary in light of the relevant purposes of processing. Deciding how you can share personal data when responding to a regulator's request may therefore involve some assessment of the proportionality of the request.

Data Sharing

You should consider whether you need to enter into any form of data-sharing provisions or data-sharing agreement with the regulator prior to providing any personal data. While there is no strict requirement for the parties to enter into any written provisions, the **ICO Data Sharing Code** notes that compliance with the code will help controllers to demonstrate that they are meeting their obligations of fair and lawful processing and accountability where data is being shared on more than a one-off basis or where the data is particularly sensitive.

Governance considerations

If your organisation becomes the subject of an investigation by a regulator, you can be sure that your governance processes will be reviewed. If you are a trustee/board member you will be asked about the extent of your understanding of the issue being investigated and, if you were not aware of it, why not. Again, co-operation and transparency are key.

Your organisation will have (or should create) a governance framework that establishes the process by which decisions should be made. It is important that you re-familiarise yourself with this process and ensure that it is being followed throughout.

The matter is being investigated and so is most likely quite serious. We'd advise that you hold board meetings on a more frequent basis than usual in order to manage the investigations process. Minutes should set out not only the decisions taken but the matters considered when reaching decisions and any particular rationale, especially if not obvious. If you do not agree with decisions or minutes of meetings, make sure that is noted.

There is useful guidance on governance strategies to adopt to navigate a crisis – on pages 21–22 of our special update on *Managing in a Crisis*.

If you need any advice or guidance on navigating an external investigation, please contact us as soon as possible.

Sharing internal findings

If you are also carrying out an internal investigation, and it's been completed before the regulator's investigation, it can be a good idea to reveal the conclusions of the internal investigation to the regulator. It may be a requirement in some circumstances. If the regulator considers a thorough investigative job has been done, they may be prepared to adopt and accept some of the conclusions (although sharing a critical internal report should be considered in the light of any risk to the organisation).

Sharing your findings demonstrates co-operation. It also shows the regulator how you are responding proactively to the situation and is evidence of your commitment to learn lessons and

put processes in place to stop things from going wrong again. If the same thing was to happen again, there is an increased chance that the regulator will use the full extent of its powers.

When sharing information about identified or identifiable individuals, you should always consider the data protection implications and the principles set out above – there's more on this in the article on [page 14](#).

There is useful guidance on handling communications – both internally, with key stakeholders, and externally – in our special update on [Managing in a Crisis](#). The guidance was written by specialist communications consultants, Forster Communications.

Are we at risk of prosecution?

Decisions about prosecution (be it criminal or civil in nature) are based not only on whether there is evidence of a regulatory breach but also whether it is in the public interest to prosecute. There will be certain types of case where a prosecution will automatically follow if there is sufficient evidence. These would involve, for example, serious injuries to people, or the most serious type of 'near misses' where systems were clearly inadequate.

If, however, an incident is not deemed to be so serious, has been isolated, and remedial measures have been put in place, regulators may decide not to intervene or prosecute or, where they have powers to sanction, to offer a lower penalty.

In conclusion

Regulators' investigations may spread quite widely through the organisation across a number of its activities. The more an organisation engages with the process and its timescales, the less likely it is that the organisation will be found to have developed a non-compliant culture.

Case studies

Here are some real-life examples of how communication and co-operation with your regulators can lead to a positive outcome.

Serious incident reporting

Our client, which ran a children's home, was issued with two compliance notices from Ofsted following a monitoring visit to the home. While the issues underlying the compliance notices were unlikely to have been considered 'serious incidents' by the Charity Commission in isolation, we advised that the most prudent course of action would be to report the issuance of the notices to the Commission as a serious incident. We also suggested that they report the underlying issues themselves as part of the same report, in the interests of openness and transparency.

Our client duly **submitted a serious incident report** to the Charity Commission with a full explanation of the events that had led to the issuance of the compliance notices and the steps they had taken to address the underlying issues.

The Charity Commission praised the charity for its approach, saying that it demonstrated that the trustees had dealt with the matter appropriately and responsibly and decided not to take any further action.

Compliance and communication

We acted for an organisation that provided care to vulnerable adults and which was the subject of a Warning Notice from their regulator, the Care Quality Commission, in respect of a purported failure to comply with safe treatment and care under health and safety regulations.

We submitted a detailed response to the CQC on our client's behalf, including representations on proportionality grounds and made arguments as to the broader context of the Covid-19 pandemic and its effect on our client.

The CQC subsequently withdrew the notice on the basis that our client was able to evidence its expedient and unprompted compliance.

The CQC also confirmed that the notice would not be published as the remedial work carried out had assured them that to do so would be disproportionate.

Navigating an internal investigation



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As with external investigations, an internal investigation may be triggered in any number of ways. You may have received a specific complaint, for example, or need to tackle difficult relationships or a broader organisational issue.

We know that internal investigations can be stressful and can feel like a distraction from your core charitable activities. But by putting some fundamental principles in place from the outset, you can ensure that the process is fair and thorough, so that the investigator's findings are sound and your charity can take an informed decision about what to do next.

When you get it right, not only do any individuals affected have an opportunity to air their concerns, but the organisation can benefit from lessons learned.

Where do we start?

Your own policies and rules may be relevant, depending on the circumstances. If the investigation is prompted by a complaint from outside the organisation, or a membership concern, your complaints policy or any policy about managing the conduct of your members will be relevant. Where a staff member has made a complaint, your grievance policy will apply.

Consider carefully what your internal rules say about what you need to do – and whether any of the procedures need to be changed in this case, so you can let any affected individuals know. For example, policies may anticipate that investigations will conclude within a relatively short timeframe, such as 14 days. But where the

issue is complex, it could take significantly longer, perhaps a number of weeks.

Who can carry out the investigation?

Do you need an external investigator or would an internal investigator suffice?

The starting point is that an internal investigation can be carried out by someone within the charity – as long as they haven't been involved in the issues raised. But where a complaint or relationship breakdown involves the most senior individuals in the organisation, for example, or where the investigation will examine assertions of a particular endemic culture, an internal investigator is unlikely to be seen as impartial. Equally, it may be that no-one within the organisation has the time or experience to investigate the issues, particularly if there are lots of documents to review and people to interview.

But do consider the appropriateness of an external approach: does the matter require an understanding of the organisation that can only be gained from within? Does moving to an outside investigator at the first stage send the right message internally or externally? If the first stage of a process is external, who would hear any appeal?

Where can we find an external investigator?

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

“You should set out in detail what you expect the investigator to do. Clarity from the start can avoid uncertainty further down the line.”

What can we expect the investigator to do?

You should brief the investigator at the outset, with terms of reference that set out in detail what you expect them to do. These are really important – clarity from the start can avoid uncertainty further down the line. Your terms of reference should set out the scope of the investigation, timescales, key contacts and your expectations as to how the investigation will be carried out.

The investigator’s main role is invariably fact finding. They will need to consider the issues raised and any allegations or complaints that have been made and gather information about them, from documents and interviews. Their findings will allow them to determine whether any particular allegations or complaints can be upheld.

Depending on the circumstances, they may make a formal adjudication and/or recommendations for the way forward.

Data Privacy

Think about whether the investigator needs an appropriate policy document (depending on the nature of the data) and a data-sharing protocol (see the *ICO Data Sharing Code*).

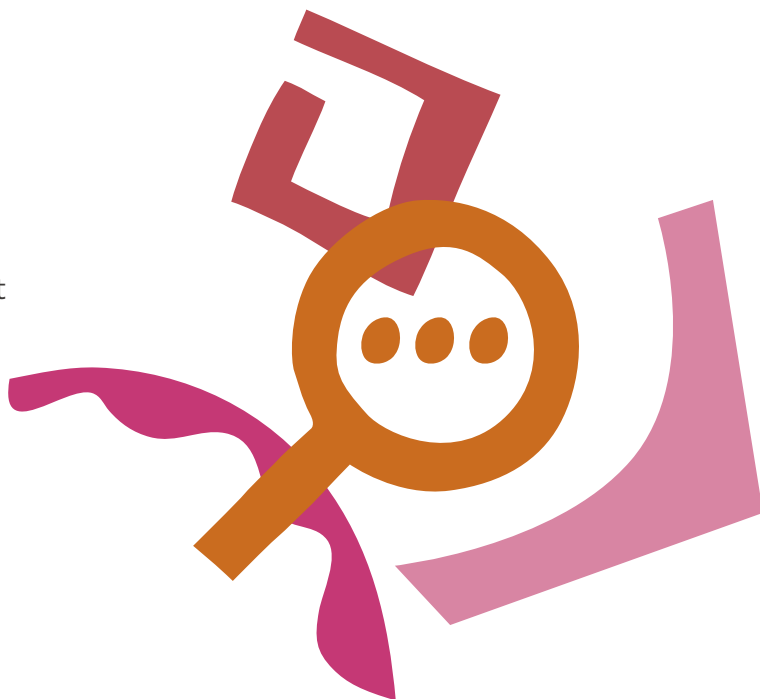
You should also check your own privacy notice. It may be appropriate to have a separate privacy notice that deals specifically with the collection and use of personal data in the context of investigations and disciplinary processes.

Who will the investigator speak to?

Engaging with the individuals involved isn't always easy. Where an investigation arises from an individual complaint, that complaint may be just one element in a complex situation. This can make the investigator's relationship with the complainant and/or the subject of the complaint difficult.

Consider whether the investigator will have full discretion to interview anyone they consider appropriate to the matter, or will you prepare a defined list of witnesses ensuring that the investigator refers back to you if they believe they need to broaden the investigation. Are there any other parameters that should be put in place to determine the breadth of evidence and the documents the investigator will see?

You should introduce the investigator to those involved, but you can then expect the investigator to explain to them how the investigation will work.



Where the issue is a complaint, the investigator will usually want to speak to the complainant first to give them a chance to highlight any issues that are particularly important to them. This also helps them get to the heart of the issues in a way that would be more difficult if they looked at a written complaint alone.

Bear in mind that if the complainant is a staff member raising a grievance then they need to be invited to a formal hearing pursuant to your grievance policy.

You should expect the investigator to give anyone who is the subject of a complaint an opportunity to respond to it. They should be given enough information to understand the allegations, but don't need a detailed breakdown or documents. The key is that they have a chance to tell their side of the story.

Anyone who agrees to speak to the investigator can bring a supporter, but the investigation is not a legal process so it wouldn't usually be appropriate to bring a lawyer. A staff member raising a grievance has the right to be accompanied by a colleague or trade union representative.

Notes of the investigatory interviews will need to be taken, to be shared with each interviewee for their review and comment on accuracy. If the note-taker is someone within your organisation consider carefully who they should be. It can avoid any issues at the interview for the identity of everyone who is going to be present to have been shared in advance.

“Anyone who is the subject of a complaint should have the opportunity to respond... so that they have a chance to tell their side of the story.”

What if key documents are missing or key people can't be interviewed?

Where an investigation is internal, no one is legally obliged to speak to the investigator – although where they are a staff member it is likely to be a reasonable management instruction to expect them to do so. If

someone chooses not to speak to the investigator, it may be appropriate to agree that the investigator should proceed without them and let them know that's what will happen.

If it's not possible to engage with key interviewees and/or documents are incomplete or unavailable, this doesn't mean the investigation can't go ahead – but the investigator should acknowledge the limitations on their investigation when making their findings.

Consider providing administrative support to the investigator – this will help them to progress more efficiently and focus their attention on the issues.



Dealing with sensitive information

We've mentioned data privacy notices above. Before speaking to someone, the investigator should send them a privacy notice explaining why and how their personal data will be used, who it may be shared with and how they can exercise their privacy rights, such as the right to make data subject access requests.

The investigator should explain to all interviewees that while the content of their discussions should not generally be shared more widely, complete anonymity and confidentiality cannot ever be guaranteed – the evidence provided may need to be used by your charity for reasons related to the investigation, such as **reporting a serious incident**, or in subsequent process, such as a disciplinary procedure.

That said, in appropriate cases where anonymity has been requested the investigator should take reasonable steps to anonymise names or otherwise protect the identity of any person either in interview notes or in their report.

The investigator's findings

You can make it clear in the investigator's terms of reference that you would like to see their draft report so that you have a chance to address any factual amendments required before it is finalised and circulated more widely.

A good investigation report will make findings of fact and will analyse each element of any complaint to determine and explain why it is upheld, partially upheld or not upheld, based on the evidence the investigator has considered. It will

typically also make recommendations, both specifically relating to any complaint or allegation, and more broadly to help your organisation apply any lessons learned.

The report should stop short of dictating what the charity should do next – that's a decision for the charity.

Once the report has been finalised and submitted by the investigator, the next step is usually to share it with the officers of the charity who have been tasked with decision-making in light of the report, so that they can consider the recommendations, make appropriate decisions, and communicate the outcome.

If the issue prompting the investigation escalates, and a court, tribunal or regulator becomes involved, you may need to disclose the report for the purposes of the proceedings and/or any regulatory investigation.

There are some potentially complicated issues around disclosure of the report and publication of the outcomes. Depending on what you plan to do with the report, you'll need to think these through.

Where individuals are identified or identifiable in the report, they may have



rights under data protection law to seek access to it via a data subject access request, object to the publishing of their data or ask for data related to them to be deleted.

If the findings are to be made public it's usually appropriate to give anyone criticised in the report a chance to comment first. Also bear data protection principles in mind. Is publication justified? Do those identified or identifiable in the report know about its publication in advance? You should make careful records of your decision-making here as you may need to show it to the Information Commissioner's Office if there's a complaint.



Is an investigation the end of the matter?

Most complaints policies afford the complainant and the subject of the complaint a right to have the investigator's findings reviewed. Grievance procedures must provide for the right of appeal. Generally, this next stage will be invoked on the basis that it is alleged that the investigation process has been flawed and/or that there is new information to consider. This means that you may need to undertake a second process, using an appeal officer who is entirely independent of the original investigation.

There may be further action including complaints to and/or intervention by an external regulator, or even a claim at court.

However, ensuring that a thorough investigation process has taken place will demonstrate to your regulator(s) – and stakeholders – that you have acted appropriately, and will form part of the evidence you rely on in defence of any claim against you. It will ultimately help strengthen your charity as it applies the lessons learned.

Preparing for the unexpected: Top tips for avoiding an external investigation



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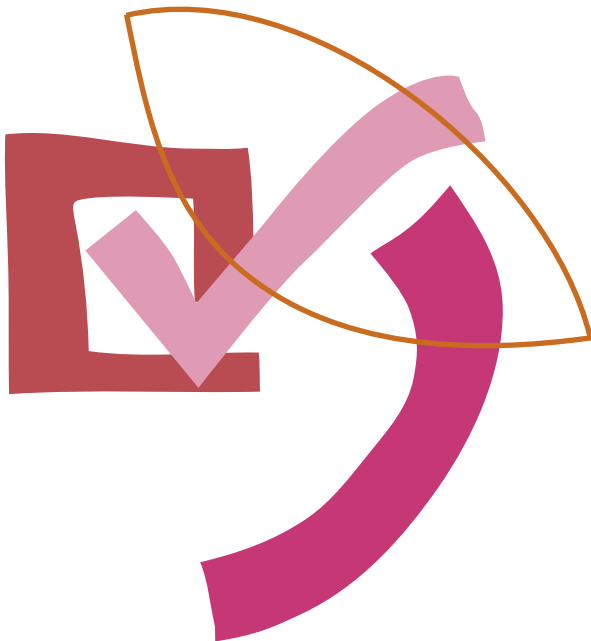
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Investigations are often triggered by actions and circumstances that are unexpected and outside of leadership's control.



This means that organisations may simply need to deal with them as they arise. However, we do have some top tips for practical steps that you can take to put your organisation in the best possible position to prevent external investigations arising.

#1 Be alive to risk

- **Do you have an up-to-date risk register that is kept under regular review?** Putting one together might seem like a painful process, but it can be invaluable in highlighting themes and issues across your organisation, and help you to anticipate and ultimately avoid threats on the horizon.
- **The risk register should be regularly shared with the board.** The trustees are ultimately responsible for managing the charity and need to ensure that key risks are appropriately identified, categorised and mitigated.
- **Senior leadership should have clear ownership of risks on the register** – so that they can be actively monitored and managed, rather than identified once and then promptly forgotten as you get on with your day-to-day work.

#2 Establish and follow workable policies and processes

- It's important to have policies in place to manage risk, but simply having them isn't enough: key policies must be embedded in the organisation and its culture, and implemented through practical processes and procedures.
- A good policy will be workable and not too complex or prescriptive. Making your policies too specific means that they can be difficult for staff to follow and comply with, leaving you open to challenge. For example, if you have a specific deadline for responding to a complaint, you need to make sure that this is something that you can always comply with (remembering that your team are human, and deadlines will be impacted by leave, sickness, and other priorities). Policies that are too restrictive risk leaving no room for nuance in sensitive situations.
- You need to regularly review policies and consider them in the round, making sure that relevant policies link-up together and are consistent: eg does your disciplinary policy tie in with your grievance and complaints policies? One way of achieving this could be by streamlining your policies, where possible – so, for example, establishing a single reporting route for complaints and concerns: see more on this below.

#3 Give your decision making an MOT

- It is important to make sure that you have a thorough decision-making framework in place to guide leadership.
- Consider and follow the Charity Commission's helpful guidance on decision making – *It's your decision*. We often suggest using a decision-making matrix, particularly where significant decisions are concerned.
- Keep clear and accurate records of your decision making, including board and sub-committee minutes. Minutes should not only record the decision that has been made but also the key factors that have been considered in reaching that decision.
- It is also important to recognise where specialist advice is needed, such as accountancy or legal advice. As well as guiding you through difficult situations, this will help to demonstrate that your organisation is considering risks at an appropriate level.

#4 Foster an open culture

- While you can't always stop individuals from acting inappropriately, you can stop issues in their tracks by fostering a culture that encourages people to be open and to come forward with complaints and concerns.
- A clear reporting framework will help to highlight issues at an early stage, when they can hopefully be resolved.
- Making sure that information is being reported and passed to the right teams is vital to ensure that senior managers have the information they need to resolve issues and move quickly if a serious issue arises. It's also important for leadership to be able to identify patterns and themes arising, even where each individual issue is resolved promptly on a standalone basis.

Even gold-plated governance can't guarantee that your organisation will never face an external investigation. But you can certainly reduce that risk – and make sure that you are well placed to respond to the regulators if you need to.

New: Governance health check service

Our new governance health check service will look at your board's composition, relevant policies and procedures and how any conflicts are managed.

The Charity Governance Code requires an external evaluation of board performance every three years for larger charities. We can fulfil this and more widely assess your organisation's performance.

We will conduct a desktop audit and produce a report including an action plan that prioritises areas that need focus now and those that can wait.

Cost

Prices for a governance review and report start from **£3,500 + VAT**.

Find out more

www.bateswells.co.uk/products-solutions/charity-governance-review/

Making a profit is core to all businesses but our goal is to combine this with a real social purpose. Our values are pivotal to us, they shape our decisions and the way we live and work.

We focus on positive social impact as much as we focus on being a successful law firm. Our top tier legal advice is coupled with a real desire to drive change and we were the first UK law firm to achieve B Corp certification, awarded to businesses that balance purpose and profit.

Today, our clients are diverse – from corporate household names, to public bodies, to start-ups. We're also the firm of choice for thousands of charities and social enterprises. We continue to lead the market we helped to shape.

Bates Wells challenges what is possible in legal expertise delivery.

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