pem.

June 2022.

Charity & Non-profit newsletter

Safeguarding & protecting people in your charity

The Charity Commission issued updated guidance at the start of this month on how to protect those working in charities. This update was to ensure all links were appropriate and follows updates in November 2021 on managing safeguarding risks when operating online risks. The guidance has been available since December 2017 and is an important tool for trustees when understanding their risks.

Charity trustees should as a minimum annually or when activities change consider their risks and responses in these areas. To support that review we have summarised below the key areas of the guidance below so that Trustees and management can take stock. Trustees should seek to understand which risks, policies, checks and safeguards are fundamental to the operations of their charity and how management and the charity is responding. Significant risks around safeguarding should be identified and included on the risk register for regular assessment and review.

The full Charity Commission guidance can be accessed here. Considering the steps outlined below should either bring confidence in the charity's actions and policies already in place, or if necessary, highlight gaps and drive change.

1. Manage the risks

A key trustee duty is to ensure reasonable steps have been taken to protect those who come into contact with your charity, including beneficiaries, staff and volunteers.

Trustees will ultimately be held responsible if risks are not properly managed therefore it is important to promote an open and positive culture ensuring individuals are able to raise and report their concerns.

Charities should have:

- Appropriate policies in place
- An awareness of how to promptly spot, handle concerns and carry out investigations
- Systems in place to report concerns
- A Risk register which is periodically reviewed
- A balanced trustee board with all trustees contributing
- Sufficient resources, training and safeguarding to protect people
- Procedures to review how risks are managed periodically

2. Types of Risks and Harm

There are numerous risks the charity must be aware of including, but not limited to:

- a charity's culture, which may allow poor behaviour and poor accountability
- people abusing a position of trust they hold within a charity
- bullying or harassment
- health and safety
- commercial exploitation
- cyber abuse

3. Policies, procedures, and practices

Anyone involved with a charity should be aware of the policies in place, where to access and how to apply them. It is important polices are compliant with relevant legislation, put into practice and reviewed regularly.

Polices should:

- Explain steps being taken to protect people from harm
- How to raise safeguarding concerns
- How to handle allegations and incidents
- Explain how the charity will respond to issues

4. Code of conduct

For all charities with staff or volunteers there must be a clear code of conduct which sets out:

- The charity's culture and values
- How people in your charity should behave

5. Other key policies

Other key policies include:

- health and safety
- first aid, fire safety and digital safety policies
- welfare, discipline, bullying and whistleblowing policies
- a complaints process for users and others with concerns
- adequate insurance which covers the individuals and the activities involved

6. Checking policies, procedures, and practice

Once policies have been established, they must be checked and challenged to ensure they are fit for purpose. This will include ensuring policies are aligned with relevant statutory guidance and requirements and that the charity complies with the policies and procedures.

Trustees should have clear oversight of how safeguarding and protecting people from harm is managed and if there are changes to the way the charity works, policies should be reviewed in light of the changes.

To help check policies in place trustees can:

- Consider the key risks to the organization and ensure they are police to cover these areas
- Carry out on site checks and discussions
- Set training plans
- Include safeguarding as a standard item on meeting agendas
- Organize external reviews and inspections

Relevant checks should be carried out on trustees, staff and volunteers to ensure suitability to act in their positions. This may include criminal record checks (Disclosure and Barring Service (DBS), references, health checks or checks to confirm individuals can work in the UK.

7. Safeguarding children or adults at risk

If your charity works with children or adults at risk, either online or in person, relevant legislation and guidance must be followed.

It is best to identify the local authority safeguarding children or adults' partnership or board who will co-ordinate safeguarding, promote the welfare of those in the area and publish policies to be followed. It is important to make sure all staff and volunteers receive regular training on child protection or working with adults at risk and appoint a safeguarding lead to work with your local authority safeguarding partnerships.

Policies must incorporate details on managing concerns, complaints, whistleblowing and allegations relating to child protection or adults at risk effectively and have clear policies when DBS checks are required, how to assess the level of check needed and how to handle the information.

8. Operating online

Additional policies and practices will need to be considered for charities operating online.

This is because online activities carry specific safeguarding risks. The following should be incorporated into policies:

- **Content:** does your charity have adequate control over its website and social media accounts? Who can post information and is all content suitable for your charity?
- **Contact:** how do people talk to each other when using your online services and how do you keep users safe? Do people need passwords to access services?
- **Conduct:** how do you monitor what people do, say and share when using your services?

9. Working Overseas

Policies and procedures may need to be adapted for charities overseas as risks may differ due to different cultures, practices, and legal systems.

10. Handling and reporting incidents and concerns

Charities must be familiar with how to handle and report incidents. Key considerations include:

- handle and record it in a secure and responsible way
- follow your protecting people and safeguarding policies and procedures
- act quickly, ensuring you stop or minimise any further harm or damage
- report it to all relevant agencies and regulators when required
- plan what to say to those involved with your charity and the media if appropriate
- be as open and transparent as possible
- review what happened to understand how to stop it from happening again

Gemma Baratte
Manager. Audit & Accounts

e. gbaratte@pem.co.uk

Overseas Cash Couriers

The Charity Commission has issued a warning reminding charities of the heightened risks of using overseas cash couriers and that they should not be used.

There have been recent changes to the law on carrying cash and the Charity Commission has seen a number of cases involving the seizure of cash charitable funds by the police and officers at UK ports.

Moreover, cash couriering is challenging to audit and often results in inadequate records and evidence of expenditure, impacting on the trustee's ability to account for the funds and to show they have been used for charitable purposes.

Instead, charities should use the regulated banking system to transfer money, thereby ensuring charity funds are protected and the required audit trails are available even if this does result in an administrative cost. If cash couriers are the only option and must be used, it is crucial that due diligence is undertaken and at a minimum:

- There is a written agreement in place with the agent
- Written details on the amount being transferred
- Currencies are dictated
- Written details on how funds are to be delivered and who is to be paid

If cash couriers are used when regulated banking facilities were also available, the charity must evidence why such channels were used and that sufficient risk management was taken.

Failure of these considerations could be seen as misconduct and/or mismanagement of the charity.

It is worth noting that cash of £10,000 or more must be declared to UK customs when carrying it between Great Britain and a country outside of the UK. Failure to do this will result in a £5,000 fine, while the money can also be confiscated.

It is the responsibility of the trustees to promptly report any seizures or forfeiture of charitable cash to the Charity Commission as a serious incident.

Charity Commission consultation on the Annual Report

The Charity Commission launched a consultation on the 9 June 2022 regarding the Annual Return (AR). The finalised questions will be included in the new Annual Return Regulations which will come into force on 1 January 2023. The new AR will apply to charities' financial years commencing on or after that date.

The Charity Commission aims to improve the use of analytics and ensure the availability of reliable information and believes that the new questions in the AR will support these objectives. The AR currently has four components:

- a survey to collect baseline details about all registered charities with income over £10,000 and all charitable incorporated organisations (CIOs) (Part A)
- a survey to collect structured financial data; all charities with an income over £500,000 are required to respond (Part B)
- copies of charity financial accounts – all charities with income over £25,000 must provide this
- a charity's Annual Report - all charities with income over £25,000 must provide this

The Charity Commission states that in redesigning the AR they have used simpler language to enable charities to share information more easily and additional questions are offset by improvements in question usability. The new proposals will allow for a more flexible approach which will see core questions enhanced by additional questions which can be selected for inclusion based on circumstance and allow the regulator to react to unforeseen events, such as the pandemic, more responsively.

The proposals see the annual baseline questions double with the maximum number of questions increasing from 32 to 52. Questions will probe the diversity of income, trustees' expenses and grant making. New questions are proposed to help focus on good governance and identify risk, these include: a question about grants to connected parties, due to the importance of conflict identification and management; a question on whether written agreements are in place with overseas partners; and a new question identifying where the charity's website is hosted.

The full consultation can be found at Charity Commission: revisions to the Annual Return 2023-25 - GOV.UK (www.gov.uk).

The consultation will close for comment on 1 September 2022.

Nikki Loan
Director. Audit & Accounts

e. nloan@pem.co.uk

Related parties & conflicts

The importance of knowing your related parties in order to recognise and manage potential conflicts is an often repeated theme following Charity Commission investigations.

The Charity Commission has issued many forms of guidance to support trustees and senior management in carrying out their duties in the best interests of the charity. Both accessible, quick reference guides, such as the introductory video or 5 minute guides, and more detailed information are available below:

- CC29 Conflicts of interest: a guide for charity trustees
- Managing conflicts of interest in a charity (Article)
- Managing conflicts of interest in a charity (YouTube)

However, this remains an area that is often a cause for Charity Commission investigation and one which can be reputationally damaging not only to the charity involved but to the reputation of the sector.

Recent Charity Commission investigations have highlighted:

- Unauthorised trustee benefit from reduced/no rent paid on residential accommodation
- Cheques paid by a trustee to a family member without a second signatory or clear oversight
- Payments made in breach of financial limits to related parties
- Payments made to repay a loan to a related party of a trustee where there were few supporting historical records for the original loan
- Payments made to a trustee of personal expenditure
- Employment rights accruing to a related party of a trustee due to extensive periods of voluntary work undertaken
- Use of a charity as a vehicle for the expression of an individual trustee's party-political views

Conflicts of interest can take many forms. They may be financial but can also derive from using a charity to promote a personal point of view. Given that many trustees get involved with a charity due to their passion for a cause, or perhaps because of their knowledge in a particular field from employment or a close personal experience, with personal or professional connections that can benefit the charity; it is not surprising that conflicts arise. The art of good governance is to identify the conflicts, actual or potential, and manage them. The

particular challenges around beneficiaries acting as trustees are highlighted in [CC24 Users on board - Beneficiaries who become trustees](#).

What are conflicts of interest?

Conflict of interest: a conflict of interest is any situation in which a trustee's personal interests or loyalties could, or could be seen to, prevent them from making a decision only in the best interests of the charity.

Conflicts derive from real or perceived benefits or divided loyalties.

Conflicts may therefore be perceived to arise by other charity stakeholders even where trustees are confident that they have acted in the best interests of the charity and therefore transparency and disclosure are key elements of managing conflicts.

For example, a trustee may provide a service to the charity, such as building work, or consultancy which is considered reasonably priced by other trustees but appears to be in the self-interest of the trustee involved.

Trustee benefit: this means any instance where money, or other property, goods or services, which have a monetary value, are received by a trustee from the charity.

The law says that trustees cannot receive a benefit from their charity, whether directly or indirectly, unless they have an adequate legal authority to do so. The potential for a trustee to benefit from the charity also creates a conflict of interest which the trustees need to address effectively. The term trustee benefit does not include any payments to trustees which are for their proper out of pocket expenses.

Conflicts and benefits are not only relevant to trustees but should also be considered for relationships with charitable subsidiaries and with key/senior management and persons connected to trustees and key management.

Connected person: in broad terms this means family, relatives or business partners of a trustee, as well as businesses in which a trustee has an interest through ownership or influence.

The term includes a trustee's spouse or unmarried or civil partner, children, siblings, grandchildren and grandparents, as well as businesses where a trustee or family member holds at least one-fifth of the shareholding or voting rights.

The conflict management process

Identify the conflict

The process for managing conflicts starts with recognising them. It is important that trustees are open and transparent in their dealings with a charity.

A conflict may arise from a direct interest of a trustee or an indirect interest through an individual or company related to a trustee.

The safest policy for a trustee is always to declare an interest, or possible interest, if in doubt.

It is good practice to have a register of interests, an annual declaration, and ask for declarations to be made at the start of each meeting so there should be ample opportunity for trustees and key management to physically or metaphorically raise a hand and make clear the conflict.

Remove the conflict

Depending on how serious the trustees consider the potential conflict to be, they may decide to remove it, by:

- Not following a course of action
- Proceeding in a different way to avoid the conflict
- Not appointing a trustee or securing a trustee resignation.

If trustees wish to proceed, despite the conflict, they must prevent the conflict from interfering, or being perceived to interfere, with their decision-making in the best interests of the charity.

Manage the conflict

Managing the conflict will mean ensuring that any affected trustees are excluded from the discussion and the decision-making and not allowed to influence the trustee board in any way.

The conflict and actions taken must be documented as must any decision.

A decision to the benefit of the conflicted trustee must be clearly documented with explanation as to why the remaining trustees considered that action to be in the best interests of the charity.

For example:

- the decision to award a grant payment to an organisation in which the trustee has an interest should be made in the absence of the related trustee; clearly documented; and made based on the same criteria as any other grant award; or
- the decision to award a service contract to a trustee or a company or individual related to a trustee should follow the same contract process as any other service award: the discussion and judgment take place without input from the related trustee, other than that granted to all other prospective suppliers; should be documented properly; and trustees should consider what they would do if the service provided is not satisfactory.

Trustees should note that, in addition, if a connected person is to be paid or employed by the charity, any connected trustees must not be involved in the decision and Charity Commission permission should be sought.

Record the conflict

The conflict, action taken and decision should be minuted, and those charities preparing accruals accounts should disclose the transaction in their financial statements.

Good governance

The steps are relatively simple, but they require charity trustees to be alert for conflicts and for perceived conflicts. Where trustees' actions or failings present a serious risk to the charity, the Charity Commission is likely to regard this as mismanagement or misconduct and take remedial action.

A new Chair & a new business plan

Orlando Fraser, the new Chair of the Charity Commission, gave his inaugural speech on the 4 May at the Trustee Exchange Conference. Orlando Fraser has been a Chancery barrister for the last 28 years and a Queen's Counsel since 2014.

He previously served on the Board of the Charity Commission from 2013 to 2017 under William Shawcross and has many years of experience working in and with the sector, including taking an aid convoy to Bosnia in 1992 to help its Muslim population, sitting on a Management Committee, being a Governor and a volunteer. In his speech Orlando Fraser set out his intention "to lead a regulator that is fair, balanced and independent".

He talked of making sure that there was a fair legal process for all and that there would be an appropriate and commensurate balance between robust and benign. He set out that the Commission would be very robust to protect charities from abuse and maintain public trust and confidence in the sector. The Commission would deal severely, with intentional wrong doers, the fraudsters, the extremists, the aggressors and the grossly negligent; but would be supportive in the case of honest and reasonable mistakes.

The new Chair set out the importance of independence and that the Charity Commission would act without fear or favour from its varied stakeholders in applying the law.

Orlando Fraser highlighted the progress made in the Commission's Digital and Intelligence teams as well as the importance of data going forward and touched on the business plan to be issued. He promised that the Charity Commission would keep working to try to improve online services and be available and responsive when trustees get in touch for advice and guidance; he cautioned trustees to take care in their stewardship role and legal duty of prudence; and he encouraged trustees to recruit inclusive and diverse trustees of the future. The full speaker's notes can be read here.

The Charity Commission Business Plan 2022 to 2023 was published on the 13 May and sets out three key Charity Commission priorities:

- **Priority 1:** we will improve our ability to regulate efficiently, effectively and robustly
- **Priority 2:** better engage with trustees to support them run their charities well
- **Priority 3:** we will strengthen our organisation to ensure we deliver our ambition

Key deliverables of this plan include:

- Implementing the Charities Act 2022 as it comes into effect in stages, through changes to guidance, online services and regulatory approach
- Widening the data held and the ability to analyse that data
- Strengthening the quality of the case work
- Automating processes and improving the website journey
- Delivering a programme of campaigns to support trustees to understand their responsibilities

The business plan is available on the Charity Commission website here.

Responsible investment & charities – high court judgment

In April 2021, the Charity Commission launched a consultation on *charity responsible investment guidance*.

This was not finalised pending the outcome of the Butler-Sloss v Charity Commission case in which the trustees sought a judgment on whether it was reasonable for the trustees to take non-financial considerations into account when investing.

In this case the non-financial considerations related to excluding investments that did not align with the Paris Climate Agreement 2016. The proposed policy excluded a significant number of publicly traded companies and commercially available investment funds but still targeted a return in line with the published rates of other large charities.

The claimants accepted that they were unable to accurately determine the extent of the financial detriment which may be suffered by the charities as a result of adopting their proposed Investment Policy. The previous policy in this area was set by the *Bishop of Oxford* judgment and incorporated in CC14 Charities and investment matters: a guide for trustees.

CC14 set out that Trustees could invest ethically based on the following reasons:

- a particular investment conflicts with the aims of the charity
- the charity might lose supporters or beneficiaries if it does not invest ethically
- there is no significant financial detriment

And stated that "Trustees must ensure that any decision that they take about adopting an ethical investment approach can be justified within the criteria above. They must be clear about the reasons why certain companies or sectors are excluded or included. Trustees should also evaluate the effect of any proposed policy on potential investment returns and balance any risk of lower returns against the risk of alienating support or damage to reputation."

The High Court handed down its judgment on 29 April 2022. Mr Justice Green summarised what he considered the law in relation to charities trustees considering non-financial aspects when exercising their powers of investments as follows:

- Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.
- But where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they should exercise that

discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.

- In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.
- However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.
- Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment.
- If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.

It however remains that the power to invest must be exercised to further charitable purposes. In this case the purposes of the trusts included environmental protection and improvement and therefore consideration of climate change was directly connected with the objects of the trusts.

The judge concluded:

"The Claimants have decided, reasonably in my view, that there needs to be a dramatic shift in investment policies in order to have any appreciable effect on greenhouse gas emissions and for there to be any chance of ensuring that there is no more than a 1.5°C rise in pre-industrial temperature. The only question is whether they have sufficiently balanced that objective with any financial detriment that may be suffered as a result. In my view they have and the performance of the portfolio will be tested regularly against recognised benchmarks and will seek to provide the financial return specified in the Proposed Investment Policy."

Aarti Thakor, director of legal services at the Charity Commission is reported as stating that the Charity Commission "will be publishing our updated guidance in due course to ensure trustees can confidently adopt appropriate policies including in the context of pressing concerns around climate change."

We wait to see how the judgment will impact this guidance for the whole range of charitable organisations operating and investing in the UK.

Nikki Loan
Director. Audit & Accounts

e. nloan@pem.co.uk

Construction Industry Scheme (CIS) Rules: a reminder

Charities are exempt from CIS, but their trading subsidiaries which are involved in constructions operations are not.

The most recent Agent Update from HMRC has highlighted the fact that some property investment businesses do not realise that they may be captured by the CIS rules.

If your subsidiaries undertake property investment activities and may incur £3m in a rolling 12 months period on construction operations then it would be worth reading through HMRC's narrative below.

A trading subsidiary which is a construction company will be caught under the main contractor rules.

Application of the Construction Industry Scheme to property investment Companies

We are seeing a number of property investment companies undertaking substantial redevelopments such as the example below, being unaware of the need to register as a contractor within the Construction Industry Scheme.

If you think your business is acting as a contractor, it must comply with the scheme.

If it does not, the business can be left with an unexpected tax liability that they may not be able to recover from the subcontractor.

The following three headings are reminders of the published guidance giving the definitions of property developers and property investment businesses.

Property developers

Property developers are included within the meaning of mainstream contractors because their business activity is the creation of new buildings, or the renovation or conversion of existing buildings, or other civil engineering works. The same is true of a speculative builder.

Property investment businesses

A 'property investment business' is not the same thing as a 'property developer'. A property investment business acquires and disposes of buildings for capital gain or uses the buildings for rental. It need not be involved in the construction, alteration or extension of buildings.

Even so, if its property estate is substantial enough, its expenditure on construction operations may well cause it to fall within the meaning of a 'deemed contractor'. Find out about who is a 'deemed contractor'.

When a business that is ordinarily a property investor undertakes some activities attributed

to those of 'property development', they will not usually be considered a mainstream contractor during the period of that development.

This is because the usual nature of the business is 'property investment' and not 'property development'.

When the property investment business enters into multiple or substantial contracts relating to construction operations, for the purposes of development of one or more properties, you will need to decide if the nature of that business has now changed from 'property investor' to 'property developer'.

If this is the case, the business would now be considered to be mainstream contractors as the nature of their business has changed.

When, at a future date, they revert to property investment activities only, then their status as a deemed contractor should be applicable once again.

If their expenditure is likely to remain below £3 million on a rolling 12 month period, then deregistration from CIS may also be considered appropriate.

However, where it is clear that further property development is likely to be undertaken in the future, it may be more appropriate for the business to remain registered for the Construction Industry Scheme.

When property development appears to be a regular and substantial activity of any business purporting to be a property investment business, then they are likely to be a property developer and therefore a mainstream contractor within the Construction Industry Scheme.

Example

A property investment business acquires a number of properties which it intends to let, but before letting, minor refurbishment is required to bring the properties up to a suitable standard to be able to let them.

For the purposes of the Construction Industry Scheme, we would see this as the normal activities of a property investor. If the expenditure on such activities exceeds £3 million in a rolling 12 month period, then the scheme applies.

The property investment business then acquires a large, dilapidated hotel to add to its portfolio, and decides to convert the building into a series of flats which it will then individually let out.

As a result, substantial development is required to the property to change the building to its new use.

In respect of this particular development and contract, we would regard the property investment business as having taken on the mantle of a mainstream contractor as its business activity is now that of construction operations.

Next steps

If you are concerned about how this may impact your charitable group or for more information please contact PEM.

Judith Pederzolli
Director, Business Tax

e. jpederzolli@pem.co.uk

Hannah Stoney
Manager, Employment Tax

e. hstoney@pem.co.uk

Actions to take when cyber threat is heightened

The National Cyber Security Centre (NCSC) is part of GCHQ (Government Communications Headquarters) and provides cyber security guidance and support.

While the NCSC reported that it is not aware of any current specific threats to UK organisations in relation to events in and around Ukraine, there has been a historical pattern of cyber attacks against Ukraine with international consequences. HermeticWiper, a wiper malware used against Ukrainian organisations, also has the potential to impact organisations outside of Ukraine.

Wiper malware can erase data from the hard drive of an infected computer. In May 2022, UK and US intelligence sources concluded that Russia was almost certainly responsible for the January attacks and an attack in February just before the invasion was launched. The NCSC has published some guidance for organisations which can be viewed here.

Several immediate actions for all organisations to take to protect their networks are set out in the guidance, which include:

- prioritising the patching of known exploited vulnerabilities;
- enforcing multi-factor authentication (MFA) and passwords;
- checking anti-virus software and firewalls are up to date and in place;
- reviewing back-ups and incident plans; and
- providing end-user awareness and training.

For organisations with little internal support there is some focused information for smaller organisations here, including some practical tips which are linked below.

NCSC - Cyber security: Practical Tips for Protecting Your Organisation Online

Nikki Loan
Director. Audit & Accounts

e. nloan@pem.co.uk

Jayne Rowe
jrowe@pem.co.uk

Kelly Bretherick
kbretherick@pem.co.uk

Judith Pederzolli
jpederzolli@pem.co.uk

Michael Hewett
mhewett@pem.co.uk

Nikki Loan
nloan@pem.co.uk

Kate Millard
cmillard@pem.co.uk

Kathryn Hebden
khebden@pem.co.uk

Gemma Baratte
gbaratte@pem.co.uk

PEM
Salisbury House
Station Road
Cambridge CB1 2LA

t. 01223 728222
e. pem@pem.co.uk

pem.co.uk

KRESTON GLOBAL