



Hewitsons Charities & Education E-Update

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Major reform of charity law proposed

The Law Commission has published its final detailed report, Technical Issues in Charity Law (available [here](#)) along with a draft Charities Bill proposing various amendments to the Charities Act 2011. The key areas of reform include the amendment of governing documents, land transactions and the treatment of permanent endowment. Among the proposals:

- Harmonising the criteria used by the Charity Commission when reviewing changes to a charity's objects, so the same considerations will apply for charitable companies, CIOs and unincorporated charities.
- Simplifying the process by which a Royal Charter body can amend its governing document.
- Removing the requirement to advertise proposed disposals of "designated land" by charities and consider responses from the public.
- Repealing the Universities and Colleges Estates Act 1925, with relevant institutions being given general powers of disposal similar to trustees of a charitable trust.



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- Allowing charities to spend up to 25% of their permanent endowment assets, to be reconstituted over the ensuing 20 years.
- Permitting charities to make small ex gratia payments (being payments the trustees feel morally obliged to make) without Charity Commission consent, subject to set levels.



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We will report in due course on the detail of the proposed Bill, and follow its progress through Parliament, which comes at an extremely busy time for the House. Many of the changes will be welcomed however, and are likely to be met with approval.

Revised governance code for trustees

An updated governance code for charity trustees was published last month, called the *Charity Governance Code*, produced following a public consultation by a range of sector bodies including NCVO and Acevo. The Code (available at www.charitygovernancecode.org) is intended as a tool for trustees, helping them achieve higher standards of governance. There are two versions - one for larger charities (with income of over £1m per year) and one for smaller charities. The differences mainly lie in the "recommended practices", which are tailored according to the size and resources of the charity.

Notable recommendations in the updated version include having at least five but no more than twelve trustees, discouraging trustees serving for more than nine years, reviewing board performance regularly (including that of the chair) and recruiting trustees from diverse backgrounds. Adherence to the code is not a legal or regulatory requirement - it rather provides a set of "deliberately aspirational" principles and recommended practices. The Charity Commission has withdrawn its long-standing guidance *Hallmarks of an Effective Charity*, giving extra prominence to the new code, which should now be a key resource for charity boards.

Changes to Code of Fundraising Practice

This summer, there has been much written about the launch of the Fundraising Preference Service, which enables individuals to exercise greater control over the communications which they receive from charities. It may be less well known that the Fundraising Regulator has also introduced further changes to the Code of Fundraising Practice. These changes are wide-ranging and will be of direct impact to both the general public and to fundraising organisations. There are stricter guidelines to govern how fundraisers may conduct phone calls, and rules to prevent bag collections from households which clearly indicate that they do not want to contribute in this way. In addition, trustees are being firmly reminded of the need to retain supervisory control of the fundraising methods employed by their charities. More details about the most recent changes may be found on our website [here](#).

Employment update: Tribunal fees held to be unlawful

On 26 July 2017 the Supreme Court ruled that the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 is unlawful and is therefore quashed on the basis that it

prevents access to justice. The Fees Order introduced fees in the Employment Tribunal and Employment Appeal Tribunal system back in July 2013. Ever since introduction of the Fees Order, Unison has been challenging the lawfulness of the fees regime through judicial review proceedings.

The effect of the Supreme Court's decision will have significant ramifications, including that all fees paid since July 2013 must be reimbursed by the government. Fees will no longer be payable for future claims which is likely to impact all employers, including charities and educational institutions, in terms of an increase in claims being made. For further information together with our comments on this important decision please see [this article](#) on our website.

Members' duties clarified for the first time

Charitable companies take note: the High Court has recently decided members of a company limited by guarantee have fiduciary duties to act in the best interests of their company. Previously, company members' duties were little considered and most commentators thought they did not have duties in the same way directors do. In *Children's Investment Fund Foundation (UK) v Attorney General and others* [2017] the court made clear this is not quite so. Members of a company limited by guarantee owe fiduciary (i.e. a trustee's) duties to act in the company's interests and not to act under a conflict of interest in discharging their membership role.

The facts of the case were very specific but the court's consideration of the nature of membership is very useful. For charities that are structured as companies, there are times when the members are required to approve something (such as article amendments, a name change, or occasionally substantial property transactions with trustees). When doing so, their duty is to act in the company's best interests and not in the interests of themselves any other person or organisations whose interests may conflict with those of the charity.

Protect your intellectual property

Property is theft€!, as the famously contradictory principle has it. However what we can say is some property is less well protected from theft than others. Intellectual property is often more vulnerable to exploitation and being overlooked than more tangible property. Charities frequently neglect to consider the value and protection of their name, logo, database, research, domain name, projects and work. If these are in the public arena or accessible to the public, then they are vulnerable.

A modest amount of effort considering this will pay great dividends. Registration and protection of rights can be quite straightforward, whereas dealing with breach of rights is far more difficult and costly. If you would value discussing this, please [contact us](#).

Higher education reforms

In case you missed it, the Higher Education and Research Act 2017 became law in April this year and is considered the most significant legal reform of the HE sector since the Further and Higher Education Act 1992. So here are the basics:

- The Act created two new bodies: the Office for Students (OfS) and UK Research and Innovation (UKRI).
- The OfS is a non-departmental public body to regulate and fund universities, oversee quality and standards, and approve new providers. It replaced HEFCE in these responsibilities. It operates a new single register of HE providers, monitors compliance with the new transparency duty for them, and has powers to intervene in the event of

- serious breach of obligations and standards by a provider.
- UKRI brings together under its umbrella the seven existing research councils, the research functions of HEFCE and Innovate UK. Another new body, Research England, has responsibility for quality-related research funding.

The Act had a troubled passage through Parliament and considerable concerns remain in particular as to the scope and effectiveness of the OfS, teaching standards, and the correlation between funding and an institution's overall quality.

Recent case - eviction of ex-school caretaker

The High Court held in a case earlier this year, *Hertfordshire County Council v Davies [2017] EWHC 1488 (QB)*, that a school caretaker who lived in a school bungalow owned by the local authority did not enjoy security of tenure. The caretaker was dismissed for gross misconduct and the Court held that the defendant had occupied the premises throughout his employment under a service occupancy agreement which terminated automatically at the conclusion of the employment. For further details regarding this please see our website soon for a case summary, or contact [our team](#) for assistance with any matters of this type.

Charitable status of independent schools left alone

The government's 2016 green paper *Schools that Work for Everyone* and the Conservative manifesto earlier in 2017 both made reference to the potential loss of charitable status for independent schools which do not 'do enough' for the less well off and the maintained sector. Doing enough has been said to involve offering a significant number of fully funded bursaries, sponsoring academies and free schools, and / or sharing leadership expertise, teaching and facilities. This week, the Department for Education seems to have changed the focus from a threat to the charitable status of independent schools to that of developing collaborations between the sectors. The Systems Partnership Unit has been created to facilitate these collaborations.

Removal of charitable status would be fraught with difficulty and subject to very robust resistance from the schools involved and their supporters, such as the Independent Schools Council. The most recent indications as to how this might be approached suggested the Charity Commission would revise its public benefit guidance for schools and, if they did not achieve the benchmarks set, then charitable status would be removed. Removal of status is rare, though it does happen, for instance if a class of charities is reviewed (as happened with many shooting organisations in the 1990s). However it is not that long ago that the public benefit of independent schools was exhaustively examined by, ultimately, the Charity Tribunal and schools survived that episode with their charitable status intact, even if with raised expectations regarding public benefit.

The government's latest changes in this area should give reassurance to independent schools, even though both law and public expectation continue to require efforts to demonstrate sharing of resources for the less well off.

Conversion of companies to CIOs

The long awaited so-called 'direct conversion' which will enable incorporated charities to become charitable incorporated organisations (CIOs) is finally about to become available (provided the legislation is approved). Implementation is due to begin in January 2018. Increasingly popular, the CIO structure provides the benefits of incorporated status without the need for dual regulation by both Companies House and the Charity Commission: CIOs need only submit to the filing requirements of the Commission. These new regulations will simplify

the process of conversion very considerably, and we will report in the coming months regarding their progress.

Charity Lunchtime Forums - Preparing for GDPR

We would be delighted if you can join us at one of our next Charity Lunchtime Forums.

Over the Autumn we are hosting forums in three locations: Milton Keynes, Cambridge and Northampton. These run from **12:30pm to 2:30pm**. These forums are suitable for trustees and senior managers of all charities including schools, colleges, universities and unregistered charities.

The law on data regulation is changing rapidly. A major change will take place in May 2018 with the introduction of the General Data Protection Regulation and so charities need to act now to adapt. All are welcome to join us in discussing the new data regime.

Should you be interested in attending one of our Lunchtime Forums then please register your interest by clicking [here](#).

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