

# Charity legal update

Legal updates for in-house charity lawyers



## Welcome to our latest legal and sector update.

As well as details of recent legislation and cases, we also have information on consultations from HM Treasury on 5MLD, likely to have an impact on charitable trusts, and from BEIS on proposals to increase transparency in companies (including charitable companies).

Following the recent publication of the Commission's 143 page final report into Oxfam, we have summarised the main lessons for charity trustees to draw from this.

There are also the usual updates on guidance published by the Commission and HMRC, news from HMCTS on preparations for the changes to the system for notification of legacies to charities at the end of July, and some interesting facts and figures on giving in the UK.

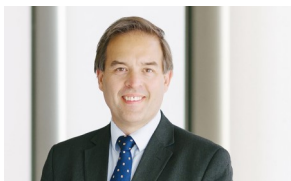
If you have any questions or comments, please don't hesitate to contact me or my colleague Tori.

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## Legislative and Government news



### Legislative news

#### **The Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019**

These [regulations](#) made on 13 June this year amend Schedule 3 to the Charities Act 2011 with effect from 1 August 2019 to provide that any higher education provider that is registered with the OfS and is also a charity can become an exempt charity by an Order of the Privy Council.

This change will affect those charities that are higher education providers and currently registered with the Charity Commission, as it will enable them to become exempt charities with the OfS as their principal regulator.

### Government news

#### **HM Treasury consults on 5MLD**

HM Treasury published a [consultation](#) on 19 April 2019 that ran until 10 June 2019 on the steps that the Government proposes to take to transpose the directive (EU) 2018/843 (“5MLD”) into national law.

A significant change brought about by 5MLD is that it extends compulsory registration to all UK resident express trusts, whether or not they pay tax. The consultation states that charitable trusts are likely to be caught by 5MLD’s extended scope.

#### **BEIS consults on proposals to increase transparency of UK companies**

Charitable companies, and charities with subsidiary trading companies, will be interested in a new consultation published by BEIS on 5 May, setting out proposals “to enhance the role of Companies House and increase the transparency of UK corporate entities”.

With a view to improving the accuracy of information held by Companies House and to strengthening the UK’s ability to combat economic crime, the Government is consulting on a wide range of measures.

If implemented, the proposed measures would be the most significant reform of the UK’s company registration framework since a register was first introduced in the 19th century, and result in significant operational changes for all companies. For more, see our [blog post](#).



## Cases



### The David Roberts Art Foundation Limited v Nicole Marlene Riedweg

This [decision](#) relates to a contract for the sale of land by a charity, The David Roberts Art Foundation Limited, and is particularly interesting because it appears to be the first time that a court has considered whether or not a contract for the sale of land by a charity is unenforceable if the charity trustees have attempted to comply with the requirements of Part 7 Charities Act 2011 but there has only been partial compliance.

The conclusion of the Court was that, in such circumstances, the transaction for the sale of land by a charity is not rendered void.

#### Background to the decision

In this case the charity failed to advertise the property being sold, or to obtain prospective advice that advertising the property was contrary to the best interests of the charity. However, the charity trustees did obtain a report in compliance with section 119 (1) Charities Act 2011.

The charity entered into a contract which incorporated the Standard Commercial Property Conditions (Second Edition) and fixed a completion date of 31 October 2017. The sale of the land failed to complete on that date, but by that stage the buyer had already paid a substantial deposit to the charity. The charity served notices to complete on the buyer, and then in due course gave notice of rescission of the contract. It then sought an order from the Court that the contract had been validly rescinded and so the deposit was forfeit.

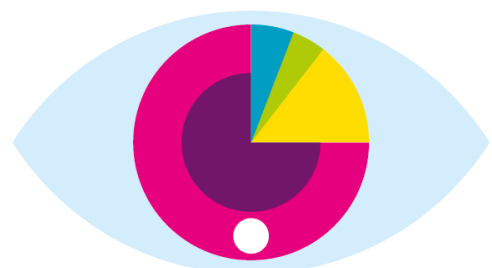
The buyer, however, alleged that the contract was unenforceable as a result of being invalid, void or ultra vires because the charity failed to comply with the provisions of Part 7 the Charities Act 2011, and sought the return of her deposit.

The Court disagreed and considered that where an attempt had been made to comply with the requirements of Part 7 Charities Act 2011 “the regime in Part 7... cannot have been intended to be so unforgiving that even if the trustees can be, and are, satisfied that the

disposal achieves the best price reasonably obtainable, the transaction is unenforceable because a report was obtained later than envisaged by section 119(1)”.

The Court decided that the requirements of section 119 (1) Charities Act 2011 had to be interpreted in the light of the provision of section 119(3) of the same act – that the terms of the disposition are the best that can reasonably be obtained for the charity.

The Court also considered that this case could properly be distinguished from that found in *Bayoumi Women's Total Abstinence Union Ltd* [2004] Ch 46 on the basis that the trustees in the Bayoumi case had made no efforts at all to comply with the requirements found in the then Charities Act 1993 for the disposal of land by a charity, and, in the absence of an order of the Court or an order made by the Charity Commission, there was in that case a clear statutory bar on the disposal of land by the charity.



# Charity Commission for England and Wales



## Decisions / Inquiry reports

### Oxfam – wider lessons for trustees

The final report produced by the Commission on Oxfam and its safeguarding issues, revived by the reports in *The Times* last year has finally been published.

The Commission's 143 page report was highly critical of the management of Oxfam during the period in question, and even the 37 page summary report made for hard reading.

References in internal Oxfam communications to "underage prostitutes" (that's not what exploited and abused children should be called...), a lack of understanding within Oxfam as to whether use of a prostitute in Haiti was illegal so that it was in breach of Oxfam's Code of Conduct for employees, the Country Director being offered the opportunity to resign and have a "phased and dignified exit" when he not only allowed the various problems to occur "on his watch" but also was under investigation himself for using prostitutes in Oxfam residences, the seeming omission of the CEO of Oxfam at the time to tell the then trustees about the investigations into the use of prostitutes in Oxfam residences by the Country Director when reporting back to them on conduct of the investigations and his proposed resignation... all these issues and many more are set out by the Commission in excruciating detail.

Safeguarding continues to be an important focus for the Commission, and this investigation into Oxfam was reopened by the Commission as a result of information being published last year that suggested Oxfam had not been full and frank in its reporting to the Commission of the serious safeguarding incident in 2011. The Commission also said when reopening the investigation that it had concerns that the handling of the incidents would have an impact on public trust and confidence.

In the light of all this, it is unsurprising that the Commission has, alongside the publication of its report, both given an official warning to Oxfam, and made a regulatory direction that requires the charity trustees to provide regular updates to the Commission about its progress in this area.

In terms of broader lessons for the sector, charity trustees should take this as another opportunity to reflect on the continued importance of safeguarding as a focus for the sector as a whole. In particular, charity trustees should bear in mind:

- They have ultimate responsibility for safeguarding and the reporting of serious incidents. This means that although they can delegate responsibilities, they must ensure they have sufficient oversight to comply with their trustee duties in this area. Higher risks will require greater oversight, and where responsibilities are delegated to an executive, charity trustees must be willing to hold the executive to account.
- Failure to ensure that their charity is a safe place not only for beneficiaries, but also staff, volunteers and anyone else who comes into contact with the charity can mean that trustees are in breach of their legal duties to comply with their charity's governing documents and the law, act in the best interests of their charity, act with reasonable care and skill, and to ensure their charity is accountable.
- Every charity should have the right policies and procedures in place to address safeguarding, and such policies and procedures should be reviewed and updated regularly to accord with best practice.
- However, documents alone are not enough to create effective safeguarding. Charity trustees should seek to create an internal culture which embeds responsible behaviours and conduct throughout their charity, and encourages those affected by safeguarding issues, or aware of them, to come forward with the information.
- Charity trustees should also consider whether they are dedicating appropriate resources to safeguarding – having the correct policies and procedures in place will not help if those charged with investigating safeguarding issues, for example, are insufficiently trained in the area.
- If safeguarding issues do occur, trustees should make sure full details of any incidents are reported in a timely fashion to all the appropriate authorities – including the police and any appropriate regulators, such as the Commission (using its new online reporting form – see section 3.2.1 of this update below).

All charity trustees should consider safeguarding to be a focus for their charity. Oxfam's problems in this area were not just cultural, but also systemic – and lessons can be learnt regardless of the scale and complexity of operations of the charity, or the sector in which it operates.

## Relief for Distressed Children and Young People – restitution for loss to charity, and costs

Trustees of this charity for the relief of poverty misapplied substantial charity funds – over \$5 million had been transferred to non-charitable organisations and friends or family of the trustees in Iraq – and failed to manage conflicts of interest. In addition, as a result of the trustees' conduct, a potential tax liability of up to £3.5 million had been incurred.

The Commission's [inquiry report](#) explains how it put protective Orders in place in respect of the charity's assets, and, after the removal of the Chair in 2007 and the discharge of the other trustees in 2008, appointed interim managers.

Interestingly, not only did the interim managers obtain restitution for the charity from the former trustees for the loss to the charity, and interest on that loss, they also successfully sought restitution of the costs incurred by the charity as a result of the former trustees' conduct.

### The Garden Bridge Trust

The Commission's final [decision](#) in relation to The Garden Bridge project contains confirmation that there was no mismanagement by the charity trustees, who fulfilled their legal duties, despite the spending of £50 million of public funds to no demonstrable public benefit.

The Decision recognises, however, that failures such as The Garden Bridge project can damage public trust in charities, and has some comments for policy makers and funders of such projects to consider:

- Policy makers should “think very carefully before setting up an entirely new charity to deliver a singular public project or purpose”. It may be appropriate to have a charity supporting such a project, in a grant-making capacity, for example. However, it is not necessary for a charity to be responsible for delivery of such a project, and the report notes it is unlikely that the public would expect risks inherent in a major infrastructure project to be “outsourced” to a charity. The report also reminds policy makers that they retain responsibility for the use of funding and must ensure accountability through appropriate contractual mechanisms.
- Funders of such projects “may wish to consider building in accountability and reporting requirements for public money which are more demanding than the general responsibilities for charity trustees, in order to meet public expectations.” Charities carrying out such projects should aim for a transparency and accountability to their funders and the public that goes beyond the legal minimum of the accounting standards.

- In the future, the Commission will still determine the charitable status of organisations such as The Garden Bridge Trust according to the legal test applicable to all charities. However, when dealing with applications for registration from charities being created either wholly or mainly to deliver a publicly funded project, the Commission “will engage with those seeking to establish the charity to ensure they understand the consequences and responsibilities that follow, including the need to meet the public's expectations around the transparency and financial stewardship.”

## Guidance

### New online form for reporting serious incidents

The Charity Commission has introduced a new online form for the reporting of serious incidents to replace the email address used for this purpose previously. The [link for the online form](#) can be found in the updated guidance on reporting serious incidents, in the “How to report” section of the guidance.

### Date for legal names of charity trustees to be displayed on register changed to 1 September 2019

The Commission has updated its guidance on the changes to charity trustee names publicly displayed on the register to confirm that full legal names will be shown from 1 September 2019 rather than from 1 April 2019 as originally planned. This means that charity trustees seeking a dispensation to have a name other than their full legal name on the register (because its inclusion would endanger them personally) now have until 1 September 2019 to seek the appropriate dispensation.

### Report serious wrongdoing at a charity as a worker or volunteer guidance updated

This [guidance](#) has been updated to include the telephone number for advice line for charity whistleblowers opened on 3 June, which is being operated independently from the Commission by the charity [Protect](#).

The Commission will be monitoring the amount and the quality of the information received through the helpline, as well as how this new helpline affects the experience of charity whistleblowers. It is also testing a new service that will see whistleblowers being telephoned directly by the Commission to discuss the concerns raised and providing a direct point of contact at the Commission in case the whistleblower wishes to speak to the Commission further while the concerns raised by being investigated by the Commission.

### Charities and trading guidance updated

This [guidance](#) has been updated by the Commission to include the new limits for small trading tax exemptions.

## Other Commission news of interest

### Review of SORP by independent panel published

A review of SORP requirements by an independent panel established by the charity regulators has [published](#) its recommendations for the future of SORP, including:

- simplifying and clarifying the report and accounts so as to make these an easy read for “proxy users” (key users who “who best represent the public and beneficiary interest” and “whose needs should enjoy a greater prominence in the process”) and those interested in the work of charities,
- more support for charity trustees to develop the necessary skills to understand charity finances,
- that steps be taken to ensure the SORP is more accessible to those applying it in the context of small charities,
- that the SORP-making body and the SORP Committee should seek more and broader engagement with stakeholders in developing the SORP, and
- changes to the composition of the SORP committee.

### Commission signs MOU with OfS

The Commission has signed a [Memorandum of Understanding](#) with the OfS to promote a common understanding of roles and co-operation between the two regulators.



## HMRC



### Guidance published on Acceptances in Lieu and the 36 per cent rate of Inheritance Tax

Section 33(2ZA) Inheritance Tax Act 1984 (“IHTA”) prevents the use of the reduced 36 per cent rate of Inheritance Tax in calculating the “special price” available where an offer of property in lieu of the tax arising on an estate eligible for the reduced 36 per cent rate is made under Section 230 IHTA.

HMRC has [confirmed](#) that to allow the benefit of the 36 per cent rate to extend to the offer of property in lieu, it has been decided that the amount of tax added back to arrive at the special price (the ‘douceur’) in appropriate cases will increase from:

- the current 25 per cent to 32.5 per cent for the offer of objects; and
- the current ten per cent to 19 per cent for land.

HMRC’s April Trust and Estates Newsletter also confirms that “appropriate changes will be made to our [website guidance](#) in Capital Taxation and the National Heritage”.

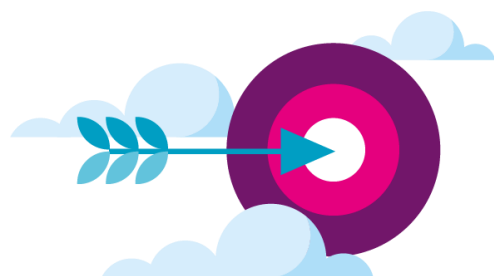
### VAT Notice 701/1 updated to include new section on mixed sponsorship and donations

This [Notice](#) now contains new 5.9.6 on mixed sponsorship and donations, and makes clear that:

- Where a donation is received and sponsorship entered into at the same time, provided either the donation is entirely separate to the sponsorship, or the sponsorship agreement makes clear what part of the payment is made for services and what is a donation, there is no need for the charity to account for VAT on the donation.
- If a charity agrees to allow a business to use its name to raise donations, while there is a supply of a service to the business in the form of increasing the business’s sales, not all payments made to the charity need be considered to be in return for

that benefit. Instead, the value of the benefit can be calculated at the outset and a fair value included in the contract. Any further payment received over that value stipulated in the contract can be treated as a donation to the charity by the business – and such a donation will be outside the scope of VAT.

- It is considered good practice for a charity entering into a “charity of the year” arrangement with a corporate sponsor to enter into two contracts: one between the charity’s subsidiary and the corporate sponsor in relation to the granting of publicity rights, and the other between the charity itself and the sponsor in relation to the donation. This approach allows the donation to be outside the scope of VAT, whether or not the sponsor commits to providing a minimum donation.
- If a business agrees to promote giving to a particular charity by its employees and customers, such donations will not be treated as consideration for a taxable supply of services.



# Charity fundraising



## Fundraising Regulator news

### New Fundraising Code of Practice to come into effect in October 2019

Following a consultation in autumn last year, the Fundraising Regulator has now announced that the [new Fundraising Code of Practice](#) will be effective from October this year.

The “new and improved” Code is intended to make the Code easier to navigate, to make it clearer where there are differences to the law in England and Wales, Scotland and Northern Ireland, and to consolidate the former Code, rule books and appendices into one new Code.

The new Code will be applied by the Fundraising Regulator to any incidents which occur from October onwards. Incidents that pre-date the new Code will continue to be considered in the light of the Code in place at the time of the incident.

### Other fundraising news

IoF / PWC publish “Fundraising for Impact” report

This benchmarking [report](#) looks at the current priorities for charities and decisions they are making around fundraising.

It found, unsurprisingly, concern amongst charities about future economic uncertainty, and the level of disposable income possessed by donors, as well as increased financial pressures on charities as a result of a rising demand for their services and increased costs of compliance and fundraising.

However, it also found:

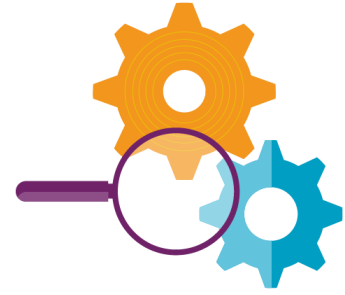
- charities predicting a growth in income in the future, with:
  - digital engagement being the most likely area of predicted increased donations and
  - growth of at least 10 per cent in most areas of voluntary income over the next three years
- a current focus on improving the experience of

current supporters, and a future focus on recruiting new supporters and

- almost three quarters of responding charities said that investment in generating voluntary income was a priority.







## Social investment

### Call for evidence on Social Investment Tax relief (SITR)

The call for evidence has been [published](#) by the Government will close on 17 July 2019.

The Government is seeking to understand how SITR has been accessed since its introduction in 2014 and what impact it has had on access to finance for social enterprises.

The relief will come to an end in April 2021 as a result of a “sunset clause”, and the Government intends to use the feedback received as part of the call for evidence to inform its decision about the future of SITR.



## Philanthropy



### HMCTS seeks to reassure charities regarding changes to legacy notifications

The CEO of HMCTS, Susan Acland-Hood, has [written](#) to charities to seek to reassure them about the provision of continuity of service in relation to legacy notifications, when the current service by Smee & Ford comes to an end. She confirms that “good progress” has been made on securing an interim arrangement and she is confident that such an arrangement will be in place at the end of July when the current service ceases. The steering group was scheduled to meet again on 18 June.

### CAF publishes UK Giving 2019 report

This [report](#) reveals that the UK public gave over £10 billion to charity last year (similar to the figure given in 2017), but also:

- a decrease in the number of people giving money to charity and
- a decrease in the number of people reporting themselves as being involved in charitable or social activities over the four weeks preceding the survey, although overall participation remains high at 64 per cent.

Encouragingly, those who have donated to charity are giving more, and the rate of volunteering remains stable.

### Remember a Charity survey suggests greater positivity about legacy giving

The survey (reported [here](#)) showed that, compared to 63 per cent in 2008, only 47 per cent of respondents believed it was better to give money to charity when alive than through a legacy – and only 41 per cent thought close relatives ought to receive the majority of an estate.

### NCVO UK Civil Society Almanac 2019 published – and shows income growth for sector has slowed

This year's [Almanac](#), used by the ONS to calculate charities' contribution to the national accounts and considered an authoritative source, shows that:

- The sector's annual income has grown to over £50 billion for the first time.
- Income has grown for large charities, and decreased for medium, small and micro organisations.
- The government and the public are the largest sources of income (with the public accounting for almost half of all income received) but these sources have dipped slightly.
- Income growth has been driven by increases in income from grants and investments.
- Legacy income continues to grow, but this source of income disproportionately benefits larger charities.
- The sector's net assets have grown by four per cent to £131.2 billion in 2016/17.

### The Times Giving List 2019 published

This year's [Giving List](#) (£) has revealed a drop in the number of individuals giving more than one per cent of their wealth to charities. Around 330 philanthropists have donated £3.75 billion in the last twelve months, with the most generous being Jonathan Ruffer – who gave £317.5 million to various charities. A summary of the findings has been reported by Civil Society for those without the subscription access required for the full Giving List.

## Big Society Capital publishes guidance on making social impact investments from DAFs

The new [guidance](#) seeks to encourage donors to invest for social impact from their Donor Advised Funds (DAFs), alongside making traditional investments and grants.

The guidance contains a simple explanation of how DAFs can be used in this way, and includes a number of interesting case studies.

