THE GOOD NAME OF CHARITY

A view from the charities bar: the third instalment of a regular series by Matthew Smith, Maitland Chambers, counsel specialising in charity law and practice.

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For many years the Charity Commission (Commission) has invoked the concept of a charity's reputation when advising charity trustees how to act or when criticising their conduct. Its guidance on serious incident reporting includes reputational damage as within the scope of the regime. In 2013, the then Chief Executive of the Commission published an article on protecting charity reputations (see *Charity Commission: Protecting your charity's reputation (13 July 2013)*). The "good name" of the charity was prayed in aid by Mr Justice Lightman in the RSPCA's fox hunting litigation (*RSPCA v Attorney General and others [2002] 1 WLR 448* at 42).

But is there reason to think that the concern to protect a charity's reputation has itself become the source of some of the problems with which charities are now contending?

It is widely recognised today that many charities have (at least historically) been involved in covering up serious forms of abuse. Of course, the criticism is often made that, in those cases, the charity was protecting the perpetrator. However, there are many cases where the charity trustees no doubt genuinely thought that protecting their charity from scandal was part of their function and that it dictated an attempt to hush up things which should not have happened. Viewed through this prism, the fact that a wrong-doer might repeat their offence in the employment of another charity was not the concern of the charity trustees of the charity glad to see the back of the offender: their concern was to protect the reputation of their own charity.

Under the general law, there is no obligation to report a crime (with notable exceptions relating to issues such as money laundering and terrorism). In the absence of a positive obligation to report, and given the potential consequences of adverse publicity, it is easy to see why charity trustees have erred on the side of keeping quiet.

Following the revelations of recent times, there can hardly be any charity trustee who now subscribes to that view in connection with allegations of abuse. But has that change in attitude been brought about by anything other than a realisation that, in the court of public opinion, the cover-up can often be worse than the crime? In other words, might the reason that charity trustees now go public upon discovering a scandal simply be because they know that a failed cover-up would be worse for the charity's reputation than being open about the problem?

It seems deeply unsatisfactory to articulate the obligation of charity trustees in cases of serious wrong-doing and crime simply in terms of reputation management. The logical consequence of such an analysis would seem to be that one should disclose pro-actively if there is a chance of the matter becoming public but that one should cover up if there is decent chance of getting away with it. That cannot be the law.

Of course, for the last few years, the Commission's serious incident reporting regime has gone some way to addressing this issue. But even that process has its limits. The reporting of incidents under that regime is encouraged as a matter of good practice. But, in terms of legal obligation, the only statutory duty on charity

trustees is to file an annual return with the Commission (which cannot now be done without answering a question about serious incidents). That obligation only strictly speaking applies once a year and it only applies to registered charities required to file an annual return (namely those with an income exceeding £25,000 in the relevant financial year).

There is reason to suppose that the charities which are subject to serious incident reporting are under-declaring the problems they encounter:

- Even in the depressingly familiar context of safeguarding, it seems unlikely that full disclosure is being made today. The Commission recently revealed that it received 1,023 serious incident reports concerning safeguarding in 2016/17. The police were reported to be shocked. To some of us in the sector, that still sounds like a serious under-estimate.

- The figures about financial and serious governance failures are much worse. Reported fraud in the charitable sector is extremely low compared to other sectors. Few seasoned advisers would think that this is because fraud is extremely rare in the charitable sector: under-declaration is rife. But, again, concerns about reputational damage (and, in particular, losing the support of donors) weigh very heavily on the minds of charity trustees when considering how to respond upon discovering a fraud.

Serious governance failures are probably even less likely to be reported to the Commission – unless or until they give rise to more tangible problems.

So many trustees continue to keep quiet about wrongdoing – and even if they disclose those matters to the Commission, they do so expressly on the basis that the disclosure is confidential. This necessarily limits the efficacy of the disclosure.

One possible means of addressing this conundrum is to start to recognise that charity trustees owe a duty to charity at large. Just as a trustee of a private trust has a duty to balance the interests of the life tenant against the remaindermen, should not the charity trustees of a charity balance the interests of their own specific charitable purposes against the interests of wider charitable purposes? After all, charity property is (at least in theory) dedicated to charitable purposes in perpetuity and, viewed in that way, every individual charity is a cy-près scheme waiting to happen. Something of this idea can perhaps be seen in the Court's hostility to allowing one charity to sue another (see *British Diabetic Association v Diabetic Society Ltd [1995] 4 All E.R. 812* at 816e).

The Commission has always fought shy of this concept (although it would have had considerable advantages for the basis of its regulatory engagement in some high-profile cases in recent years, such as the Cup Trust case, see *Legal update, Charity Commission decision to open inquiry into The Cup Trust upheld*). And it is right to say that its full implications might not yet be entirely clear. But it would at least give charity trustees a conceptual framework in which to consider how to approach the management of their charity's reputations without running the risk of harming other charities in the process or in damaging the charity brand.

For Practical Law's guidance on:

- The serious incident reporting regime, see *Practice note, Duties of charity trustees: an overview: Reporting serious incidents.*

- The Commission's regulatory powers, see *Practice note, Charity Commission inquiries and regulatory powers: overview.*