

HEMPSONS

# Charities and Social Enterprise newsbrief

Welcome and round-up

**Serious incident  
reporting**

SH:24 client spotlight

**Choosing a brand**

Voluntary overtime  
v right to holiday pay

**Upcoming events**

Autumn 2017

[www.hempsons.co.uk](http://www.hempsons.co.uk)

@hempsonslegal



---

## Contents

- 3** Welcome and round-up
- 4** Serious incident reporting
- 6** SH:24 client spotlight
- 8** Choosing a brand
- 10** Voluntary overtime v right to holiday pay
- 11** Upcoming events

# Welcome and round-up

They do say that you wait ages for a bus and then two come along at once, and that's a bit how it feels in preparing this column. When we first started thinking about it, it seemed like there wasn't going to be much to say and then suddenly... Hold on to your hats – you're going to need them!

Firstly, we hope that you had a very social Social Saturday (14th October). In other social enterprise news, £800m turnover business giant Cordant Group announced its launch as a social enterprise in September to a mixed reception and giving some food for thought about what it means to be a social enterprise. Is it the start of a movement for big corporates? SEUK recently launched its 'State of Social Enterprise' survey "The Future of Business?" and the report provides helpful evidence for what most in the sector probably knew to be the case already – that social enterprises do a great job working in disadvantaged areas and employing disadvantaged people, on average are growing their turnover at a greater rate than SMEs, and help lead the way in female and BAME leadership. With half-an-eye on November, we're looking forward to Social Enterprise Yorkshire and Humber annual awards, for which we are a long-standing sponsor.

In the world of charities, there's been plenty happening too. For any charitable companies or CICs hoping to convert to a CIO, it looks like you'll be able to do that from January 2018 onwards subject to the draft legislation receiving the necessary Parliamentary approvals. There was also a report that auditors had expressed concerns on the accounts of 97 large charities for a variety of reasons including that the auditors considered they were no longer a going concern, that the accounts did not comply with the new SORP, and that there was a lack of evidence in the accounting records of the charity.

For NHS charities there has been a recent update to the snappily-titled guidance "NHS Funds Held on Trust – Guidance on the acceptance, management and transfer of charitable funds for NHS bodies" to reflect some changes in the way such transfers are handled and a move away from the previous practice of statutory instruments.

The Law Commission has now published its long-awaited report on charity law which is now awaiting a formal response from the Government. The report itself weighed in at an impressive 484 pages and includes recommendations on a number of technical areas of charity law which are the kinds of things that won't crop up for many readers but, if they do, they are likely to cause a headache for charities and take some time to unpick, such as that (for Royal Charter charities) changing the provisions of your governing document can be really complicated and time-consuming.

Finally, we were pleased to run our annual free trustee training workshops in London, Harrogate, Newcastle, and Manchester. It was great to see so many attendees and to get overwhelmingly positive feedback from those who came along. We will be running the sessions again next autumn but in the meantime, please see elsewhere in this newsbrief details of sessions planned for early in the new year building on a great pilot event in Newcastle in the summer.



**Ian Hempseed**  
Partner, Head of Charities and Social Enterprise

t: 020 7484 7530  
e: i.hempseed@hempsons.co.uk



**Simon Lee**  
Associate, Charities and Social Enterprise

t: 020 7484 7629  
e: s.lee@hempsons.co.uk

# Charity Commission updates its guidance on reporting serious incidents

In the past six months the Charity Commission has launched or concluded a number of statutory inquiries where a charity has failed to report a serious incident. Then in September it updated its guidance on when and how to report a serious incident.

## What is a serious incident?

The Charity Commission's new guidance sets out what it regards as a serious incident. These mainly revolve around the following key themes:

- financial crime: fraud, theft and money laundering
- other significant financial loss
- unverified or suspicious donations
- links to terrorism and extremism
- safeguarding beneficiaries
- other significant incidents e.g. insolvency, forced withdrawal of banking services or criminal activity

In June 2017 the Charity Commission announced that it had opened a statutory inquiry into the Youth Development Summer Camp the previous year. The inquiry was launched after the police informed the Charity Commission that a trustee had been arrested under the Safeguarding Vulnerable Groups Act 2006.

None of the trustees submitted a serious incident report to the Charity Commission. Furthermore, the charity's annual return for 2014 onwards indicated that the charity had no written safeguarding policy in place despite the charity running summer camps for children. This raised serious regulatory concerns for the Commission resulting in the statutory inquiry being opened.

This follows two other inquiries, into ANO and The Grail Trust, where in the first case UK Ports Officers stopped a trustee carrying £19,300 in cash and seized the money; and in the second case an overseas authority had begun an investigation into allegations of child abuse at a children's home previously operated by the charity. Neither charity reported the incident in question.

## Problems with serious incident reporting

The Charity Commission has for a long time expressed concern that charities are not reporting serious incidents in the way that they should. This is one of the reasons why in October 2016 the Commission consulted on revising its guidance. The new guidance *How to report a serious incident in your charity* was published in September 2017.

The new guidance is particularly helpful for its clarification of what the Charity Commission means when it talks about fraud or theft being a serious incident.

On the other hand, the new guidance also places greater (excessive?) emphasis on operational incidents (e.g. the loss of a significant contract, the loss of banking services) as well as negative media reporting. It also extends the reporting requirement where an incident involves someone external to the charity (e.g. a delivery partner) being placed on a UK or international terrorist list or subject to an asset freeze.

In any event, if the trustees are unsure whether an incident is sufficiently "serious" or "significant", the Charity Commission recommends that trustees should nonetheless report it as if it were a serious incident. The Commission would prefer charities to err on the side of caution in this regard.

Whether a charity's trustees decide that the current situation constitutes a serious incident or not, they should fully consider the Charity Commission's guidance and summarise their deliberations in the minutes so that there is a clear record.

## When should you report a serious incident?

The Charity Commission is keen that registered charities report any serious incident as soon as possible.

This might create a significant burden for those registered charities where beneficiaries sometimes become injured, ill or worse as a largely unavoidable part of their activities e.g. amateur sports clubs, care homes, independent hospitals, hospices, etc.

The Commission is therefore content for such charities to submit periodic or bulk reports (rather than separate reports for each incident), and for these to be based on the internal monitoring and reporting (rather than having to modify the Commission's own form) provided that certain key information is included.

In addition, the charity's annual return includes a declaration that the trustees have reported all serious incidents to the Charity Commission during the year or within the annual return itself. However, the Commission is clearly trying to encourage charities to report more promptly rather than waiting until the end of the year.

#### **Reporting the incident**

If the trustees do decide to submit a serious incident report, the Charity Commission's guidance document sets out what information it will want to know in different circumstances. The Charity Commission will also want to know what steps the trustees have taken, or are taking, to learn lessons and to reduce the risk of future harm.

Charities should also be aware that, unless a statutory exemption applies, the Charity Commission may be required to publicly disclose any communications on request under the Freedom of Information Act 2000.

#### **The Charity Commission's response to a serious incident report**

Part of the Charity Commission's role is to ensure that the trustees are discharging their legal duties as trustees, including as to whether they respond appropriately to, and effectively manage, any risks and serious incidents that may arise.

Reporting a serious incident serves to demonstrate to the Charity Commission that the trustees have identified a risk to the charity and are taking appropriate action to deal with it. Where it is clear that the trustees are handling serious incidents appropriately and the risks are being managed by them, the Charity Commission is more likely to take no further action.

If, however, it is not clear that:

- (a) the incident and risks arising from it are being dealt with
  - (b) the trustees are acting responsibly
- the Charity Commission may need to engage further with the trustees, including potentially some form of regulatory intervention.

In particular, if a serious incident that has not been reported becomes known to the Charity Commission at a later date, the Charity Commission may consider taking regulatory intervention against the trustees for mismanagement or breach of duty, particularly if further abuse or damage has occurred as a result of the trustees not dealing with the incident(s) appropriately. The Charity Commission also considers any failure to follow its guidance without good reason potentially to constitute mismanagement or breach of duty which could, in principle, result in some form of regulatory intervention.

#### **Summary**

As part of any effective risk management strategy, it is important that the trustees put in place appropriate policies and procedures for identifying and mitigating risks, recording incidents or near-misses and overseeing how to respond to them going forward. This will include promptly reporting serious incidents to the Charity Commission in line with its guidance, which will want to be assured that (amongst other things) the charity is taking reasonable steps to prevent the same or similar incident occurring again in the future.



**Chris Hook**

Associate, Charities and Social Enterprise

t: 0191 230 6052

e: c.hook@hempsons.co.uk

---

# Spotlight: SH:24

---

This issue, we focus our spotlight on SH:24, an online sexual health and reproductive health service in partnership with the NHS. The service was developed in the London boroughs of Lambeth and Southwark and provides free STI test kits, information and advice. SH:24 are now providing services across the country in collaboration with the NHS.

We spoke to Dr. Gillian Holdsworth, Managing Director of SH:24 about the background of the service, its aims, and what the future holds. Dr Holdsworth is a medically qualified public health consultant who works in population health.

## **How did SH:24 come about?**

Dr Holdsworth previously worked in women and children's services, focusing on teen pregnancy – at the time Lambeth and Southwark saw some of the highest rates of teen pregnancy in the country. Sexual health was also an issue in the area, and it was suggested that the situation could be improved by moving the services online. Many of the issues with the system as it stood stemmed from the incapacity of services in the area to cope with demand.

Dr Holdsworth and her team heard anecdotal evidence of long queues outside clinics at all times of the day, stories of people having to take entire days off work to get seen at a clinic and women being unable to get appointments to be prescribed contraceptive pills. She turned to Guy's and St Thomas' Charity with the idea of moving sexual health and reproductive services online and secured approval and funding from its innovation fund. In March 2015, the service was launched.

## **What are the aims of the organisation?**

SH:24 aims to improve access to a comprehensive range of sexual health and reproductive services and information. The organisation also aims to build relationships with its clients, so that people can manage their own health in an informed, safe way. SH:24 works with clinics as partners, so that people who need to be seen get fast-tracked and have a quicker journey through the system.

## **Legal assistance**

SH:24 is a Community Interest Company (CIC) regulated by the Care Quality Commission (CQC) and NHS Digital (formally HSCIC). "We're operating within a complex regulatory framework," Dr Holdsworth explains. "We've needed advice on safeguarding, our policy around online prescribing and our approach to that. We've had a very good experience with Hempsons."

## **Looking ahead**

The SH:24 model has already been highly influential on other projects developing similar services. What advice does Holdsworth have for those looking to innovate within the healthcare environment?

“ I sincerely believe that in five years' time everywhere will have a service like this, because users want it. ”

**Dr. Gillian Holdsworth**, Managing Director of SH:24



It's safe to say that SH:24 is being successful in meeting its original aims. Not only are other areas taking inspiration from their model, but the project has been awarded multiple times, receiving the BMJ awards' Innovation Team of the Year and the DL100 Digital Leaders Cross-Sector Collaboration of the Year. The project continues to make strides, earlier this year introducing an online contraception service.

“ You need to give it a lot of thought before starting. The complexity is how you fit a service delivered in a different way into the current regulatory framework – that's the hardest thing to navigate. You need to be sure you can deliver at NHS standards or above.

**Dr. Gillian Holdsworth**, Managing Director of SH:24



---

# Choosing a brand

---

We all know the key role your brand plays in building awareness of your charity with its beneficiaries and in driving engagement with donors, but how do you maximise and protect its value?

Your brand is that unique and recognisable identity such that it distinguishes your charity from others in the sector and which communicates the values of your charity to your beneficiaries and donors. It can contain many different elements, some of which are easy to identify, such as the brand name and logo, but others can be more difficult to discern, such as reputation and goodwill. These diverse elements mean that there is a lot to consider when creating a new brand, or undertaking a re-branding exercise.

We'll outline some of the legal issues surrounding possibly the most important element of any brand – the brand name – later, but as an initial consideration if you're engaging a consultant (or other third party), to support your brand creation and development, you must ensure that they are properly engaged before they start work. Key to this is to ensure that the charity owns the intellectual property (IP) in the outputs and deliverables generated by the consultant in the course of their services by ensuring an appropriate written agreement is in place. In absence of such an agreement, or if you contract on the consultant's standard terms, it's likely that ownership of the IP will remain with the consultant, even though you've paid for their services.

This can cause serious problems, as although in most cases, the charity will have the right to use the IP that it has paid for, control will remain with the

consultant. There is no guarantee that the consultant will adequately protect it or maintain protection, and they may look to license or sell it to third parties. A further payment may be required to secure ownership for the charity at a later date, diverting time, effort and money from pursuing your charitable aims and objectives.

As your brand name forms the core of your brand and is easily the most recognisable (and possibly the most valuable) element, it's essential that you ensure that it can be freely used, without infringing any third party's rights. If not, the charity could become embroiled in legal action, have to pay damages for infringement and/or be forced to withdraw the brand name from use.

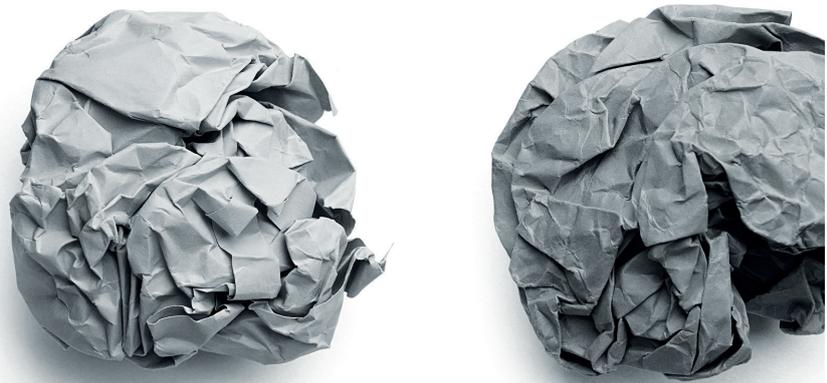
As a minimum, searches of the relevant trademark registries, company registries and domain name registries should be conducted to understand what rights already exist and whether they could be problematic. If you're creating a new name for your charity, you should always bear in mind the Charity Commission's guidance and disregard any potential names that may be offensive, misleading, or which are already in use by another charity – this can be confirmed by a straightforward search of the register of charities.

Once you have chosen your brand then consider registering it as a trademark. A registered trademark grants the owner the exclusive rights in the use of the

trademark, which is registered for use in respect of one or more classes of goods or services. Use of a brand name identical to a registered trademark in respect of a registered use will infringe these rights. In addition, infringement may also arise from: (a) a brand name similar to a registered trademark being used for a registered use; or (b) a brand name similar to a registered trademark being used for a use that is similar to a registered use, and in both cases where this use may cause confusion on the part of the public.

This relatively wide scope of rights granted to the owner of a registered trademark make it a powerful tool to protect your brand name and by extension, the value of your brand.

Potentially any "sign" that can be represented graphically and which is capable of distinguishing your goods or services can be registered as a trademark. Your mark should be distinctive and not descriptive of the goods or services offered under it. While brand names and logos are obvious candidates, trademarks have been registered for shapes, colours, sounds and even smells. So you should consider your whole brand proposition and seek to register any distinguishing elements that fulfil this definition. Although, as always, you should seek professional advice, to maximise the protection gained and to minimise the risk of issues arising. There are various domestic and international systems of registration





and you will need help and guidance to ensure you protect your key brand assets in the right territories, in respect of the right goods and services and in a cost effective manner.

You should also consider taking domain names and establishing social media accounts that represent your brand name, to prevent unscrupulous or parody use by third parties.

Once a trademark is registered, as a general housekeeping matter, you should ensure that it is put to use and that any renewal fees are paid promptly, failing to do this may make it liable to being removed from the register.

Crucially, you should take swift enforcement action against any infringer. This not only defends your position in the sector by preventing confusion amongst your beneficiaries and donors, but also protects the value of your trademark, as continued use by infringers can lead to it losing the ability to distinguish your brand, meaning it ceases to be registrable as a trademark. However, you need to take care not to make a 'groundless threat' of infringement action, as doing so can expose your charity to legal action and the risk of being liable to pay damages for the loss resulting from the threat. This is a complex area of law, and typically no more than a notification of your registered trademark should be given without you having sought professional advice.

You will also need to take prompt action against any conflicting trademarks that are put forward for registration, as in the UK, rejection of a registration on the basis that there is an existing conflicting mark relies on the owner of the prior trademark raising an objection. Preventing registration early on is far more effective and cheaper than bringing an action for infringement further down the line.

The above points highlight the main legal issues which you should consider in building and developing your brand. In summary, the key issues are:

- **Create** – Bear in mind the Charity Commission guidance and ensure that consultants providing services to create the new brand are engaged on appropriate terms that pass ownership of any IP to the charity. Choose distinctive brand names that are not descriptive.
- **Clear** – Conduct clearance searches to determine whether the potential brand name can be freely used – searches of the relevant trademark registries are essential.
- **Register** – Apply for registration of the key elements of the brand as a trademark wherever possible.
- **Defend** – Take swift action to prevent conflicting trademarks from being registered and against infringers, taking care to not make any 'groundless threats' of infringement.



**Nabil Asaad**

Solicitor, Corporate and Commercial and IP Teams

t: 01423 724102

e: n.asaad@hempsons.co.uk

---

# Voluntary overtime v right to holiday pay

---

Regular voluntary overtime to be taken into account when calculating holiday pay.

The EAT has confirmed in *Dudley Metropolitan Borough Council v Willetts and Others* that “remuneration linked to overtime work that was performed on a voluntary basis could be included in normal remuneration for calculating holiday pay”.

The case involved over 50 council employees who were employed as electricians, plumbers, roofers, storemen, operations officers, and quick response operatives. Each employee had set contractual hours of 37 hours a week. In addition to these normal working hours, once in every four weeks and, in some cases five weeks, the employees also performed the following additional duties on a voluntary basis:

1. Out-of-hours standby shifts
2. Attending call-outs
3. Voluntary overtime

The regularity of the shifts and when they were performed was decided by the employees.

The EAT held in order to ensure that the employees did not suffer a detriment by taking leave, the Council should have taken into consideration any voluntary payments received when calculating holiday pay, and the failure to do so was contrary to the Working Time Regulations 1988.

The EAT found that workers are entitled to “normal remuneration”, not just contractual pay, during the four weeks’ annual leave. The pay workers receive in respect of that annual leave should correspond with their “normal remuneration”.

Determining whether a payment qualifies as “normal remuneration” is a question of fact on a case by case basis. However, the frequency and regularity of the payment will be a relevant factor to take into consideration.

Although this is a binding decision on the status of voluntary overtime when calculating holiday pay a great deal of uncertainty still remains. This is because the EAT has provided little guidance of what is meant by regular in order for a payment to qualify as “normal remuneration”.

By way of example, in this particular case, payments made over a period of years at a rate of roughly one week in four or one week in five were sufficiently regular. It is also the case that this decision applies only to pay for the 4 weeks annual leave derived from the European Working Time Directive. It does not apply to the additional 1.6 weeks under UK Regulations or to any additional contractual holidays. Is it practicable for an employer to have systems in place to assess whether overtime is sufficiently regular to be “normal remuneration” and also have different methods of calculation for the different types of leave?



**Paul Spencer**  
Partner, Employment Team

t: 0161 234 2474  
e: p.spencer@hempsons.co.uk



**Zubeda Tayub**  
Trainee, Employment Team

t: 0161 234 2420  
e: z.tayub@hempsons.co.uk



# Upcoming events

## Revisiting risk and seizing opportunities – 2018

Building on the success and popularity of the event we held in Newcastle in July 2017, we will be holding this seminar in our London, Harrogate, Manchester and Newcastle offices in early 2018. Keep an eye on our website for confirmed dates.

We will have a range of speakers from various departments within the firm, from employment, to intellectual property, information governance and charities and social enterprise. Previous topics have included:

- Dealing with risk – The Charity Commission's Perspective
- Intellectual Property – Key issues for charities
- Employees, workers and volunteers – latest trends.
- Ready to roll with GDPR

Watch our website [www.hempsons.co.uk/events](http://www.hempsons.co.uk/events) for more details in the coming weeks.

## About Hempsons

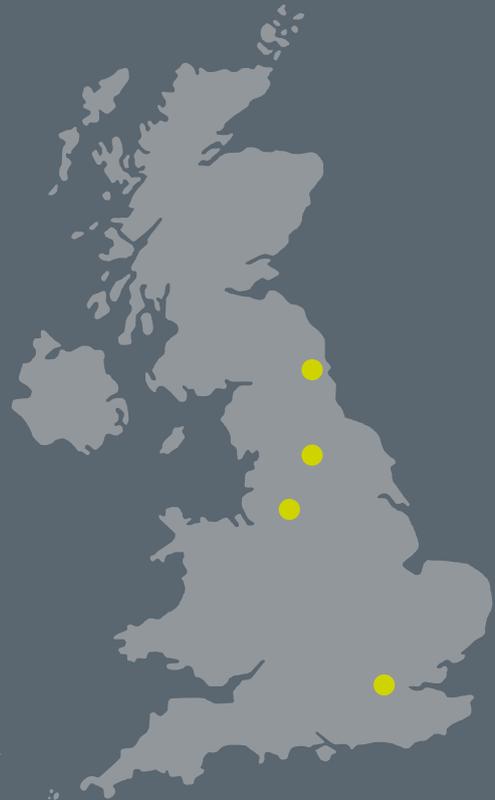
### Helping you to deliver maximum social impact

Our broad expertise in advising charities, social enterprises and other not for profit organisations (including membership bodies and trade associations) enables us to provide pragmatic and proactive advice to the sector as a whole as it faces challenging times and recognises the need to become more innovative and entrepreneurial.

As a top 10 specialist legal advisor to the UK's top charities, our team has worked with those operating within this sector for many years and advises on all aspects from start-up options and legal structures, to expansion and collaborations. Our aim is always to assist clients to maximise their impact and become more efficient.

We have a dedicated national team operating across the firm's four offices in London, Harrogate, Manchester and Newcastle. Our clients range from household names to start-ups and from national charities to local groups.

Access our Charities and Social Enterprise web pages via:  
<http://www.hempsons.co.uk/sectors/charities-and-social-enterprise/>



[www.hempsons.co.uk](http://www.hempsons.co.uk)

LONDON | MANCHESTER | HARROGATE | NEWCASTLE

London: 020 7839 0278 | Manchester: 0161 228 0011 | Harrogate: 01423 522331 | Newcastle: 0191 230 0669



Hempsons is registered with the Law Society of England & Wales and we are authorised and regulated by the Solicitors Regulation Authority No 51059. Published in November 2017.