Legal and regulatory Update – November 2019

Developments at the Charity Commission

1. **An overview in numbers – 2018/19:**
   - 8,074 registration applications
   - 4,936 charities registered
   - 4,812 charities removed from the register
   - 3,895 serious incidents reported (up 38% from the previous year); 2,504 of these were safeguarding incidents
   - 2,666 new compliance cases opened of which 764 involved safeguarding concerns
   - 103 new statutory inquiries opened
   - 155 statutory inquiries concluded
   - the commission used its regulatory powers 1,864 times (up from 1,136 last year)

   For more detail see the Charity Commission’s annual report 2018/19 and the What’s New at the Charity Commission article in the Bates Wells autumn 2019 Charity and Social Enterprise Update.

2. **New Charity Commission strategy**

   2.1 At the commission’s Annual Public Meeting for 2019, the Charity Commission Chair, Baroness Stowell, set out in her speech how the commission is implementing its new five year strategy.

3. **Use of the Commission’s “new” statutory powers**

   3.1 In statistics on Dealing with wrongdoing and harm, published in January 2019, the commission reported that it had used its new legal powers on 137 occasions since they were introduced in the Charities (Protection and Social Investment) Act 2016, including:

      3.1.1 disqualifying 21 charity trustees;
      3.1.2 removing seven disqualified trustees from position;
      3.1.3 issuing nine orders directing that specified action should not be taken, in the context of a statutory inquiry.

   3.2 It has also used its new powers to direct the winding up of a charity.

   3.3 The commission is making increasing use of its new power to issue official warnings. In 2018/2019 the commission issued 20 official warnings and 27 notifications of its intention to issue an official warning. We have also seen the power exercised in the course of a statutory inquiry on several occasions, rather than as an alternative to opening an inquiry. And in June 2019 the commission withdrew an official warning which it had issued to a charity in February 2019.
4. Inquiry reports

4.1 The commission continues to report on a number of its inquiries. Two high-profile reports from the last year are: Oxfam GB and The Garden Bridge Trust

5. Serious incident reporting

5.1 In June 2019 the commission launched its new online form for reporting a serious incident. All serious incidents must now be notified to the commission via the online form. For more information see the article on What's New at the Charity Commission in our autumn 2019 Update.

6. Updated Safeguarding guidance

6.1 On 22 October 2019, the commission published an updated version of its guidance, Safeguarding and Protecting people for charities and trustees. The guidance continues to emphasise that safeguarding responsibilities and protecting people must be a governance priority for all charities, with trustees having clear oversight and monitoring mechanisms in place and now recommends some key sources to charities to use as guidance for best practice in the sector: NCVO's safeguarding resource and Bond's 'Good governance for safeguarding'.

6.2 For more background on safeguarding issues in the aid sector specifically:

6.2.1 the Parliamentary International Development Committee has published a “Follow-up report: sexual exploitation and abuse in the aid sector”.

6.2.2 the Department for International Development has published three reports showing some of the progress made since the 2018 Safeguarding Summit. The first report has updates from each of the eight groups which made commitments at the summit: donors, UK NGOs, private sector suppliers, the United Nations, International Financial Institutions, CDC, research funders, and Gavi and the Global Fund. The second report covers how donors are meeting their commitments and the third report gives more details about what DFID has done. One new development is the Misconduct Disclosure Scheme, which allows employers to share data on conduct and disciplinary records related to sexual misconduct. The “It is still early days, but the over 1,500 requests for information since January have prevented the hiring of at least 10 individuals.”

6.3 The Bates Wells Safeguarding team runs a series of Safeguarding Best Practice Roundtable sessions: visit our website for more information.

7. New guidance for charities connected with a non charity

7.1 This long-awaited new guidance was published in March 2019. The guidance is broad in scope. It applies to a wide range of charities and non-charities, including charities with trading subsidiaries, corporate foundations, charities associated with campaigning organisations, charities established by government or local authorities, charities which regularly fund - or receive funding from - a non-charity, charities which work regularly with a non-charity “to deliver services, campaigns or other projects”, and charities which have a non-charity as a trustee or “a sole or significant member”, as well as in situations where a non-charity has rights to appoint trustees.

7.2 See here for commentary on the guidance from Bates Wells’ Partner Simon Steeden.

8. Other Charity Commission developments

8.1 In December 2018 the commission issued a regulatory alert to charitable think-tanks which sets out new “guidance” on a range of issues. Partners Luke Fletcher and Simon Steeden published this briefing on the guidance, setting out a number of concerns about its content. Some of the broader issues in the alert will be of interest to educational charities.
8.2 In December 2018 the commission announced a new approach in assessing applications for registration from organisations using or promoting complementary or alternative medicine (CAM) therapies, following its public consultation in 2017. The commission concluded that the basic legal principles around charitable status and promotion of CAM remain unchanged. The key question at registration is what evidence there is for the claims made by the applicant: for example, those claiming a therapy will cure a disease would need to provide robust medical evidence, but if the purposes relate to relieving suffering or providing comfort to patients, this can be shown by other types of evidence, such as patient reported outcomes.

8.3 The commission has published a number of reports as part of its accounts monitoring review, including:

8.3.1 **Public reporting by charities in their annual report and accounts**: the commission concluded that the quality and transparency of charity accounts has fallen, with 70% of trustees’ annual reports and accounts in the review meeting the commission’s basic benchmark of user requirements, compared with 74% in the previous year.

8.3.2 **Public benefit reporting by charities**: the commission found that 52% of trustees’ annual reports met the public benefit reporting requirements.

8.3.3 A **review of charity reserves policies**, undertaken by selecting a random sample of 106 sets of accounts of charities with an income of over £500,000. The commission found that less than two thirds of the sample provided the required information about reserves in their trustees’ annual reports, and less than a quarter stated the correct reserves figure.

8.3.4 Reports on Auditors’ and independent examiners’ compliance with their responsibilities and Reporting of related party transactions. Only around half of charity accounts reviewed met the regulator’s external scrutiny benchmark (which has now been made publicly available). See [this press release](#) for more details.

8.4 Small amendments were made to The Charities (Total Return) Regulations 2013 following a review of the Regulations in 2018.

8.5 The Charity Commission has changed all of its email addresses, removing the “gsi” element of the address.

8.6 The commission is planning to issue a “guidance tool” for trustees to help them with decisions to refuse or return donations. Sarah Atkinson, the commission’s Director of Policy, Planning and Communications, made the announcement in this [blog](#) on the commission’s website. See the article on What’s New in Fundraising in our [autumn 2019 Update](#) for more information.

8.7 The commission has issued a [press release](#) announcing that the Charities SORP-making body has set out plans to change the way the Statement of Recommended Practice (SORP) is developed, so that it better meets the needs of users of charity reports and accounts, following a [governance review](#).

**Fundraising**

9. **New Code of Fundraising Practice**

9.1 A new [Code of Fundraising Practice](#) came into force on 1st October. It is intended to be a clearer, better presented version of the previous Code, with no fundamental changes. To help navigate the new Code, the Fundraising Regulator has published:

9.1.1 [this brief guide](#) to where content from the previous Code can be found in the new Code; and

9.1.2 lists of merged and deleted sections – both of which are downloadable [here](#).

9.2 Complaints will continue to be considered against the version of the code in effect at the time of the incident. This means the new code will be used as the basis for making decisions about any incidents that take place...
from 1st October onwards. Bates Wells’ solicitors Molly Carew-Jones and Hannah Lyons set out some initial thoughts on the new Code in this briefing.

10. **Fundraising Regulator investigations and common Code breaches**

10.1 Some changes this year to how the Fundraising Regulator investigates complaints are:

10.1.1 If the Fundraising Regulator decides to investigate a charity, it will send a letter to the charity’s executive team and the Chair of Trustees asking for information. When the Regulator shares its final decision, it will also ask the Chair of Trustees to make sure the recommendations are acted on by the charity.

10.1.2 The Fundraising Regulator now has a policy of naming all charities that it investigates, whether the complaint is upheld or not. The charities are named in quarterly post-investigation summaries – see here for the first batch published in September 2019.

10.2 Common grounds for complaint to the Fundraising Regulator include: how a charity has used an individual’s data, fundraising by third parties, delivery of clothing collection bags and representations to donors about how money fundraised will be spent. The Fundraising Regulator will also generally consider whether a charity handled an initial complaint properly, making it more important than ever that charities have good complaints handling policies in place. Also see this Fundraising Regulator report about complaints received about fundraising in 2017-18. This identifies the most breaches being ones related to these areas of the Code: general principles, third-party fundraising and personal data.

11. **Fundraising Preference Service**

11.1 The FPS is the relatively new service run by the Fundraising Regulator where members of the public can register to opt out of receiving certain types of fundraising from named charities. Any charities named are notified and must log on to the FPS to access the details of the request. Some developments this year include:

11.1.1 The time period for a charity to action FPS requests has reduced to 21 days (previously it was 28 days). For more, see here.

11.1.2 In March, the Fundraising Regulator referred 59 charities to the Information Commissioner and Charity Commission for failing to act on FPS requests.

11.1.3 The Fundraising Regulator now publishes a list each month of charities which have failed to act on FPS requests.

12. **Self regulation of fundraising**

12.1 Public awareness of the framework for self regulation of fundraising appears to be low. The Fundraising Regulator has published a report, *The role of the Fundraising Regulator: public awareness, trust and expectations* which summarises recent research showing:

12.1.1 Awareness of the Fundraising Regulator is low at 7% and

12.1.2 Knowledge of the Fundraising Preference Service is similarly low at 6%.

13. **Data protection for fundraisers**

14. Working in conjunction with the Institute of Fundraising and the Information Commissioner’s Office, Bates Wells has produced guidance to help charities and fundraisers navigate the tricky issues surrounding data protection and legacies. Our guide *Legacy Fundraising, Contested Wills, & Data Retention* provides helpful advice on how charities can appropriately record and retain personal data so that it can be accessed at a later date in the case of a contested Will.
15. The Institute of Fundraising has published a refreshed version of its May 2017 *GDPR: The Essentials for Fundraising Organisations* guidance. The IOF says it is not a fundamental rewrite, the basics are still the same – but it includes new information around minimising data protection risks, advice about when you need to consider employing a data protection officer and new top tips on how to assess whether you have a legitimate interest for carrying out direct marketing under GDPR.

16. **Fundraising with corporates**

In May 2019 HMRC published new guidance on arrangements between a charity and a business where there is a mix of sponsorship and donations – see para 5.9.6 of this [VAT notice](#). HMRC has confirmed that where a charity (or other non-profit making body) agrees to let a commercial business use its name in order to raise donations, there is a supply of the benefit to the commercial business of increasing sales. However, there is no need for all the payments to be assumed to be made in return for the benefit. The value of that benefit must be calculated and a fair value stipulated in the contract. The remainder can be treated as a donation from the commercial business to the charity, and is outside the scope of VAT. HMRC has also confirmed if a corporate passes on donations from employee or customer fundraising, or agrees to make up a shortfall below a minimum amount, then those amounts are outside the scope of VAT.

17. **Telephone fundraising**

The Institute of Fundraising has published new guidance on telephone fundraising. [A Good Call](#) provides “information and advice on how the telephone can be used in a range of ways to have great conversations with supporters and aims to give organisations the confidence to make the most of the telephone as a way of connecting with supporters”. The guidance includes useful flowcharts to help charities decide whether they have a legal basis for making unsolicited marketing calls and administration calls, as well as the fundraising call compliance checklist.

18. **Legacy fundraising**

18.1 See above under Data protection for fundraisers.

18.2 The government review is underway of the legacy alert service run for years by Smee & Ford. Currently there is an interim arrangement in place with Smee & Ford so that charities can continue to receive alerts about money that has been left to them in wills, but the costs have increased because Smee & Ford now have to pay a statutory fee for all wills and grants.

18.3 Proposed substantial increases to probate fees have been abandoned. The Institute of Fundraising and others in the sector had raised concerns that any increases would reduce legacy income available for charities.

19. **Lotteries**

In July 2019, the Government published its [response to the consultation on Society Lottery Reform](#). See [here](#) for a Bates Wells’ briefing summarising the proposed changes.

**Tax and HMRC**

19.1 Since April 2019:

19.1.1 the limits which apply to the small scale trading exemption have changed. Charities with annual income under £32,000 can carry out non-primary purpose trading with a turnover of up to £8,000. For larger charities, the limit is 25% of their incoming resources, up to an annual limit of £80,000.

19.1.2 the rules on Gift Aid and donor benefits rules have been simplified: the benefit threshold for the first £100 of the donation is 25% of the amount of the donation. For larger donations charities can offer an additional
benefit to donors, up to 5% of the amount of the donation that exceeds £100. The total value of the benefit that a donor can receive remains at £2,500.

19.1.3 the eligible donation limit under the Gift Aid Small Donations Scheme (GASDS) has increased from £20 to £30.

20. **Company tax returns**

HMRC is writing to a sample of charities and CASCs requesting them to complete a company tax return: see the article in our [autumn 2019 Update](#) for more detail.


In July 2019 the Charity Tax Commission published a report containing various recommendations for reform. In a [written response](#), given in the House of Commons on 9 September 2019, Simon Clarke MP said there were “no plans to undertake a formal comprehensive review of charity taxation and reliefs”.

**Governance**

22. **Charity Ethical Principles**

22.1 In January 2019 NCVO published the [Charity Ethical Principles](#). There are four essential principles:

22.1.1 Beneficiaries first

22.1.2 Integrity

22.1.3 Openness

22.1.4 Right to be safe

The principles are intended not to be a set of rules that tell charities how they should act in all situations but instead to provide an overarching framework that can guide decision making, good judgement and conduct.

23. **Charity Governance Code**

23.1 A consultation on the Code is due to be announced during Trustees Week in November 2019, with a view to relaunching the Code in summer 2020.

23.2 NCVO has launched a new [toolkit](#) designed to support micro and small charities implement the Governance Code’s principles, with direct links to the Code. It uses the same principles but describes the kind of practice a micro organisation should aspire to implement. As a rule of thumb, this tool is intended for use by charities with an income of less than £100,000 per year with no paid staff.

**Other news**

24. **Transparency**

24.1 Compulsory registration of all charitable trusts, regardless of size, including restricted and endowment funds, is proposed in HM Treasury’s [consultation](#) on implementation of the Fifth Money Laundering Directive.

24.2 Charitable companies will be affected by proposals to increase the accuracy of the information on the Companies House Register – see the [consultation](#) launched by the Department for Business, Energy and Industrial Strategy in summer 2019.

24.3 See the article on Transparency in our [autumn 2019 Update](#) for more detail.
25. **Scottish charity law consultation**

In January 2019 the Scottish Government launched a consultation into charity law in Scotland. The proposals include broadening OSCR’s powers and extending the disqualification criteria for charity trustees by bringing them into line with the criteria in England and Wales. A short summary of the responses and links to some of the responses is available here.

26. **Social value**

The Government held a consultation on placing greater emphasis on social value in procurement between March and June 2019. Bates Wells responded to the consultation, commenting that if the proposals are seen as a final flourish in respect of the Government’s approach to social value, they fall sadly short.

27. **Mutuals**

In July 2019 the Government launched a consultation on the definition of public service mutuals, closing on 18 October 2019 (extended from 30 September), with the aim of providing clarity and increasing understanding in the sector. See here for commentary from Abbie Rumbold.

28. **Campaigning**

28.1 Bates Wells has produced guidance, with support from Unbound Philanthropy, tackling some of the main issues and considerations that charities need to explore before undertaking or funding a campaign – copies of the “Charity Campaigning guide and toolkit” and “Grant funding campaigns guide” can be downloaded here.

28.2 We have also produced the following free resources, created in collaboration with Thomson Reuters Foundation / TrustLaw and Campaign Bootcamp:

28.2.1 “Politics, Elections and Lobbying” includes guidance on the laws relating to charities and political activity, election law and lobbying.

28.2.2 “Right to Protest” offers guidance on the legality of protest, the limits on freedom of expression and freedom of thought and assembly, and an overview of the main restrictions that may be imposed on peaceful protests.

28.2.3 “Campaigns Targeting Corporates” looks at the laws relating to defamation, online campaigns and shareholder action as a campaign tactic.

28.2.4 “Data Privacy” provides guidance on the EU General Data Protection Regulation, the UK Data Protection Act and the Privacy and electronic Communications Regulations, as they might apply to campaigning organisations.
Keeping up to date

The weekly Bates Wells Briefing covers developments affecting charities and social enterprises. Anyone is welcome to subscribe. If you are also interested in the impact economy, our Impact Economy group produces a fortnightly Impact Economy brief, presenting a selection of articles, podcasts and materials, with the latest analysis and developments in the Impact Economy. You can sign up for both here.

An online version of this handout will be made available by NCVO after the conference.

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

© Bates Wells, November 2019