

# Trends in the Charity Sector

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2017/18





# An Updated Code of Governance for the Sector

The latest edition of the Charity Governance Code was published in July 2017 by a range of sector bodies including NCVO, ACVEO and ICOSA.

The Code is very much designed as a “*tool to support continuous improvement, not as a simple tick box exercise*”. How can the Code help charities ensure that their governance is as effective as possible?

The Charity Commission welcomed the publication of the Code, commenting that it is “*vital that charities get their heads around governance. Following good governance practices, not just paying lip service but really understanding and applying them, could have averted many of the bad headlines of the last two years. It’s more than ticking the boxes. It’s about attitudes and culture, whether a charity puts its values into practice. It’s about how trustees make decisions and how well they understand what’s going on. We have seen the consequences of failing to do that*”.

From the Commission’s perspective, therefore, there is a very real value in the Code, which has essentially been endorsed by them as the benchmark for charity sector governance.

## **The Code’s Approach**

The Code sets out seven principles, underpinned by a ‘foundation principle’ which is, as the Commission put it, that it is a “*given that all trustees understand their legal duties and are committed to their cause and good governance*” and that “*we don’t take trustees’ commitment for granted, but it should be reasonable to expect that commitment to translate*

*into finding out about their responsibilities*”.

Having said this, the Code itself makes it clear that it does not attempt to set out all the legal requirements that apply to charities and charity trustees, but it is based on a foundation of trustees’ basic legal and regulatory responsibilities and that the seven Code principles build on the assumption that charities are already meeting this foundation.

The Code develops each of the seven principles with a ‘rationale’, a ‘key outcome’ and then a series of items of ‘recommended practice’. It is these aspects of recommended practice that many trustees and senior managers of charities may wish to focus on in more detail, because they represent the practical output of the Code.

## **Larger and Smaller Charities**

The Code’s principles, rationales and key outcomes are intended to be universal and apply equally to all charities, whatever their size or activities.

The recommended practice to meet these principles will obviously vary. The Code states that “*although it’s hard to be precise about the distinction between larger or more complex charities, governance practice can look significantly different depending upon a charity’s size, income, activities or complexity*”.

The Code therefore includes different versions of the recommended practice for ‘larger’ and ‘smaller’

charities to reflect and address some of these differences (larger charities are those with typical income of over £1m a year and whose accounts are externally audited).

## Self-Evaluation

Of course, many charities may already use the Code as the basis of their governance practice but even if not, we recommend that trustees of charities should give serious consideration to using the Code as a method of self-evaluation of their governance effectiveness. In that sense, it is a very useful tool to enable trustees to self-assess how they are doing against the Commission's expectations as regulator.

**“ The Code itself anticipates that how a charity uses it is something which will develop and mature, particularly where a charity is growing and changing. ”**

Given this, some of the recommended practice may not be appropriate for a particular charity to follow initially, but may become relevant in the future.

## 'Apply or Explain'

The Code recommends that a charity should explain the approach it takes to applying the Code, so it is transparent to anyone interested in its work.

The Code calls this approach 'apply or explain' and encourages trustees to meet the principles and outcomes of the Code by either applying the recommended practice or explaining what they have done instead or why they have not applied it. The Code does not use the phrase 'comply or explain' (which is used by some other governance codes), because meeting all the recommended practice in this Code is not a regulatory requirement.

## The Seven Principles in the Code:

1. organisational purpose and direction
2. leadership
3. integrity
4. decision-making, risk and control
5. diversity
6. board effectiveness
7. openness and accountability

## We look in a little more detail at some of these principles below:

### Organisational Purpose and Direction

In relation to 'organisational purpose and direction', the principle is that the members of a charity's board of trustees are clear about its charitable objects. The rationale for this is that the trustees should have a focus on strategy and assurance (rather than the day to day details of operations), with the key outcome of ensuring that the trustees have a shared understanding of, and commitment to, their charity's objects.

In terms of 'recommended practice', the Code recommends that the trustees ensure that they:

- set and review the charity's strategy
- can explain the public benefit requirement and how their charity meets it
- are focused on the evaluation of both impact and outcomes
- are committed to benchmarking to support continuous improvement
- keep the external environment under review at all times and that their strategy for their charity is sustainable

### Leadership

The principle of 'leadership' is that the trustees must provide strategic leadership in line with the charity's objects and its values, the rationale being that it is the responsibility of the trustees to set and safeguard the charity's strategy, vision and values.

**“ The key outcome is that every trustee accepts collective responsibility and ensures that the agreed values underpin all of the charity's activities. ”**

The key aspects of recommended practice are that:

- the chair of trustees accepts leadership responsibility
- there are proper arrangements for delegation to the senior managers of the charity
- the board recognises and welcomes diverse, different and conflicting views
- all trustees give sufficient time to their role
- the trustees provide oversight, direction and 'constructive challenge' to the charity's senior managers

### Decision-Making, Risk and Control

The principle in relation to 'decision making, risk and control' is that the board of trustees uses informed and rigorous decision-making processes and effective delegation and controls, with the rationale being that the trustees are ultimately

responsible for what the charity does. But they cannot do everything and the key outcome is that the trustees are all clear that their role is strategic rather than operational and that they have the degree of assurance they need in relation to the charity's control and risk managements systems.

Again, there is a recommended practice in relation to this principle. Trustees are expected to review the terms of their delegation to senior managers (and committees of the board) to ensure that their operational plans are in line with charity's objects and strategy, to scrutinise delivery against the operational plans and timescales, to ensure that the trustees retain overall responsibility for risk management and that the board promotes a 'culture of prudence', but also understands that 'being risk-averse is itself a risk'.

### **Board Effectiveness**

There is a specific principle in relation to 'board effectiveness'. This is that the trustees work as an

effective team to use their skills, experience and knowledge, with the rationale that the overall performance of the trustees is paramount to their charity's success (so good trustee performance and development is essential).

- The key outcome is that the trustees function collectively, with an appropriate knowledge and skills base.
- In terms of recommended practice, trustees should ensure that they receive all information and come to meetings prepared, that their meetings are well structured and chaired, that the board evaluates its own composition and size to check on effective leadership, that there is a formal, rigorous and transparent trustee recruitment process supported by a skills audit and that trustees receive an appropriately resourced induction. The Code also recommends that the board should evaluate its own performance and that of individual trustees on a regular basis.

## **The Author...**

Con has advised charities of all kinds for more than 15 years and specialises in helping clients with the governance and the strategic challenges that they face.

His aim is always to provide clients with the right advice at the right time, while always acknowledging that our quality of service depends not only on our understanding of the law and regulation, but also on our commerciality and ability to think creatively and pragmatically.



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# The General Data Protection Regulation - Are You Ready?

From May 2018 the General Data Protection Regulation (GDPR) will apply, increasing fines and introducing new requirements for charities.

Data protection is a vital consideration for every charity, and it is important that the impact of the new regulations are considered in advance.

## What Is the GDPR?

The GDPR is a comprehensive regulation produced by the European Commission, and covers all aspects of data protection. Despite Brexit, the government has confirmed that the GDPR will apply from 25 May 2018, superseding the current Data Protection Act 1998 (the DPA).

It is unclear precisely how the GDPR will apply in practice as Member States are given a degree of discretion regarding how it will work in practice. In addition, the GDPR anticipates that Member States will work together to ensure a uniform approach to data protection law following its implementation. It is not clear how this will work for the UK in the context of Brexit. However, enough is currently known for charities to begin preparing for compliance with the GDPR.

## How Charities Should Be Preparing for the GDPR

The GDPR will apply to all organisations which process

personal data. There is no exemption for charities, nor is there an exemption for volunteers. In fact, the ICO has fined a number of charities for data protection breaches in the last year, so it is important that charities take their responsibilities under the DPA and the GDPR seriously.

The risks of non-compliance are significantly greater under the GDPR than under the DPA. For example, maximum fines will increase from £500,000 under the DPA to the higher of £17 million and 4% of turnover for certain breaches under the GDPR. It is therefore even more important that charities start taking on board the changes and take steps to ensure GDPR compliance in advance of May 2018.

## Key Points that Charities Should Be Considering

### Record Keeping

The GDPR imposes extensive requirements around record keeping and being able to show a paper trail of compliance. These records must contain, for example, information about the purposes of processing and a description of the categories of data subject and categories of personal data.

## Reporting

The GDPR creates a new obligation to report data breaches to the Information Commissioner's Office (the ICO), which will apply in the majority of cases. Currently, breach reporting is not mandatory.

## Policies and Procedures

The GDPR makes explicit reference to having data protection policies (although in practice this is already a requirement under the DPA). Charities should therefore ensure that they have policies in place which provide practical guidance to staff, particularly around information security.

## Privacy Notices

Individuals have a right to be given certain information about how a charity handles their data, which is usually provided in a document known as a privacy notice. The GDPR will require additional information to be included in privacy notices. For example, individuals must be told about their right to complain to the ICO. The GDPR also requires privacy notices to be written in clear and plain language.

## Information Security

Under the current law charities are required to take appropriate technical and organisational measures to keep personal data safe. The GDPR expands on these obligations, for example by referencing specific measures such as encryption, pseudonymisation and privacy by design. Charities should review all consents as all those not given in line with the GDPR requirements will have to be revisited. This is particularly relevant for any consents obtained for fundraising.

## Data Processors

A data processor is anyone who handles personal data on behalf of a charity (eg a cloud storage provider). Charities will need to check that their data processors are GDPR compliant. The DPA already requires that there is a written contract in place between the two parties, but the GDPR mandates additional requirements around the wording which must be included in the contract.

## Fundraising and Consent

The GDPR sets a higher standard for consent than the DPA. For example, blanket consents are insufficient, as are pre-ticked boxes and consents 'hidden' in general terms and conditions. It must also be as easy to withdraw consent as it was to give it. These changes reflect the idea that consent is not a one-off tick box procedure, but is an ongoing and actively managed choice.

In the last year the ICO has issued monetary penalties to multiple charities due to breaches relating to their fundraising practices, which demonstrates the ICO's increased focus on this area. Examples of practices from which the breaches stemmed are carrying out wealth analysis on supporters to estimate their capacity to make further donations, and swapping the personal data of donors or potential donors with other charities. Charities should review their data protection and fundraising practices, particularly whether what they

are doing requires consent, and if so, whether that consent meets the GDPR standards.

## Privacy Impact Assessments (PIAs)

If a charity plans to handle personal data in a way that represents a 'high risk' to individuals then the GDPR will require the charity to carry out what is known as a privacy impact assessment. The requirement to carry out a PIA is subject to further implementation but it is likely that activities such as introducing a new IT system will trigger an obligation to carry out a PIA.

## Subject Access Requests (SARs)

The GDPR preserves an individual's right to request a copy of the data held about them (a SAR) with some changes. In most cases, a charity will have just one month to respond to a SAR, rather than the 40 day time period under the DPA. Charities should therefore consider what measures it needs to put in place so as to ensure that SARs will be dealt with in accordance with the shorter statutory timeframe.

## New Rights (Such as the Right to Be Forgotten)

Various new rights will be introduced by the GDPR. The right to be forgotten, for example, requires the charity to delete personal data in certain circumstances. Charities should ensure that there are processes in place to allow these rights to be exercised.



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Andrew has acted on a number of high profile data protection enforcement matters.



# Recent Changes in Charity Law and Regulation

The Charities (Protection and Social Investment) Act 2016 may have been made back in March 2016, but the impact of some of the changes it made has become clearer more recently.

Apart from the implementation of that Act, the other big trend gathered over the past year has been in the robustness with which the Charity Commission treats financial recovery from charity trustees.

## Official Warnings

Perhaps the most visible of the changes in the Charities (Protection and Social Investment) Act has been a power for the Commission to issue official warnings. Although the Commission has quite extensive regulatory powers to deal with the most serious misconduct, it lacked a formal power to cover circumstances when a warning would be appropriate.

These new official warnings can be issued without an inquiry being open if the Commission considers there has been a breach of trust, duty, misconduct or mismanagement. Failure to remedy concerns set out in an official warning provides grounds for using other compliance powers like suspending and removing trustees.

The Commission consulted on the circumstances when it might use official warnings. In response to consultation, the Commission decided to allow charities more notice of a warning (28 days). It confirmed the availability of its internal review procedures to challenge warnings and produced more detailed guidance as part of its publicly available staff operational guidance.

The consultation had implied a low threshold for giving a warning, in part because it had been concerned with distinguishing circumstances for giving warnings from those justifying more serious actions. Following consultation, the tone of the Commission's threshold for issuing official warnings has been refined. Words like 'deliberate', 'reckless', 'failed' and 'repeated' describe the circumstances when warnings might be given.

**“ The Commission also offers reassurance that the warnings are unlikely to be used when trustees have acted honestly and reasonably (and are putting things right), or in respect of technical breaches, or where the risk of harm is low. ”**

At the time of writing, the Commission has issued two official warnings. The first was in respect of a combination of unauthorised trustee payment, improper delegation and issues with record-keeping and financial controls. Taking the issues together, the regulatory concern is understandable. The Commission exercised restraint before giving the official warning: it first sought to resolve its concerns more informally by issuing firm regulatory advice in the shape of an action plan.

The second use of the power again related to a number of issues rather than a single cause for

concern. These included concerns that:

- the trustees were not working collectively or taking decisions in the interests of the charity
- they were not ensuring fair access to charity premises (a place of worship)
- there was unauthorised expenditure; that trustees were not doing enough to prevent inappropriate materials from circulating
- trustees were exposing charity members to risk as a result of repeated disruption at the premises

Very different circumstances and again, taken together, the regulatory concern is understandable. The warning indicates that it follows earlier regulatory advice.

In the future, there may be cases which are serious enough for the Commission's first substantial compliance move to be an official warning; and the guidance acknowledges that. But early experience is that, even in the case of cumulative and quite serious difficulties, the Commission is prepared to give trustees the opportunity to resolve matters on a more informal basis first. If trustees are given this opportunity, they should aim to co-operate with the Commission in agreeing achievable actions, given the Commission is clearly willing to issue warnings when it is not satisfied with the outcome.

The public impact of these warnings can be quite different from the case reports that the Commission publishes at the end of a case. Case reports are able to recount how the Commission worked with the charity to put things right. Official warnings by comparison are sharply focussed on live, defined and particularised shortcomings. That, combined with their relative novelty, greatly increase the scope for adverse PR impact.

### **Disqualification of Trustees**

Remarkably, there was previously no power for the Commission to disqualify a trustee. The rationale was that if a trustee was removed by the Charity Commission, that carried an automatic disqualification. But there was a problem.

In the course of a Charity Commission inquiry, a trustee could initially decide to stay in office. This ensured that he or she had input in managing the response to the Commission. As evidence of misconduct or mismanagement mounted, the trustee would probably consider resigning, particularly if suspended. A trustee who has resigned cannot be removed and, as things were, could not be disqualified. The new power is meant to plug this bizarre loophole.

How robustly the Commission will use the new power remains to be seen. One of its first uses was against Mountstar (PTC) Limited, the corporate trustee of the Cup Trust, the charity at the heart of a charity tax avoidance scandal of 2013. It has obviously been made in the most extreme and uncontroversial of cases, making criticism unlikely.

As for the position of a trustee in the context of an inquiry? Resignation probably still makes sense if there's little left to be gained from staying. Certainly it makes sense if it becomes clear that the Commission is likely to exercise its power of removal. It may help to mitigate personal regulatory risk, particularly as the Commission hasn't yet demonstrated that it will routinely pursue and secure disqualification in these circumstances.

### **Putting Information Together**

The Commission has shown that it uses information from different sources to carry out thematic reviews or to target particular risk areas, for example audit reports with an 'emphasis of matter'. It has been involved in new guidance to auditors and independent examiners on their whistleblowing obligations to charity regulators. At VVV in our day to day dealings with the Commission, we have found that they check the latest annual return against information provided, for example following-up if charities working with vulnerable people forget to confirm in the annual return that they have a safeguarding policy.

This visible, active use of information means it is very important that charities make sure that the information the Commission is given in letters, forms, returns and accounts is accurate. Charities should be especially cautious of tick-box responses: they make clear and unambiguous statements, but are very easy to click-through and get wrong.

It seems likely that the Commission will build on this work of matching information about charity operations against regulatory requirements. Charities may be particularly vulnerable around requirements from the Charities (Protection and Social Investment Act) 2016, given they are relatively new and unfamiliar.

#### **For example, if the charity:**

- carries out social investments, can it show the Commission that it has followed the statutory procedure for approving and reviewing social investments?
- uses professional fundraisers, does it have adequate agreements in place which comply with the specific regulatory rules attaching to these? Have the agreements been updated for the 2016 changes including reference to a voluntary code and protection of the public from intrusion, persistence and influence?
- meets the audit threshold, does the annual report contain the required information about fundraising?

### **Recovery from Charity Trustees**

One of the major themes in the Charity Commission's recently published compliance reports is its use of legal remedies against trustees who benefit from or cause loss to charities.



Over the past year, the Commission's reports have included:

- active consideration of the recovery of unauthorised remuneration
- trustees making-good a grant made in error
- charity Commission taking and settling proceedings for loss to a charity
- interim manager appointed to assess prospects of taking action against trustees and direction for trustees to take advice, leading to settlement of claim

The prospect of trustees being called on to make good losses or repay benefits in relation to breaches of trust is no longer remote. Based on the evidence in its reports, it seems likely that if it becomes involved, the Commission will pursue the

question of recovery and will expect trustees to do the same.

## Conclusion

The charity sector continues to be actively regulated by the Charity Commission. To ensure the Commission is receiving the right messages about your charity, it is important to check the quality information provided in returns, correspondence, accounts and reports. Is information consistent and accurate and are you meeting the most up-to-date requirements for the content of the trustees' annual report?

### The Author...

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Focused on getting pragmatic, common-sense answers from the law, he has ten years of experience working as a lawyer with the Charity Commission at the heart of its regulatory policy development and complex, high-risk casework.



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## Protecting Your Property

Property can often be a charity's main asset. It is a valuable, secure asset which, as long as it is looked after properly, can provide a home for your charitable operations and, depending on your situation, often an income to support your charitable work.

There are however, many pitfalls that property owners can fall into which degrade the value of that asset. In recent months, a number of high profile cases have highlighted some of these pitfalls.

### Repair

The primary way to protect your asset is to physically look after it. Keeping it in a good condition is more efficient than repairing something which has fallen into disrepair. However, if you let property to a tenant, the condition it is maintained in won't be within your direct control, and so you need to be mindful of this when agreeing the lease.

Think about the arrangement between the landlord and tenant. If you are sharing the property with them, the landlord may retain direct responsibility for repairing the property. However, if the tenant (or tenants) is to be the only occupier, then it is more usual for the lease to be structured as follows:

- The tenant is obliged to keep the property in a good state of repair.
- If the tenant does not keep the property in that good state of repair, the landlord can step in, carry out necessary repairs and recover the cost of doing so from the tenant.
- The landlord should inspect the property regularly and if there are items in disrepair, exercise the right to step in and remedy these defects.

Even where a lease passes on the liability for repair

to the tenant, the landlord can be liable for injury or damage caused by a lack of repair under the Defective Premises Act 1972. If injury is caused by a disrepair which is a breach of the tenant covenants in a lease, the landlord can be liable if they have the right to step in but have not exercised it.

In the case of *Dodd v Raebarn Estates Ltd and others*, Mr Dodd died after falling down some steep stairs with no handrail at a property he rented. The property was owned by Raeburn, sublet to a developer and they in turn sublet to a third party who granted the lease to Mr Dodd. Here the eventual claim against the freeholder, which could have exceeded £1m, was unsuccessful, but the case offers a useful reminder of the effects of the Defective Premises Act on all landlords. Charities should pay particular regard to this to ensure that they protect their assets and funds.

**“ Landlords need to ensure they have an appropriate agreement in place which will allow them to regain possession of the property when they expect to be able to. ”**

### Security of Tenure

A ruling in the case of *Camelot Property Management Limited and another v Roynon* is likely to have significant consequences for guardian property companies who use licence agreements to place occupiers into properties, and serves as a warning to landlords in general.

In particular, landlords should exercise caution when granting occupation of a specific area as this is likely to amount to a grant of exclusive possession, resulting in a tenancy.

In the case of commercial property, security of tenure can be excluded and so it is important to consider whether occupation will amount to a tenancy and take steps to exclude the lease if appropriate, so that possession can be recovered at the end of the term.

Bristol City Council owned an elderly people's residential home which was vacant. They engaged a property guardian company, Camelot Property Management Ltd, to place 'guardians' into the property in order to guard against the risk of squatters entering the property.

One guardian, Mr Roynon, entered into an agreement to occupy specific rooms, together with access to a communal kitchen and bathroom. The agreement stated that it was a licence and that exclusive possession was not granted.

However, when notice to quit was served, Mr Roynon refused to vacate, claiming that he was an assured shorthold tenant and benefitted from statutory rights to remain in the property.

The court held that Mr Roynon had exclusive possession of the two rooms and that the agreement was therefore an assured shorthold tenancy, notwithstanding the fact it was labelled as a licence.

The court found that, although a degree of access and control of the rooms was retained by Camelot, the terms of the agreement were not inconsistent with exclusive possession, since landlords often retain the right to enter property to inspect and

carry out repairs.

Having a tenant claim security of tenure can have a substantial impact on a charity's funds, plans for the property and value of assets. It can often be costly and time consuming to remove them and recover possession of the property either to re-let, occupy yourself or to sell.

### Break Clauses

If a tenant negotiates a break clause into their lease, there are important considerations from a landlord's perspective. If a tenant is seeking to exercise a break clause, the landlord should be aware that conditions in the break clause can often make it difficult for the tenant to operate the break clause. There is no obligation on a landlord to be helpful to the tenant and advise the tenant what to do to comply with any break conditions. Landlords should not accept keys from the tenant or secure the property without first seeking legal advice, as this can inadvertently end the lease.

In *Riverside Park Ltd v NHS Property Services Ltd*, Riverside granted the NHS a 10 year lease with an option for the tenant to determine the lease on the fifth anniversary of the term. To exercise the break, NHS was required to give six months' notice in prescribed form and to give vacant possession to Riverside on or before the break date.

The property was open plan when the lease was granted but the tenant (with the landlord's approval) installed a large amount of partitioning, kitchen units, floor coverings, window blinds, an intruder alarm and water stand pipes. NHS failed to remove the works by the break date.

Riverside claimed that the partitions were chattels and that the partitioning was a substantial

## 5 Top Tips

- Ensure any leases you grant oblige the tenant to look after the property.
- Undertake regular checks to monitor the condition of the property.
- Consider stepping in and undertaking repairs where tenants are in default (but do not do so without legal advice).
- Make sure you protect yourself from tenants obtaining security of tenure where this was not your intention.
- Enforce break clauses - especially where a new tenant might be hard to find.

impediment to its use of the property for letting purposes. The partitioning was described to the court as a 'rabbit warren,' far from the open-plan layout preferred by most tenants.

On this basis, Riverside argued that the break was ineffective as, by their remaining at the property, vacant possession was not given. The High Court agreed. Relevant to their decision was that:

- standard demountable partitions which were not fixed to the structure but held in place by screw fixings affixed to the raised floor and suspended ceiling.
- Their arrangement was unique to NHS and was generally not what other tenants looked for.
- They prevented or interfered with Riverside's right of possession because it had left behind chattels which substantially prevented or interfered with the enjoyment of the property.

Therefore, the tenant had failed to meet the condition to give vacant possession and had not validly exercised the break clause. It was liable to

pay rent for the remainder of the term.

Enforcing the conditions on a break clause properly means that the landlord is not prejudiced by receiving back a property, which it cannot lease out again. With the significant obligations on charities to preserve charitable funds, it is important to take steps to ensure that any property which is intended to be leased out has paying tenants whenever possible.

### Summary

These are just a few pitfalls highlighted by recent cases. If you are considering letting out property or have tenants already, consider these points to protect your assets and spend less on maintenance and more on fulfilling your charitable objectives.

### The Author...

As a Property Lawyer, Jess regularly advises a wide range of charitable organisations on their property issues including investment properties, property management, relocations and portfolio management, as well as guiding clients through complex reorganisations and disposals.

If you are interested in further information on any of the topics above, Jess is happy to review your lease and advise on potential for subletting and also to discuss offering property training to your staff and trustees.



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# Serious Incident Reporting - Do You Understand Your Duties?

Serious incident reporting has been around since 2007 in its current formal incarnation. Trustees must report serious incidents.

Exceptional incidents are probably easier to spot and report, but there are streamlined options for large charities which experience multiple serious incidents. Serious incident reporting is the system which places the onus on charity trustees to inform the Charity Commission of matters which may be of regulatory interest. The requirement has two main sources.

The first source for the obligation is the annual return. The trustees of any charity with an income over £25,000 must complete a question in the annual return confirming “*there are no serious incidents or other matters which they should have brought to the Commission’s attention and have not done so already*”. By putting this in the annual return, the best practice expectation that incidents would be reported has gathered a mandatory legal force.

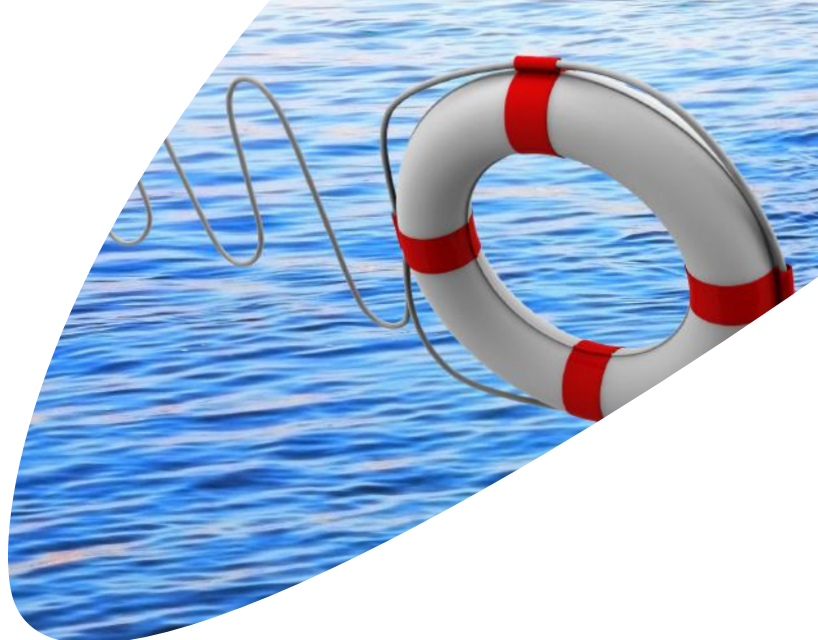
**“ Charity Commission’s published guidance, brings some formal structure around the practice and helps to explain what is sufficiently serious to report. ”**

## Reporting Not Optional

Serious incident reporting isn’t optional. Trustees who know or ought to have known that there have been serious incidents but have not reported them may be committing a criminal offence when they submit the annual return. Whilst at VVW, we aren’t aware of any prosecutions, the Commission does make findings about reporting and the speed of reporting in its compliance reports. It may be a factor in their use of regulatory powers.

## A Single Threshold

The Commission’s guidance aims to present a common threshold. By the very nature of guidance, there will be judgment calls for trustees as to whether given incidents should be reported, although the Commission advise “*if you are unsure whether an incident is serious or significant, we recommend you report it to us anyway*”.



In some limited ways, the threshold is context-specific. For example, a financial loss will have a bigger impact on smaller charities with fewer resources, making it more serious, and the guidance reflects this. A safeguarding risk to beneficiaries on the other hand will be serious regardless of the size of the charity and regardless of the risk inherent in the sector in which the charity operates.

Trustees of large charities and those working in higher risk areas need to be particularly aware of these thresholds. It may not be obvious that an incident must be reported to the Commission if the charity has well developed systems and procedures for addressing risks of that type, making their effective management routine.

Trustees of large charities and charities operating in higher risk sectors may be concerned at the prospect of reporting multiple incidents to the Commission. The Commission’s guidance does offer some comfort, saying “*we recognise that some serious incidents may occur more frequently in some charities because of the scope and nature of their activities and work*”. The important thing is that the report provides the Commission with enough information to understand that the incidents are a legitimate part of the scale and nature of the charity’s operation - and not the product of governance or risk management or risk appetite failings.

**“ These same trustees may face another challenge - how best to report multiple incidents. ”**

## Reporting Isolated Incidents

In the case of isolated incidents, it is quite clear what to do. An email can be sent to the Commission explaining the nature of the incident, what processes and procedures the charity has to guard against such incidents, how the charity managed the immediate situation and the steps the charity is taking to review processes and procedures in light of the incident. The

Commission's guidance contains some more suggestions.

### **Streamlined Multiple Reports**

After more than a handful of examples the viability of making individual reports quickly diminishes. Similar information about processes and procedures will be repeated. It becomes difficult to keep track of reported incidents and the cost increases with each bespoke report. In these circumstances it may be worthwhile discussing with the Commission the prospect of making multiple reports, organised on a single spreadsheet. Alongside this table demonstrating how individual incidents have been managed, the charity can explain its policies for recognising, avoiding and managing the risk.

### **Conclusion**

Serious incident reports are an important part of the charity regulatory framework. All charities are expected to report against a common standard, including the largest charities working in higher risk fields. If your charity is making multiple reports, it may be worth getting in touch with the Commission to discuss a more streamlined approach to reporting.



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# The Fundraising Regulator's First Year

The Fundraising Regulator has been with us for a year. This article provides a recap of fundraising regulation, the way the Fundraising Regulator regulates, new fundraising rules and the funding model.

## The Regulatory Regime

The Fundraising Regulator has no statutory powers to dictate fundraising practice or to fund itself. It is a voluntary regulator within a framework of self-regulation. But it sits within a matrix of expectation and legal framework ready to impose mandatory regulation at any time.

Agreements with fundraisers must state the fundraiser's "voluntary scheme for regulating fund-raising, or any voluntary standard of fund-raising". It must explain how people are protected from intrusion, persistence and pressure. Charities must ensure they are meeting this requirement and should review their agreements with fundraisers if they have not already.

**“ Charities which meet the audit threshold must also cover fundraising in their annual reports, including whether it is part of a voluntary scheme, and how it protects people from intrusion, persistence and pressure. ”**

Because the reporting regime is retrospective, charities need to have their policies and procedures in place now in order to report on them.

The Fundraising Regulator is the available voluntary

scheme. It took over the Code of Fundraising Practice which is the available voluntary standard. It seeks to resolve issues between members of the public and fundraisers under the Code by investigating and taking remedial action whether or not the fundraiser is registered. But it relies on co-operation.

The Charities Protection and Social Investment Act 2016 provides government with the legal framework if it wants to establish a mandatory statutory regime.

## Fundraising Preference Service

This is a platform allowing members of the public to say they don't want fundraising contact from specific charities. It is administered by the Fundraising Regulator who will inform charities of requests it receives. As a request takes away the legal basis for making contact in data protection law, enforcement is a matter of data protection regulation.

## Style of Regulation

At the time of writing, there is one adjudication. The investigation into Neet Feet and eight charities identified improper practices carried on by Neet Feet's staff, generally in contravention of its written policies. That these were failings is uncontroversial. What is noteworthy is the Fundraising Regulator's approach to the charities that employed Neet Feet.

The Fundraising Code said “organisations *MUST* check, and make all reasonable efforts to ensure, the on going compliance of third parties with the Code and their legal requirements.” Something had gone wrong on the ground and the question was whether the employing charities had made “all reasonable efforts”.

A clear regulatory expectation emerged that a specific, extensive and in-depth suite of on going due diligence be carried out by charities employing fundraisers. These specific expectations had never before been expressly set-out, but the Fundraising Regulator was willing to find that charities had failed to comply with the code. Where the Code sets standards like ‘reasonable,’ the Fundraising Regulator showed itself to have the latitude to develop best practice standards in its adjudications and to hold charities to account on retrospectively identified specifics.

Given legislation is already in place to impose a statutory regulator, the voluntary Fundraising Regulator was always going to have to demonstrate its credibility and teeth to the public.

#### **Those Standards Include:**

- checking policies, performance measures and incentives
- a lead individual to monitor compliance
- clear reporting for performance, quality and compliance
- assessing risk and specifying type and frequency of monitoring accordingly
- approving, reviewing and (in the case of compliance matters) observing training
- call monitoring, mystery shopping, site visits and shadowing
- policies for complaints and whistleblowing
- agreeing action plans for concerns



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## **New Rules in The Fundraising Code**

The Fundraising Regulator does update the Code. Amongst other changes, the due diligence standards from the 24 November neet feet decision became part of the Code on 31 July 2017 with immediate effect, the Fundraising Regulator saying that “organisations should already be making reasonable efforts”.

### **Funding**

The Fundraising Regulator is funded by a system of levies and registration charges. There is a fixed levy exempting charities and a sliding scale levy for registered charities spending more than £100,000 on fundraising. Small charities can register for £50 and fundraising businesses can register for a sliding scale fee based on fundraising turnover.

There is no strict legal obligation to register or pay the levy, but in June 2017, the Fundraising Regulator reported that 75% of charities within the levy had paid.

### **Conclusion**

Charities need to ensure that their agreements with professional fundraisers comply with the updated statutory requirements. If they meet the audit threshold, they will need to ensure they are in a position to include a comprehensive report on fundraising in the trustees’ annual report.

The reality of voluntary regulation is that the Fundraising Regulator will adjudicate on any charity. It is establishing itself as a credible regulator with the media and public. The legal framework presses charities to subscribe to the Code and there is the looming threat of a compulsory levy if it isn’t paid voluntarily. The regulation of charity fundraising is a compelling reality even if it is not (yet) all on a statutory footing.

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Rachel advises charities in relation to all aspects of charity law and regulation, governance, constitutional review, mergers and other strategic projects.

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# Changing Employment Models For a Changing World



## From Servant to Self-Employed. The Labour Market in the UK continues to evolve.

By 2025, it is expected that millennials (those born between 1980 and 1999) will form 75% of the global workforce\* and it is impossible to miss the press reports on the challenges to traditional employment models arising out of the ‘gig’ economy. So are traditional employment models still fit for purpose?

The relationship between employer and employee is fundamentally based on a contractual agreement but as the master/servant relationship has evolved and to address imbalances in negotiating power, statutory protections have been applied both under national and EU law. These provide a framework of minimum protections which cover a range of terms, including benefits (eg minimum wage, sick pay and holiday entitlement), job certainty (eg protection against unfair dismissal, the right to return to work after maternity leave and protection on a TUPE transfer) and societal fairness (eg discrimination legislation, equal pay and the right to ask to work flexibly).

**“ As workforce expectations change and businesses look for alternative platforms to provide services, what can or should be done to regulation of this changing relationship? ”**

These questions led the Government to commission a review into modern working practices by Matthew Taylor, Chief Executive of the Royal Society, for the encouragement of Arts, Manufacture and Commerce. The report was published in July 2017 and recommends a number of changes, but it does also highlight the strengths of the UK’s existing labour market. The goal, which many charities will no doubt agree with in principle, is to create better jobs and the report calls on the Government to adopt the ambition that all work should be ‘fair and decent’ with scope for fulfilment and development.

## The Report Sets Out Seven Key Policy Principles for ‘Fair and Decent Work’:

1. The UK should aim for ‘good work’ for all, which includes a fair balance of rights and responsibilities for employer and individual, with baseline protection for all individuals, while allowing an ability to adapt to innovation and technological change. Consistent taxation is also key to this concept of ‘good work’.
2. Genuine two-way flexibility offered by platform-based working should be protected whilst ensuring fairness for those who work through platforms.
3. The law should help employers to make the right choices and help individuals to know and exercise their rights.
4. The best way to achieve better work is responsible corporate governance, good management and strong employee relations.
5. Everyone should have attainable ways to develop and strengthen their work prospects.
6. We should develop a more proactive approach to workplace health.
7. Individuals must not become stuck at the living wage minimum or face insecurity.

Charities will frequently share these aims and much of the perceived exploitation of workers has occurred in the commercial sector where the courts have criticised employers such as Uber and Deliveroo for wrongly classifying drivers or riders as ‘self-employed’ instead of ‘workers’, thereby depriving them of significant statutory protections eg the right to holiday pay.

However, there is pressure on many charities whose funding is limited to seek best value for the money they expend on their workforce. A charity’s values might pre-dispose it to fair employment practices, but if commercial organisations are

prepared to exploit legal loopholes in the pursuit of profit, they can gain a competitive advantage by undercutting the costs of services offered by those in the third sector, resulting in further losses to charities.

In this context, therefore, the recommendations of the Taylor Review should be welcomed by many charities. If the Government acts to implement the recommendations of the report, the results will not only be a healthier and more engaged workforce, but also a more level playing field. So does that mean that charities can sit back and wait for legislative change?

### Engaging Millennials

With the number of millennials exceeding not only the numbers of economically active 'generation X' workers but also those in the 'baby boom' generation then regardless of regulatory change, any HR strategy does need to consider the very different expectations of this key pool of workers. A number of surveys have been undertaken to assess attitudes to work of graduates (including by Deloitte and PwC) and whilst individual expectations will of course vary, some key trends in expectations can be identified.

**“ Encouragingly, there is a noticeable preference for working ‘with a sense of purpose’ and millennials are more likely to join an organisation that shares their values (whether in the corporate, public or third sector). Charities should stress the social benefit and shared values that they can offer as organisations to attract and retain strong candidates. ”**

However, never having known life without the internet, broadband, smartphones and social media millennials understandably expect instant access to information, a high level of interaction on a number of different media streams, (although often with a reluctance to use 'face-time') and many expect to use their own devices. Antiquated IT systems and restrictive policies on use of email,

social media or personal smartphones can act as a significant disincentive.

Flexible working practices are also important to them, not just in relation to reduced hours but also the offer of variable start and finish times and work at different locations including home based working.

The drive for flexible working may be driven by demand from employees for work-life balance and/or by the employer's need to reduce fixed costs in many organisations but it is valued and as commercial organisations increase the flexibility offered, whether by alternative employment models or in terms of work-time and location, charities need to consider how flexible working practices can be integrated into efficient operational and service delivery. Where flexible working operates successfully based on trust between employer, employees working in a traditional pattern and those working flexibly, it can assist with attracting and retaining staff and also enhance a feeling of accountability not only for the individual's personal performance, but for the organisation as a whole.

However, despite their desire for flexibility, millennials demonstrate a somewhat surprising need for structure, clear objectives, regular positive feedback and transparent career progression. It is therefore important that clear management structures and processes remain in place as working practices change.

### So are there sustainable alternatives to paid employment?

Whilst many charities are not affected by the gig economy, reports suggest that the number of volunteers has increased significantly over the past 18 months and charities are well placed to capitalise on the increasing willingness of society to give up its time, without pay, to contribute labour. Volunteers may work for organisations on a voluntary basis for a short time, to gain experience. In the charity sector, volunteers if well-managed and offered interesting and engaging experiences,



\* From inter alia Deloitte's 2016 Millennial Survey.

may be prepared to stay for long periods. Some charities report that volunteers have become a fundamental part of their on going business model. Millennials who value the feeling of contributing and who may well be able to vary working hours to accommodate volunteer working are perhaps under-utilised by many charities.

If charities do engage volunteers, they should remember that volunteers not only must not be paid but that they cannot be provided with benefits in kind. The only payment a charity can make to a volunteer is reimbursement for out of pocket expenditure.

**“ Whilst it is important to ensure that volunteers are adequately trained and have a proper induction program, the training provided should not go beyond the skills needed in the volunteer role as otherwise even excessive training could be considered to be a benefit. ”**

If payments (other than expenses) are made or benefits provided, then HMRC is entitled to treat the volunteer as a ‘worker’ and this could have serious

consequences for a charity which may not only have to pay the volunteer national minimum wage, but may also be liable for penalties.

Although cases heard to date have preserved the status of volunteer and disapplied statutory protection, the recent findings of the courts in the Uber, Deliveroo and other similar cases that those allegedly ‘self-employed’ in the gig economy, are in fact workers, may encourage further claims from disgruntled volunteers for certain statutory protections.

It is advisable to ensure that there is a written agreement in place setting out the expectations of both parties and specifying what if any, expenses are recoverable by the volunteer, but ensure no benefits are provided or obligations placed on the volunteer, in order to avoid the risk of creating an employment relationship.

The world of work is changing and the way that charities respond to the challenges facing them, whether or not the recommendations of the Taylor report are implemented, will be a key factor in their ability to succeed.

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Kathy has over 20 years’ experience as an employment lawyer acting for a wide range of commercial clients and clients within the public sector and third sectors including housing associations, schools and charities.

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## Members' Duties

In a recent decision, the High Court decided that the members of a charitable company have duties to the charity. Why is it important and what might it mean in practice?

Legal orthodoxy had been that when members of a company exercise their functions, voting on resolutions, they owed no duties to the company. They couldn't exercise powers as members fraudulently or in bad faith, but otherwise were free to exercise them in their own interests. The principle was well established in case law.

The suspicion was that things had to be different where charities were concerned - even though the legal evidence seemed to point the other way. The assumption gained ground, in part as a result of the Charity Commission's 2004 publication *RS7 - membership charities*. This made the bold legal claim that members are bound to *"use their rights and exercise their vote in the best interests of the charity for which they are a member"*.

### CIOs Compared

When Charitable Incorporated Associations were introduced, the step was taken to enshrine the duty of a CIO member in statute. The Charities Act provides that the member of a CIO must exercise function in the way *"most likely to further the purposes of the CIO"*.

The fact that Parliament had felt the need to say that CIO members had a duty seemed to cast more doubt on the thought that the law automatically imposed a duty on the members of a charitable company.

### The First Recognition of the Duty

The duty was first recognised in June 2017. A charity, The Children's Investment Fund Foundation (UK) proposed making a substantial grant to Big Win Philanthropy. Certain Companies Act provisions

came into play, meaning that the decision had to be put to the members.

Reflecting the assumption that had been developing in the sector, the Court's judgment records that the parties almost unanimously assumed that members owed duties:

- to act in the best interests of the charity
- not to act in a conflict of interest

The Court decided that the assumption had been right.

The Court explained that the law establishing that companies were not owed duties by their members did not apply to charities. Unlike those company members, the member of a charitable company is not *"exercising his own right of property, to vote as he sees fit."* On the contrary. The member of the charitable company doesn't own shares. The member of a charitable company has powers meant for furthering the purposes of the charity, is part of the administration of the charity. They are indeed bound, as the Charity Commission claimed in 2004 to *"use their rights and exercise their vote in the best interests of the charity for which they are a member"*.

### Must Members of a Charitable Company Always Exercise Powers in the Interests of the Charity?

For the time being, that is the working assumption.

However the judge was careful to confine his reasoning to the circumstances of the case. We shouldn't read too much into this qualification. It reflects a degree of pragmatic caution on the

part of a judge laying down new legal principle. For the most part, powers of members will fall squarely within this category of powers meant for furthering the purposes of the charity and have to be exercised accordingly. Powers intended for other things will be the rare exception.

### **Members of Non-Company Charities**

The division of charity governance between trustees and members isn't just a feature of Charitable Incorporated Associations and companies. It is also found in charter corporations, unincorporated associations and Community Benefit Societies.

The Court's reasoning would apply equivalently to these other structures. Their members will have powers and functions meant for furthering the purposes of the charity, which they are legally bound to exercise in the interests of the charity.

### **Conclusion**

When the reported law implied that members could use their powers for their own interests, the Charity Commission may have seemed bold in stating that the position was otherwise for charities. However it reflected the practice and assumption of the sector. That practice and assumption is now formally recognised by the court as the position in law.



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# Reputation Management

A charity's reputation is one of its most significant assets and can have a real impact on its ability to secure future funding and maintain financial viability.

It is vital that charities understand how they can manage and protect their reputations. In this article, Tabitha Cave and Ben Holt examine some key issues that charities should consider.

We know that serious incidents, complaints, grievances and disputes all pose reputational risk to charities which should be managed carefully. In today's litigious society, and with the widespread use of mobile technology, it can be difficult to manage communication about such issues.

## Communications

Effective communication with stakeholders is key. Measured communication with appropriate groups which seeks to address identified issues and manage expectation is best.

This will involve careful consideration of the matter and its context, a review of what information (if any) can be shared and care in assessing how the proposed correspondence may be perceived on receipt and as the matter develops.

It is human nature to be curious, especially if it relates to an issue involving you or your family. Charities are however bound by obligations of confidentiality and data protection which may restrict their ability to provide information and this can create considerable frustration. It can be helpful to explain these restrictions from the outset. It may also be helpful to liaise with your regulator for support and guidance and/or to engage specialist PR and/or legal advisers so that they are on hand to support you with reputationally-sensitive issues.

If the charity is approached by the press for comment on a particular situation, it is sensible to designate a specific person/team to field those enquiries, and for all charity personnel to know that any requests should be directed to them. By way of risk management, we suggest that charities prepare for the fact that details about reputationally-sensitive issues may get into the public domain, even if they are confidential, and plan accordingly. This may involve the preparation of statements 'just in case'. VVV generally recommends against 'no comment' responses but it is usually sensible for initial statements to be

short, simple and reassuring.

## Incident Management

The manner in which a matter is handled can impact the charity's reputation more significantly than the issue itself. An example of this is a suggestion that issues have been covered up by current management and not handled appropriately. We recommend care in the management of issues with reference to current procedures and measured communication with third parties.

With this in mind, early consideration should be given as to whether a serious incident report to the Charity Commission or a report to any other regulator should be made.

Charities should review their management delegation system to ensure that if reputationally-sensitive issues are raised, they are identified as such quickly, and reported internally so that they can be managed at the right level and with a proportionate level of professional support.

**“ Charities should note that their own investigations and internal communications may be discloseable to regulators and third parties in the context of complaints or litigation and they should be planned and drafted carefully with this in mind. ”**

Insurance will often include cover for professional costs and it is sensible to explore cover for this, so that you are aware of the cover that is available and any restrictions which may apply, if an issue arises.

Proactive monitoring of a charity's reputation will enable you to react quickly if a situation does arise. This can be done by the charity or outsourced. The time and costs associated with monitoring should be assessed carefully with reference to the charity's business to decide on the level of investment in this context. A relatively easy basic tool is to set up an online search alert that notifies you by email when something is published online that mentions the charity by name, but there are more sophisticated



products and services available.

## Dealing with Adverse Comment

If you become aware that an adverse comment about your charity has been published (whether orally, or in hard or soft copy), there may be a number of options available. The key is to act quickly to seek to manage the risk and to minimise any damage being caused.

### This can range from:

- contacting the person responsible
- contacting any publisher(s) of the adverse comment
- if in print, complaining to the editor and/or the Independent Press Standards Organisation
- if broadcast, complaining to the editor and/or Ofcom
- if online, making complaints to the website owner / social media platform and/or asking for the article to be taken down pursuant to their terms and conditions of use
- considering legal action, for example in defamation, malicious falsehood or harassment

For a comment to have been defamatory, it needs to have been published to a third party and have the effect of lowering the charity in the 'estimation of right-thinking members of society generally'. The statement will also need to have caused, or be likely to cause, the charity serious harm.

Action may be more appropriate by the individuals

concerned (particularly if the issues relate to privacy or data protection breaches). The charity will want to consider the extent to which it needs - or wants - to support such claims.

### 6 Top Tips

- Plan for situations posing the risk of reputational damage. Ensure that your internal team is organised, on message, and know where to access support. Co-ordinate outgoing messages and make sure that enquiries are directed to the relevant individual.
- Task someone to monitor adverse comment and set up search alerts so that you become aware of any adverse issues relating to your charity.
- If an issue does arise, act quickly and consider all of the possible options. Plan your strategy before contacting third parties.
- Although you should prioritise compliance with legal and regulatory duties, care should also be taken to ensure that communications are effective.
- Involve PR and legal advisers at an early stage on contentious and sensitive matters.
- Consider reporting incidents (and the timing of such reports) to insurers, the Charity Commission or other regulator. Review your insurance arrangements so you are aware of the available cover if needed and consider whether it is necessary to purchase further insurance to cover the cost of these risks.



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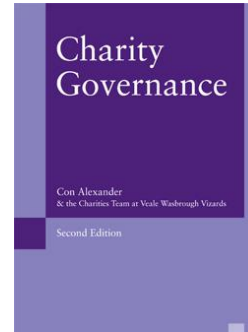
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