

Charities and Social Enterprise Newsbrief



Academies update

Meetings and communication – are your members properly engaged?

Don't ruin great messaging by lazy content management

System leadership is the future for charities

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Welcome and round-up

For the great majority of charities, their only dealings with the Charity Commission are when they file their annual report, accounts and return and update their details. However, where there has been misconduct or mismanagement in charities, the Charity Commission have considerable statutory powers to intervene in a variety of ways. The Charity Commission's annual report and accounts 2018-2019 show that the Commission is an active regulator, and increasingly so.

Starting with steps taken by trustees in 2018-2019, 3,895 serious incident reports were lodged with the Charity Commission, an increase of 38% on the previous year, and 64% of these related to safeguarding issues. It is not then surprising that regulatory compliance cases opened by the Charity Commission increased to 2,666 from 2,269 in the previous year. To put that in perspective, there are 168,000 registered charities.

The Charities (Protection and Social Investment) Act 2016 conferred new powers on the Charity Commission, one of which is to enable them to issue Official Warnings. The Charity Commission can issue a warning both to a charity or its trustees that there has been misconduct or mismanagement or a breach of trust or duty. Failing to listen to a warning and take remedial action could

be used by the Charity Commission as evidence of misconduct or mismanagement which could lead them to exercise other statutory powers available to them under the Charities Act. In 2018-2019, 20 Official Warnings were issued and one of the most high profile was to the RSPCA in respect of a payout to a former Chief Executive.

Another function of the Charity Commission is to publish guidance. In March 2019 the Charity Commission pulled guidance together specific for “**charities with a connection to a non-charity**” – <https://www.gov.uk/guidance/guidance-for-charities-with-a-connection-to-a-non-charity>. The Charity Commission recognise that there can be good reasons for a charity to link-up with a non-charity for furthering its charitable purposes or for raising income. The guidance is relevant, for example, where a charity has a trading company, is set up by a corporate business or collaborates with a non-charitable organisation to deliver services. The guidance is essentially about trustees identifying and managing the risks which can arise from these connections. One critical risk, which must always be considered in collaborations, is that a charity should not allow its resources to be applied to activities outside its charitable purposes. This can occur where there is poor planning on joint projects and a failure to clearly demarcate which tasks are to be carried out by which organisations in the collaboration. Also, if a non-charity corporate is looking to set up a charity there is a useful checklist at the end of the risk areas on which the Charity Commission will need to be satisfied before it can register the charity. As a reminder of some changes brought in in August

2018, you should now have updated your **recruitment processes for Chief Executives and Finance Directors**. Someone who is disqualified from being a charity trustee is now also disqualified from holding those senior management positions in a charity. Not only should you be checking that new recruits are not disqualified, you should also check that none of your current postholders are so.

If you are looking to **diversify your income through trading** which is not in direct furtherance of your charitable objects, you may be able to benefit from a piece of deregulation. Charities have been able to carry out trading within the charity even if it does not further their charitable objects (non-primary purpose trading) and to obtain tax relief on the trading profits where it falls within what is known as the “small trading

exemption”. The turnover limits for non-primary purpose trading on which tax relief is available have been increased from £50,000 to £80,000 (for charities with total turnover of more than £320,000) and with declining limits for smaller charities. The change in the limit applies for accounting periods starting April 2019.

For charities registered with the Fundraising Regulator who are proud to show that they have signed up to best practice in fundraising, you need to make yourself familiar with the new **Code of Fundraising Practice** which will be introduced in October 2019. The Fundraising Regulator confirms that the new code will be applied for making decisions about any incidents that take place from this October – <https://www.fundraisingregulator.org.uk/code/new-code-october-2019>.



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WELCOME

Academies update

With a new academic year starting, Academies will need to be familiar with the requirements of the Academies Financial Handbook 2019. Published in June and taking effect on 1st September 2019, here are the key changes for Academies to be aware of:

1. Internal audit requirements including an audit committee or combined with another committee
2. Importance of the role of clerk to the board
3. More robust methods in respect of financial monitoring
4. Additional requirements around setting executive pay
5. Maintaining a risk register
6. Whistleblowing procedure
7. Providing information to the ESFA about changes in governance
8. Secretary of State directions in certain circumstances
9. ESFA work with other government bodies.

Internal audit requirements including an audit committee or combined with another committee

The main changes are in respect of the internal audit requirements. Firstly, it is now mandatory to have an audit committee, whether that be a standalone committee where the academy has income of over £50 million or combined with another committee if below this threshold. Previously, it was only academies with income over £50 million to have an audit committee. This committee must meet at least three times a year. The committee must also have a focus to its activities including terms of reference and a programme of works. The internal audit requirements are more extensive, making it mandatory to deliver internal scrutiny in an appropriate way either by appointing an in-house internal auditor, a bought in internal audit service, appointment of a non-employed trustee or a peer review by the chief financial officer or other member of the finance team from another academy trust. The internal audit must not be carried out by the trust's own accounting officer, chief financial officer or other members of the finance team. It must be carried out by someone suitably qualified and experienced.

Importance of the role of clerk to the board

There is more detail included about what the role of the clerk to the board may include, for example in guiding the board to comply with the legal and regulatory framework.

More robust methods in respect of financial monitoring

Rather than suggesting that the board consider whether additional financial reporting is appropriate if the board has concerns about financial performance, the update specifies that "the board should act quickly ensuring the trust has adequate financial skills in place". There are also links included which assist with financial planning in respect of estate management.

Additional requirements around setting executive pay

There has been some tightening of the language used in respect of the setting of executive pay, including the decisions to be made being "reasonable and defensible" reflection of the individual's role and responsibilities as well as a "proportionate" process. The pay and benefits must represent "good value for money" and be satisfied that any payments made do not undermine the transparency requirements in accordance with the Academies Accounts Direction. Finally, it is explicit that senior managers with significant financial responsibilities should be exclusively on payroll and subject to Pay As You Earn with income tax and NI contributions deducted at source. There is no definition provided in respect of "senior managers with significant financial responsibilities".

Maintaining a risk register

It is now a requirement for an academy to have a risk register, rather than a recommendation.

Whistleblowing procedure

The requirements around whistleblowing have been updated and more prescriptive, stating that the trustees must agree the whistleblowing procedure and that the trust must ensure that all staff are aware of the whistleblowing process.

Providing information to the ESFA about changes in governance

Academies still need to update the ESFA in respect of changes in governance, and in addition for multi-academy trusts the Get Information About Schools website needs to include details of the headteacher, chairs of local governing bodies and local governors (where local governing bodies exist).

Secretary of State directions

The Secretary of State directions are broadly similar, however there is now a broad sweeping provision that states where the Secretary of State “has concerns about an individual managing an academy trust, he may take action to address those concerns”. It does not state what those actions may include.

ESFA work with other government bodies

As in the previous version, the Secretary of State continues to work with the Charity Commission, however it explains now that this is not just in respect of the administration of a charity but more generally the individuals running the academy including though not limited to the trustees.

The Secretary of State also states that it will work with the Insolvency Service and refer academy trustees where they consider that they are unfit to manage a company as a director.

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Helen advises charities and social enterprises, assisting clients to choose the most appropriate charitable and social enterprise structures, as well as governance more generally. Helen’s experience includes registering of charities and CIOs with the Charity Commission, varying governing documents, mergers of charities and contractual queries. Helen works with a wide variety of charities including start-ups, social enterprises, established charities, academies and independent schools.

Meetings and communication

- are your members properly engaged?

It is well over a decade since the Companies Act 2006 gave charitable companies the option to dispense with annual general meetings (AGMs), as well as broader powers to use electronic communication. Since then, technology has moved on, as has the way we all communicate with each other. Charities are increasingly looking at innovative and flexible ways to engage their members. We discuss here some of the options available, both to traditional membership charities, and to other charities who want to streamline their membership and update how they communicate with members.

Defining membership

The first step is to properly understand who the charity members are, the rights that they have, and whether they are still representative of the charity. Charities often reach a stage where the membership becomes dis-engaged. At one extreme, it has become unwieldy and difficult to coordinate, and at the other, there is poor attendance and engagement at meeting/ decision-making level. Often it is a combination of both - where there is a risk that meetings are not representative, or that the process does not allow the trustees to maintain an effective relationship.

One option is to redefine the formal, legal membership of the charity. This can be achieved by creating new or different classes of membership, or by changing voting rights so as to make decision-making either more democratic, or in other cases, more streamlined.

Another option is to separate out decision-making so that defined groups and stakeholders who are not formal or voting members, are still involved in making certain decisions, or can take part in other strategic aspects of the charity's governance. This kind of stakeholder governance can be more flexible and need not be constrained by the legal processes that apply to formal members.

The trustees will sometimes have the power to define classes of membership, but it will often require a decision of the members themselves to bring about a full reclassification, or variation of rights, particularly if a governing document needs to be changed. Care must be exercised - for most membership charities, the members represent the core of the organisation, and its values. Their rights should not be unfairly changed in a way that could cause harm to the charity's reputation, and in the case of some charitable companies, their rights should not be unfairly prejudiced. The trustees also need to consider whether re-definition will provide clarity, or unnecessary complexity.

Updating governing documents

Charities still rely on very old governing documents to regulate their dealings with members. This is particularly relevant to member communications, and to meeting procedures, where many model documents borrow from old company law provisions which have not been modernised. In many cases, charities end up not complying with their governing document, or are unaware of how restrictive its provisions are.

Electronic communication

Corporate charities can use most electronic means (such as email) to communicate with members, provided members have consented, and in return, the charity has made it clear that an electronic communication is an acceptable format to use. To use a website for communications, corporate charities either need specific consent from members, or have passed a members' resolution and given members the chance to consent before deeming them to have consented.

Other types of charity (i.e. unincorporated clubs, associations and trusts) need to adopt express provisions to use electronic communications.

But it is problematic that the legislation relating to corporate communications is over a decade old. It does not always cover how charities want to communicate with members, for example by the use of third-party software, applications and social media. Also, the provisions relate to communications – so this is relevant when the charity is sending or receiving notices, or where decisions are being taken using a written procedure, for example where this is permitted by a governing document or by legislation, but it does not cover how virtual or electronic meetings themselves are to be conducted. This distinction is not always clear to charities.

Virtual and electronic meetings

Most charities can hold electronic and virtual general meetings, provided that their governing document contemplates such a process and there is no restriction, and that members who are not present in the same physical location are able to communicate by being able to speak and vote with each other. The method used should provide a proper way to conduct and scrutinise voting, for example how to record a show of hands, a poll or a ballot.

For corporate charities, the legislation permits virtual meetings by not expressly excluding them. As such, many do not know if they can in fact 'go electric'. The cautious view is that by adopting express provisions in the charity's articles, there is no risk of challenge. Similarly, other types of charity will need express provisions if there is any ambiguity in their governing document as to how they can hold a meeting.

The law and practice of meetings has not reached the point where charities are racing to hold fully virtual meetings. In fact, only a handful of public companies in the private sector have taken this step, with the first reported virtual AGM only taking place in 2016. This reflects the general principle that members still need to be given the opportunity to present their views in an open and accessible format. Most charities therefore opt for a physical meeting, which can then be supported by virtual or electronic attendance.

Ditching meetings altogether

Charities do not need to hold AGMs unless their governing document requires them to do so. As mentioned, the Companies Act 2006 extended this to charitable companies. However, many charitable companies still have AGM provisions in their articles which predate the 2006 Act. Furthermore, the provisions often contain obligatory business to be carried out at the AGM, which can be irrelevant for many charities, such as formally receiving accounts, or appointing auditors.

One option is therefore to dispense with the mandatory AGM, on the basis that the trustees (and in some circumstances, the members) can still call a general meeting as and when required in order to make member decisions. This would be the standard position for most charities whose trustees are also its members. That said, many charities still prefer the consistency, and in some cases, ceremonious aspect of an annual meeting.

For membership charities, dispensing with the AGM should be carefully considered. If the membership can be better engaged in other ways, then there is a usually a good case for getting rid of it. However, it is something that the trustees need to decide as being in the best interests of the charity and the members as a whole.

Separating out trustee appointments

For many charities, and particularly membership charities, AGMs are used to elect trustees. There will be an election that takes place in the run up to, or at the meeting. The nomination process is usually closely tied to the notice period leading up to it. This process can be very rigid, but it does need to be complied with.

One option is to separate out the election process by giving the trustees more discretion and flexibility to organise the election, or alternatively a ballot of the members. The trustees can then set more modern rules, which can be subsequently updated to ensure they are fit for purpose. The appointments can still take effect at an AGM, but alternatively, if the charity has dispensed with the AGM, the appointments can take effect at any other member, or trustee meeting.

As part of this, charities should consider whether any annual retirement provisions are appropriate and whether more consistent terms of office are more suitable.

Key points

- Charity trustees need to understand who the charity's members are, and the rights that they have
- Charity members should be engaged- trustees should ensure that they are being properly represented and are taking part in the decisions they have authority to take
- As part of this, trustees should consider if general meeting procedures are adequate
- Governing documents need to be checked and updated to make sure that they incorporate modern communication and meeting provisions, and that they are being used correctly.

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Don't ruin great messaging by lazy content management

Charities and social enterprises often promote the great work that they do by publishing content online and in print, but when doing so you, could you be breaching another person's rights of ownership in that content?

We live in an increasingly digital age where technology and innovation are at the forefront of everything we do, with new apps, websites and content being released and published daily, helping us stay in touch with people all around the world. There is an increasing trend in charities and social enterprises developing new mobile applications and publishing regular articles and content to promote their brand and the great work that they do. However, consideration is often not given to ownership of intellectual property in this content or 'IP' as it will be referred to throughout this article.

One key error that organisations make is failing to realise what IP is and the importance of ensuring you own any IP that has been created for you. IP is the term that is used to describe things that can be owned but are not physical in nature; examples of this would include copyright in articles written for publication, the code forming part of an app or even the design behind a logo.

The owner of IP does not own something that is tangible but instead has the right to control how that intangible thing is used, hence the phrase 'intellectual property rights'. You could have joint ownership of IP, it could belong to individuals as well as organisations and you can also sell and grant rights in IP in a similar way to a tangible object.

It is important for organisations to be aware that IP is an asset, which in the business world will often carry a significant value in a company's accounts. This is emphasised by figures from a recent report published by the UK Government, which showed that the world's five most valuable companies, despite being worth £3.5 trillion together have just £172 billion of tangible assets. This means that 95% of their value is in the form of intangible assets such as IP and data.

It is always therefore essential to ensure that you own or have the rights to use the IP that forms part of your website or product by considering where the IP comes from and who owns each aspect of it. For example, if a friend of your charity or social enterprise designed for you a logo, a volunteer wrote an article for your website or a company built you a new mobile app, then in the absence of an agreement or an employment contract, the IP in those aspects will likely automatically lie with their creator and not necessarily with you or your charity.

Therefore, you will need the owner of this IP to give you rights to use the IP that they have created.

There are two common ways in which rights can be granted in IP. Firstly, an organisation can be given permanent ownership rights through what is known as an 'IP Assignment', whereby ownership of that IP is 'assigned' to you. Alternatively, where an owner of IP wishes to retain that ownership, then you can be granted the right to use the IP by way of an 'IP Licence'. Licensing is common with photography and you will often see images being licensed by an owner to multiple users through websites such as Getty Images. If you are using someone else's IP that you don't have the rights to use, then the owner will be able to take legal action against you which may leave you financially exposed.

In general, if someone is employed by an organisation then the law states that any IP created during the course of their employment will automatically lie with the employer, unless there is an agreement to the contrary. However, for non-employees such as volunteers or consultants, the IP will typically remain with that individual. You may therefore wish to consider having simple agreements in place with your volunteers or consultants that will enable you to utilise any IP that they create on your behalf.

You should always carefully consider if you have the actual rights to use IP and if not, how you can go about obtaining such rights. If you have an image on your website, have you been granted the rights to display it? If a volunteer has written an article for you, have they given you the rights to use this online or in print? If you are developing an app, has the app developer granted you full rights to utilise this as you wish in the future? Of course, if you are unsure on IP ownership or need agreements preparing to give or receive rights in IP, then do not hesitate to give us a call so we can offer you practical legal advice going forward.

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System leadership is the future for charities

No charity can go it alone these days: real leadership involves bringing your organisation together with others.

Background

When I first became a chief executive more than 20 years ago, my brief was to grow a disruptive new organisation that would show a fresh way and shake a few trees. Partnerships and collaborations with other charities? No thanks, we wanted to compete and displace what they were doing with something better.

Although fashionable at the time, I don't think this approach has much of a place in today's world, because the chief executive's job is no longer simply to build up an organisation – it is to forge a wider response to a problem that involves their organisation in a joint effort to hit a problem.

The truth is that today most social problems are not organisation-shaped: they are complex and systemic in nature. Educational underachievement in poor areas is a good example. The genesis lies in all sorts of intersecting factors: family breakdown, poverty, school exclusions, policing, youth service cuts, gang culture.

Likewise, the solution isn't going to come from a go-it-alone mentality on the part of anyone. Real leadership involves trying to bring your organisation together with others to forge a solution that nobody can fashion on their own.

We call this system leadership. A cracking example of this is the charity West London Zone, which operates in a triangle of deprivation spanning three London boroughs. Its founding chief executive is Louisa Mitchell, whose signature skill is as a collaborator and system leader. WLZ exists to help young people across three deprived London boroughs to meet their potential in terms of education and subsequent work opportunities.

But WLZ doesn't do this by competing. Instead, it provides facilitative leadership across the whole panoply of charities, state and private organisations in the area.

As a result, WLZ is able both to increase the size of the pie resources-wise and to ensure the resources are spent optimally across the system.

Real social leadership as we enter the 2020s will be less about the kind of heroic entrepreneurial leadership that I once represented and much more about the kind of leadership embodied by Louisa at WLZ.

Future leadership is indeed system-leadership.

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Collaborations – ask the right questions at the outset

Collaboration can be undertaken for many reasons, and sometimes in haste. If you don't do your early planning properly, you can leave unresolved issues which can fester and later debilitate what you set out to achieve. Tight deadlines may also lead partners to side-line the more complex issues which they then find difficult to address once the focus of effort has moved on to the delivery phase.

You should be clear from the outset on the key fundamentals:

WHY are we doing it?
WHO should be our partners?
WHAT do we need to know about our partners?
HOW will we structure and make it work?

Factors to be considered during talks of a collaboration

1. Be clear on the rationale

There could be more than one purpose. The collaboration may be time limited for a particular project or a framework for a continuing relationship.

2. Partners

Your focus should be on who can best help you to achieve your objectives. Do not exclude the possibility of working with the private or public sectors or investors (or indeed a combination of them).

3. Know yourself

Are your charitable objects wide enough for the collaboration? If not, you may need to apply to the Charity Commission for approval to amend them. You must not

allow your resources to support the activities of other organisations which are outside your objects.

4. Confidentiality

Get all the partners to sign a non-disclosure agreement before you start disclosing any sensitive information.

5. Know your partners

Do due diligence but keep it proportionate to assess risk and ability to deliver to your expected standards. Highlighting reputational risk and how to manage it can be a key concern.

6. Key assets

If success is dependent on being able to use assets provided by a partner, make sure they own them or have necessary rights to make them available. You don't want to be accused of infringing the intellectual property of a third party.

7. Risk and control

How you decide to share risk will help define the levers of control held by each partner. Be clear whether you have liability for default by another; that might also take you outside your objects.

8. Governance

You must have a robust system for decisions, management, reporting and monitoring. If you create a "board", they should be entrusted to act, as speed could be of the essence. Decide on the appointment process to the board.

9. Funding and shared resources (e.g. staff and intellectual property)

What does each partner supply at set up and ongoing? Could there be binding calls for future funding? Beware of exposure to losses by giving very wide indemnities. If staff are seconded, how is the employer's risk shared?

10. Conflict of interest

Identify early any serious conflict situations and agree a policy for managing these.

11. Safeguarding against failure

Never the most popular topic! However, you do need to consider how you can preserve the collaboration against a partner failure, and of course protect your beneficiaries. Have a system for identifying and managing problems early – relying on the power to expel may not resolve the problem.

12. Evolution

Building flexibility to allow your collaboration to evolve, e.g. to take on new partners or projects.

Finally (almost) Legal structures

Only when you have identified your key features should you decide on what structure would achieve this. There are various options, here are some examples that you might want to consider:

- Lead contractor and sub-contractors where one organisation takes the ultimate control and risk. That risk is then shared with sub-contractors to the extent of the service they agree to provide.
- A contractual joint venture – where the advantage of flexibility may outweigh the downside of not being able to ring fence risks.
- A separate company – where the partners want to ring fence risk or to build up a trading history. The board would have statutory responsibilities which may lead to more robust governance.

Finally

Don't forget VAT, tax and accounting! These issues are just as equally important in the melting pot – so speak to your accountants early in the process to avoid any unwanted surprises.

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Time to say goodbye?

Julia Gray looks at how settlement agreements can be used effectively by employers.

Employing the right people means that dismissing staff is an inevitable – if occasional – part of a manager’s role. Settlement agreements (formerly known as “compromise agreements”) can facilitate a lower risk and mutually beneficial termination. They are the only legally binding method for staff to waive employment rights, such as the right to claim unfair dismissal or discrimination. Once those rights are waived, they can’t be pursued in a court or tribunal.

Settlement agreements tend to be used where:

- An employee is facing possible dismissal (for example, for redundancy or capability issues) and wants to leave quietly and with dignity
- The parties agree to expedite a dismissal process to save cost and minimise stress
- The parties acknowledge that the employee has been mistreated and want to resolve a potential legal claim by agreeing an out-of-court settlement

- The parties have amicably agreed to go their separate ways and want to achieve a tax-efficient exit (although the tax rules have changed, and they are no longer as efficient as they used to be)
- One or both parties want to keep the circumstances of a dismissal, or events leading up to it, confidential.

Settlement agreements have come under fire in recent years where they have sought to prevent employees from speaking out about malpractice or wrongdoing. Charities and social enterprises must tread carefully when contemplating confidentiality clauses for whistleblowers. A recent report by the Women and Equalities Committee was critical of the use of confidentiality clauses (also known as non-disclosure agreements and gagging clauses) where there have been allegations of harassment or other forms of discrimination. It’s possible that the report’s recommendations will lead to greater regulation in future. There are already rules governing settlement agreements; they only have legal effect if they conform to certain statutory requirements. These requirements change from time



to time, so it's important to ensure that an old agreement you might have used in the past has been updated. In addition, as with any contract, each party must have something to gain from signing a settlement agreement, even if no money changes hands.

Introducing the idea of a settlement agreement to a member of staff can be daunting, not least because broaching the subject could itself be grounds for complaint. If you're not sure how to raise it or you are concerned about saying the wrong thing, you could start by looking at the guidance produced by ACAS, but consider whether you need more detailed advice based on your circumstances.

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Procurement law

Have the lessons from Lancashire Care NHS Foundation Trust & Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council been learnt?

It's over a year since the case of Lancashire Care NHS Foundation Trust and Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council was determined. Hempsons advised the two foundation trusts in successfully challenging the Council's process, which had been run under the Light Touch Regime. See Lancashire Care NHS Foundation Trust & Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 (TCC).

If you are unsuccessful in a tender process then a speedy consideration of any issues during the standstill period is critical. There are very tight timescales that apply to procurement law challenges, and the remedies available are impacted by whether the contract has been signed with the successful bidder.

It is now easier to request, and receive, the contemporaneous records of the evaluation with clearly defined and robust requests for information (a "fishing expedition" is not permitted). If an aggrieved supplier requests information in relation to an award decision, usually during the standstill period, it is now usually the case that contemporaneous records of the evaluation and moderation will need to be disclosed at an early stage (see Technology and Construction Court Guidance Note on Public Procurement). Contracting authorities need to be able to demonstrate a robust and defensible audit trail as, without this, the process will be at serious risk of successful challenge.

The Trusts challenged the Council's decision to award a contract for Public Health and Nursing Services for children and young people (0 – 19) to Virgin Care Services Limited. The Judge upheld the challenge and concluded that the procurement decision should be set aside. The Trusts demonstrated that the reasons given by the Council for the scores awarded to the Trusts and the winning bidder for the quality evaluation questions were insufficient in law and as a result the decision of the Council to award the contract to Virgin must be set aside.

Nearly a year on, having advised on a number of other procurement projects since, both for contracting authorities and bidders, it appears to us that the key learning points from this case have not been consistently implemented by authorities.

In any public procurement process governed by the procurement regulations (Public Contracts Regulations 2015), it is imperative that the bids are scored and that a final rationale is documented for the score(s) awarded. If there is a staged evaluation process, then this scoring and documentation exercise should be carried out at each stage. In the Lancashire case the Judge was critical of the lack of reasons that could be demonstrated for the decisions taken at moderation. The Judge stated that "although the panel reached consensus on scores, there was not necessarily or even probably congruity of reasoning that led each evaluator to subscribe to the consensus score for the question." It is imperative that a

contracting authority is able to justify the scores it has given and the decision that it has made. If it can't, then the process is open to challenge.

While it may not be mandatory (depending on the process followed) that all the moderators agree on all of the reasons for awarding a particular score, it should be possible from the evaluation notes to understand the basis on which the moderators arrived at a particular score. In this case, the Judge was satisfied that the “notes do not provide a full, transparent, or fair summary of the discussions that led to the consensus scores sufficient to enable the Trusts to defend their rights or the Court to discharge its supervisory jurisdiction.”

Over the last year it has become clear to us from our national experience of procurements in the health and social care sectors (and more widely across the public sector) that procurement processes are sometimes falling short in terms of the level of audit trail that would be required by the Court in the event of a legal challenge. Hempsons' specialist, integrated procurement and litigation teams can utilise our significant first-hand experience to guide you through these thorny issues, working with our clients to challenge defective processes.

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Andrew specialises in procurement law, acting for both contracting authorities and bidders. He utilises the knowledge gained from acting for clients on both sides of the fence, to provide pragmatic advice on running both defensible procurement processes, and also to challenge defective processes for bidders.

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 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, Manchester, Harrogate 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/>



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