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# Charities and Social Enterprise Newsbrief

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# Welcome

Welcome to the Spring/Summer 2023 issue of Hempsons' Charities and Social Enterprise Newsbrief.

For chief executives looking to plan for this year, the strains for many of those managing charities and social enterprises must seem relentless, and more challenging than last year. Not only are there the continuing impacts of fuel costs and the cost of living crisis which is affecting the recruitment and retention of staff and volunteers, but boards and chief executives are grappling with how they can support the uncared needs of society with tightened resources.

In the midst of all that, there would be a collective groan if the charities sector had to deal with an overhaul of its regulation. So, we start with reassuring the sector that, although there is a new Charities Act 2022, this does not fundamentally change charity law and instead focuses on reducing some of the administrative burdens for charities. We will be providing continuing information to help charities understand how they can best use this.

There are some changes in the regulatory landscape, which those providing public services, particularly in health and social care, should be aware of. We provide an overview of the introduction of integrated care systems and where and how the sector can best engage with these.

There are perennial issues which the sector will always need to address, and which should come to the fore of its thinking where it has no choice but to look at new approaches to delivering its social purpose. We have chosen a couple. Charities and social enterprises should regularly be reviewing their governance and we highlight some areas for improvement. With pressure on resources, and for some services a massive increase in demand, charities and social enterprises should be doing far more to make collaboration work and to extend their horizons for partnerships with the private and public sectors. Our article on collaborations looks at how they can be structured.

Another article reminds employers of the importance of understanding the whistleblowing rights and protection for staff.

Community interest companies are often seen as more lightly regulated and thus easier to operate. Our article highlights an aspect of the statutory asset lock which CIC founders may not appreciate where they intend to run grant programmes out of their trading surplus.

Please get in touch if you would like to discuss any of the issues raised.

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# The Charities Act 2022 **update**

The Charities Act 2022 (the act) received royal assent on 24 February 2022; however none of the provisions contained within the act have yet come into force. The act amends the existing Charities Act 2011; so it is not a complete replacement but amends certain provisions of the existing legislation.

The Department for Digital, Culture, Media and Sport (DCMS) published an implementation table on 13 April 2022 explaining that implementation will be over the next 18 months as follows:

**Autumn 2022**
Changes about payment to trustees for providing goods to the charity, making moral or ex gratia payments within certain financial thresholds, failed fundraising appeals, power to amend Royal Charters and a few other amendments.

**Spring 2023**
Changes about how charities sell, lease or transfer land, greater flexibility to make use of permanent endowment, and a few other amendments.

**Autumn 2023**
Changes to how charities can amend their governing documents and a few other amendments including charity mergers.

The Charity Commission published its first guidance on 4 August 2022 setting out at a high level the changes being introduced in autumn 2022.

At the time of writing of this newsbrief there is no further detail about the act other than what is stated in the legislation. The timetable on the DCMS website is the only indication on timescales for implementation and no exact dates have been given.

We will be providing e-alerts when more details are published.




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# Reasons why you might need to review your **governing document**

A charity or social enterprise's governing document needs refreshing from time to time and even more so following the challenges of the COVID-19 pandemic that has seen virtual meetings become common place and greater scrutiny of how delegation works within an organisation. Whether your governing document is a trust deed, constitution, rules or articles of association, boards should be checking whether any amendments are needed to ensure it is still fit for purpose.

What better way to highlight potential areas of improvement than to share governance issues we have helped clients to address over the past year:

**Failure to undertake governance reviews in the round**
The governing document is the apex of an organisation's constitutional arrangements. Policies and subsidiary regulations and rules hang off that document and must be consistent with it. Where organisations focus solely on these subsidiary documents, without considering them against the governing document, they could end up with well-drafted documents which nonetheless are invalid because they contradict the main governing document. To give a couple of examples, the election process for trustees may not tie in with the composition of the board under the governing document or the governing document already contains rules for dealing with conflicts of interest which is ignored in a new conflict of interest policy.

**Allowing entirely virtual or hybrid general meetings**
Organisations wanted certainty that if key decisions were taken in a general meeting, eg to alter the governing document, they could not later be challenged as invalid because there was no express authority in the governing document to hold the general meeting entirely virtually or as a hybrid. This is particularly an issue for companies where the Companies Act refers to having a "place" of general meeting as regards giving notices. Early on in the pandemic there was legislation to allow general meetings to be held virtually, but that legislation no longer applies. In addition, the Charity Commission has confirmed that charities should only hold meetings virtually where their governing document permits them to do so.

**Confusion over the role of the wider membership**
Some organisations, which have a wider membership than the trustees, have questioned the role of members. They have evaluated whether it is appropriate for the organisation to have members with constitutional rights, and in particular voting rights (and indeed whether the membership is interested in them), or for the members to become supporters with no constitutional rights. The relationship of supporters could be changed into one in which, in return for an annual subscription, they receive certain benefits from the organisation. A realignment of how an organisation works with its members and supporters can be triggered by the members' lack of interest in Annual General Meetings (AGMs) and decisions taken at them.

Typical constitutional membership rights can include the right to elect trustees, approve changes to the governing document and, sometimes, to remove trustees.

**Confusion over split of responsibilities between the members and the trustees**
The governing document gives trustees and directors responsibility for the control and management of the organisation's affairs.

Where there is a wider membership, the powers of members are generally limited by those conferred upon them by statute or the governing document. However, there is a particular provision which can cause friction between the members and the board. That is a power written into the governing document

which would allow the members to pass a resolution at a general meeting giving directions to the board which they must follow. For boards, that can raise serious concerns if they are being directed to change the strategy or do something which would be in breach of their duties as a trustee or director. Boards may not feel it appropriate that there should be such a restriction on their ability to undertake their duties.

However, the decision in *Children's Investment Fund Foundation (UK) -v- Attorney General (2022) AC155* confirmed that members of a charitable company limited by guarantee have a fiduciary duty to exercise their powers for the charitable purposes of the charity. Where members seek to give directions to the board, the way in which they exercise this fiduciary duty could come under scrutiny.

**Moving from a wider membership to a small membership**
The organisation may have decided that its members should become supporters with no constitutional rights. Where the organisation is a company, which at law must have a separate group of members from its directors, the outcome often is the trustees/directors become the only members. This can enable a significant reduction in administration as it removes the need for an AGM. Trustees or directors in the future would be appointed by the board and therefore the appointment process in the governing document would need to be amended.

Sometimes the board will designate an annual board meeting at which appointments are made to mimic the annual cycle of appointments and retirements at AGMs. Also, to ensure the membership does not inadvertently become wider again, membership should automatically be cancelled when someone ceases to be a trustee or director.

**The risk of invalid appointments to the board**
The governing document will normally set out the composition of the board and how people are elected or nominated to it, or whether any are ex-officio.

Sometimes organisational practice has moved over the years away from the stipulations of the governing document, risking trustee appointments being invalid.

It may be unclear from the governing document which process has to be followed for the election or appointment of trustees to be valid and for how long trustees or directors can stay in office. Again, there is a risk of appointments being invalid.

**The need to refresh the board**
Some boards fail to achieve a refresh of skills and experience because the governing document allows trustees or directors continuously to recycle themselves in different roles on the board. Where persons can move from trustee to officer post and vice-versa, the governing document might limit the aggregate period they could serve in any role.

**Confusion over status of different categories of members**
Where an organisation chooses to have different categories of members with constitutional rights, the categories of members, and the rights attached to each category, should clearly be defined in the governing document or subsidiary rules. Often this is not the case, and leads to uncertainty and the risk of challenge when changes are proposed to the governing document.

Firstly, it may not be clear which categories of members are entitled to vote on the resolution. Secondly, if the organisation is a company limited by guarantee, any amendments to the articles of association would be invalid where they vary or cancel rights of a particular membership category and those have not been approved by a separate special resolution of members of that category.

It is another administrative hurdle to arrange for class meetings, in addition to the general meeting, and therefore management needs to be certain whether there are class rights and whether they are being varied. Lack of clarity in the governing document can sometimes make that a very difficult exercise.

**Failure to obtain Charity Commission approval for regulated alterations**
For charitable companies, changes to the objects, dissolution provisions or provisions authorising benefits to members or trustees are regulated alterations which require the prior consent of the Charity Commission. When a new governing document is adopted, companies should check that they are not inadvertently amending any of these provisions because if they do so without Charity Commission consent those changes would be invalid.

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# Too quick **to be a CIC**?

Social enterprises can take a number of incorporated legal forms from charities, not for profit companies, community benefit societies and community interest companies (CICs). CICs are a great option for many social enterprises as a recognised vehicle for an organisation with social purpose allowing greater access to funding. There are CIC model documents available and the process to register a CIC is quicker than registering a charity. However, as the CIC grows and expands, the CIC model does have constraints that may not be considered when starting up. We explore here what happens when the CIC generates surplus and wants to donate those assets.

A key feature of a CIC is the asset lock for both CICs limited by shares and limited by guarantee. The prescribed wording of asset lock is set out in the CIC's articles of association; that wording cannot be amended and applies during the lifetime as well as at the end of the life of the CIC.

The asset lock needs to be worked through in stages. The first question is whether or not the transfer of assets (which includes cash as well as real estate and intellectual property) is for full consideration. If the transfer is for full consideration, then the remainder of the asset lock does not apply and the CIC can proceed with the transfer. The circumstances in which this could apply might be the sale of a property that is marketed and sold at the valuation obtained prior to the sale. Another example would be the loaning of staff time to another organisation for which the CIC receives the full reimbursement for the cost of those staff being away from the CIC.

It is when the CIC wants to do something at less than market value that the implications of the asset lock really "kicks in". Less than market value could be the loan of staff time to another organisation for free or at a lower rate than it costs the CIC, or it could be the donation of cash to another organisation. In those circumstances the CIC is only permitted to make such a transfer:

1. to another asset locked body (mainly another CIC, charity or community benefit society) with the consent of the CIC Regulator; or
2. where it is made for the benefit of the community and the recipient is not an asset locked body.

"For the benefit of the community" is only relevant when making a donation or transfer at an undervalue to some other individual, group or organisation that is not an asset locked body (so not a CIC, charity or community benefit society); a "community beneficiary" could be, for example, a non-charitable company limited by guarantee or non-charitable unincorporated association.

So if a CIC were to want to make a donation or provide services at an undervalue to another CIC or charity it requires the consent of the CIC Regulator; this could be as a one off request or the articles of association could be amended to name an asset locked body that the CIC will donate its assets to during the lifetime of the CIC and at dissolution. If a CIC were to make regular donations or provide services at an undervalue on a regular basis then the best option would be to name that charity or CIC in the articles of association with the CIC Regulator's consent; the CIC might even want to set up its own charity or subsidiary CIC.

However, this approach would not work where the CIC plans annual grant programmes where the recipients could be many and vary from year to year. Where the grants go to multiple asset-locked bodies it would not be practical to obtain prior consent from the CIC Regulator to all the grantees.

Transfers for less than full consideration must be recorded as part of the CIC annual report to the CIC Regulator but this is not the same as obtaining the required consent prior to undertaking the transfer to an asset locked body.

The reality of the asset lock is often not seen until the CIC starts to generate a surplus. When a CIC reaches that point it may wonder whether the CIC model was the most appropriate given the asset lock can be more restrictive than that of a charity for running a grant programme. So before you rush to set up a CIC think carefully about how you may want to spend surplus in the future.

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# The Health and Care Act 2022

**Opportunities for providers of social support services in the third sector**
The Health and Care Act 2022 (the act) has introduced significant changes to the commissioning of primary care in England and Wales. In this article, Ross Clark explores what the future holds for primary care and how this presents opportunities for the providers of social and support services in the charities and social enterprise sectors.

**What has changed?**
The Health and Care Act 2022 has introduced integrated care boards (ICBs) to replace CCGs in the commissioning of health and social care services across the whole integrated care system (ICS), assisted by integrated care partnerships (ICPs) advising at a strategic level. One significant change here is the abolition of competition between NHS bodies, meaning that ICBs will be able to award contracts to other NHS bodies (such as an acute sector Foundation Trust) without the need for a tender process.

**It's all about integration**
The real underlying challenge is the integration that is required to deliver on the objectives of the new system and how, and where, those in the charities and social enterprise sectors can be involved. This can be considered within the three distinct levels of the ICS:

- **system (whole of ICS):** at this level the focus is likely to be on horizontal integration between NHS trusts to form pan-ICS hospital trusts or at least to integrate service provision
- **place (large city or borough council footprint)**: this is where vertical integration is likely to occur, with "place-based partnerships" (provider collaboratives) agreeing how secondary care NHS trusts (ie hospital care) can integrate with the delivery of primary care, mental health, community nursing, social care and the services offered by charity and third sector organisations
- **neighbourhoods (Primary Care Network ("PCN") footprint):** this is likely to be the area that is the "engine room" for the delivery of integrated care to patients and will also see a need for horizontal integration between primary care and the other community based providers of health, social and support services

This is not going to be easy. As GPs have found when seeking to merge or where they have come together within PCNs, it takes time to build trust and confidence when working together, and this is the cornerstone of good and productive integrated working. Trying to expand the success of PCNs into a wider collaboration with a much broader and more diverse range of providers is a real challenge. And the pressures from the pandemic and the workforce crisis only exacerbate the difficulties of successful integration at neighbourhood level.

**How will this affect general practice?**
The 2022 publication by Policy Exchange "At Your Service", with a foreword by the then Secretary of State for Health, gives an insight into the possible direction for general practice. In looking at the role of general practice in the future, this publication proposes the reform of general practice, the phase-out of the small-scale independent contractor model across much of general practice, a resultant move to a salaried or employed structure for GPs, in a model predicated upon 'layers of scale'.

In particular, the suggestion of GPs employed by "scaled providers" suggests the vertical integration of general practice within NHS trusts, unless general practice can build its own at scale models. These are only proposals from a "think tank" and are not inevitable but the structure of the ICSs under the Health and Care Act 2022 does seem to provide a framework for this to take shape.

**So what does this mean for the charities and social enterprise sectors?**
The starting point is where to focus and this depends on size and geographical reach. Sector umbrella bodies would seem the ideal organisations to address national issues with NHS England. Boards of national charities and social care organisations can seek to gain influence with the ICB at ICS level but for most providers integration at place and neighbourhood levels will be the focus.

At place level, the emerging "place based partnerships" (PBPs) will be the structure within which integrated care delivery will be determined. It may be difficult to identify these PBPs, and who are influential within them, but the local acute trust and a place level GP entity (such as a GP federation) are likely to be key players.

The focus at neighbourhood level is easier to identify as integration will be centred around PCNs, and the ICS website (ie what was the CCG website) should in most cases identify the PCNs operating within the ICS. This is where charities and social enterprises are likely to have the greatest opportunities to be involved in the delivery of integrated health and care services. The structure for integrated collaboration already exists, as PCNs are governed by a Network Agreement. This enables charities and social enterprises to be admitted as non-core members of the PCN (the GP practices being known as core network practice members).

The opportunities for charities and social enterprises come from the services and support they can offer at place or neighbourhood level, what this contributes to a holistic health and care offering and how that can reduce pressures on other providers, particularly GPs. Accordingly, those charities and social enterprises with a local (ideally Neighbourhood) presence will have the most to gain.

There is significant change underway as a result of the act but, whilst it may bring challenges, it also presents opportunities. With the pressures on primary care and the focus on an integrated health and care offering, charities and social enterprises are perfectly placed to take advantage of these.

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# Collaborating

## Where there is a need, is there the will?

Many charities and social enterprises are looking for different ways to meet the growing need for their services, or changes in user expectations, in the face of uncertain or reduced resources. This is often at the same time as funders and commissioners are changing the ways they work with the sector. Collaboration might be an option.

To collaborate can seem daunting. However, in your case, could commonly perceived barriers be more imagined than real? An initial reaction might be that collaborations (often called "partnerships") are complex to structure, particularly as "collaboration" has no legal meaning. This article will guide you through some of the possible structures.

**Think broadly**
Collaborations can range from one-off to long-term projects. You should keep an open mind whether greater impact could be achieved if you work with public or private sector organisations as well as charities and social enterprises. For charities collaborating outside their sector, they need to be aware of the Charity Commission "guidance for charities with a connection to a non-charity", which focuses on how the risks from those relationships could be managed.

However, an added challenge for collaboration by charities and social enterprises is the need to operate within the constraints of the organisation's governing document, for example ensuring that the intended activity furthers the objects and will not expose the organisation to spending funds outside its objects where a partner defaults. If you are a community interest company (CIC), the asset lock requires careful consideration to ensure it is not breached when the CIC provides funds or resources to others within the collaboration.

We set out here a few potential structures for collaborations.

**"Simpler" form of contract**
The most straightforward way to document a collaboration is by a contract. This may start with a memorandum of understanding between the parties (which may only be partially legally enforceable), which is often followed by a formal written agreement containing more detail. The challenges are to find common ground and a shared purpose for the collaboration, which is why agreeing a memorandum of understanding or heads of terms to start with can be a more accessible way to capture the fundamental points.

Here are a few pointers of issues to consider (which generally will apply to all collaborative structures):

1. What are the joint objectives of the collaboration?
2. What is the duration of the collaboration?
3. How will it be funded and resourced between the parties?
4. Will any staff or intellectual property be shared between the parties?
5. What is the exit strategy if any party wishes to withdraw early?
6. How will you manage poor performance by a party?

**More "complex" contracts**
The structure will often be dictated by a funder or commissioner, who will only want to contract with a single party. Thus, one party would take the main contract as the prime contractor and sub-contract to each of the other parties in the collaboration the parcel of services to be provided by each.

The prime contractor would have the direct relationship with the funder/commissioner and have overall control of the contract. However, that carries the risk of being responsible for any defaults by the sub-contractors. Before the delivery start date, the prime contractor should ensure written sub-contracts are in place. However, the usual contractual protections of indemnities by a sub-contractor for their default, or termination for a sub-contractor's default, could be of little worth if the sub-contractor has no value or there is no alternative provider of the services.

From the sub-contractor's perspective, they have less control of the relationship with the main funder/commission, but in a well-drafted sub-contract their risk would be limited to their own areas of services. Their main concerns could be around whether they are receiving a fair allocation of the main contract price and work and that they will get paid promptly for work they have done.

Operationally, a series of sub-contracts could produce silo services which would not be the best outcome for users and therefore often a joint working agreement is put in place between the prime and sub-contractors to deal with sharing of information, maintaining service standards and dealing with poor performance.

**Special purpose vehicle**
This option can be used, for example, for a consortium set up to bid for a contract and also where there is a pipeline of future tenders. In order to minimise the risk to each of the organisations, they can set up a company (known as a special purpose vehicle) which is the legal entity that enters into the contract with the main funder/commissioner, in order to ringfence risk within that company. The most suitable company form would need to be determined, but that could be a company limited by guarantee or shares, CIC or even a charity. The organisations would be members or shareholders of the special purpose vehicle, normally with rights to nominate directors of its board. They would also hold sub-contracts from the special purpose vehicle. If the special purpose vehicle is relying on administration services from one of the partners, there would also need to be a support services level agreement.

As a new special purpose vehicle would have no trading history, it would be essential to check with the funder/commissioner that it would be eligible to bid relying on the trading history of the partners.

A special purpose vehicle can provide a clear focus for governance as it would have directors or trustees with statutory and legal responsibilities, as long as the objects are clearly stated. There would need to be a bespoke constitution and/or members/shareholders agreement to set out the responsibilities of the parties. The parties would want to do a due diligence on the way the special purpose vehicle purpose is set up to ensure that their risks are limited and that the ringfencing would not be broken by a call for further funds or indemnities.

**How well do you know the other organisations?**
Whatever legal structure or contracting route you decide, you need to ensure that there is communication between the parties throughout the process. This will, of course, be a fundamental part of any collaboration. Getting to know the other organisations is key to ensuring that you can work together and build up trust. Part of this process is due diligence, which may be undertaken formally by solicitors and accountants, but equally as important is the work undertaken by the trustees and staff to get to know each other to enable a shared purpose and approach, and acceptance of shared values, when jointly delivering the work.

Knowing your partners could include looking at their:

- financial health
- quality of service
- reputation
- rights to make available project assets
- customer care
- complaints history
- values and vision

**Full Merger**
This article does not explore mergers, but observes that collaboration can sometimes be a first step towards a merger. A successful collaboration can be a great way to build up trust, and to learn more about how the other organisation operates and lives its values than can be gleaned from a formal due diligence process.

However, collaboration is not an inexorable slide to merger. Under a collaboration, the parties remain separate and independent organisations and therefore retain their sovereignty. A merger could only happen if and when the parties formally agree to do so.


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# Whistle-blower **protection**

## What every charity and social enterprise employer should know

**Introduction**
The Public Interest Disclosure Act protects workers who report malpractice from detriment or dismissal. The types of concern that can give rise to whistleblowing are issues which are close to the hearts of many charities and social enterprises, such as safeguarding, physical and financial abuse, and fraud. Nevertheless, awareness of whistleblower protection among trustees and management is not always as high as it should be. This is a cause for concern, given that the number of whistleblowing claims brought in employment tribunals has grown year on year and at a faster rate than tribunal claims in general. Furthermore, there is anecdotal evidence of whistleblowing claims increasing as a result of the COVID-19 pandemic, especially in relation to staffing levels and PPE.

There is no financial cap on the compensation that can be awarded by employment tribunals in whistleblowing cases, and no requirement for a claimant to have minimum period of service to bring a claim. This makes whistleblowing particularly attractive for would-be litigants, even where the link between the disclosure and their complaint appears tenuous.

There are two levels of protection for whistleblowers, claims for which can be brought in an employment tribunal:

- dismissal of an employee for the reason, or principal reason, of being a whistleblower is automatically unfair
- subjecting a worker to any detriment on the ground that they have made a protected disclosure is prohibited

The definition of "worker" for whistleblowing purposes is relatively wide but neither volunteers, non-executive directors (NEDs) nor trustees qualify for whistleblower protection unless they are also workers. This is difficult to square with the duty imposed on charity trustees to report concerns to the regulator under the Charity Commission's serious incident reporting regime. The Charity Commission recognised the importance of encouraging disclosures from volunteers when it amended its policy in 2019 to begin accepting whistleblowing disclosures from volunteers, but that still gave them no statutory protection from detriment.

New EU legislation expanding protection to volunteers and trustees will not apply in the UK due to Brexit, but it is possible that whistleblowing protection will be similarly expanded here in the future.

**Recognise when whistleblower protection applies**
Whistleblowers qualify for protection if they make a qualifying disclosure of information about:

- criminal offences including fraud
- breach of a legal obligation
- miscarriage of justice
- danger to health and safety, including safeguarding
- damage to the environment
- the deliberate concealing of information about any of the above

The categories of wrongdoing overlap to a certain extent and, taken as a whole, are extremely wide. The wrongdoing can be past, present, prospective or merely alleged. It may concern the conduct of the employer, an employee, or a third party.

To qualify for protection, a worker must have a reasonable belief that the information disclosed tends to show one of the six relevant failures listed above. They must also have a reasonable belief that the disclosure is in the public interest. Finally, the disclosure should be made via the appropriate channels – workers are expected to report using internal procedures initially or to the Charity Commission or another regulator. Wider disclosures, such as to the media, will only qualify in very limited cases.

Determining whether a particular disclosure meets the definition of a protected disclosure is not always straightforward, so it is inadvisable to ignore a disclosure on the basis that it does not meet the criteria. There is no requirement for a whistleblower to make the disclosure in good faith (ie altruistically) to gain protection. This means that a serial whistleblower, or someone who raises a concern for self-preservation or motivated by a grudge, is still protected.

A protected disclosure can be more difficult to recognise where it is raised informally or alongside other issues. For example, an employee may raise concerns by way of a grievance (or as one aspect of a wider grievance). Contrary to misconceptions sometimes held by employers and managers, to benefit from whistleblower protection, there is no requirement for an employee to follow their employer's policy in raising the concern, to use terminology associated with whistleblowing or even to recognise that they are making a protected disclosure.

**Don't underestimate the extent of whistleblower protection**
If the criteria are fulfilled, then the disclosure is a "protected disclosure" which means the whistleblower is protected from dismissal and detriment. That does not make them "bullet proof"; rather, it means that they can bring employment tribunal proceedings if they can make a connection between detrimental treatment and making the disclosure.

The detriment may be imposed by the employer itself or by a fellow worker, and in the case of the latter, the employer will usually be held liable for the actions of its staff and agents acting with its authority, whether or not the detriment took place with the employer's knowledge or approval. An employer would only have a defence to vicarious liability if it took all reasonable steps to prevent the detrimental treatment.

To utilise that defence, it would be vital to be able to show that staff in general, and the person accused in particular, have received whistleblowing training. Comprehensive, regular training where attendance is recorded helps to foster a culture in which concerns are welcomed, but it also means that an employer is far more likely to be able to show that it has taken reasonable steps to prevent staff from subjecting colleagues to detriment. Training should remind managers that fellow workers and managers can be named as respondents in employment tribunal proceedings and held personally liable for the detriment.

**Be ready and receptive to deal with disclosures**
Information gained from staff, volunteers and other stakeholders speaking up can be a highly effective means for charities and social enterprises to manage risk and improve services. Check your organisation is following best practice by:

- putting in place an easily accessible whistleblowing policy, or appropriate written procedure to deal with whistleblowing
- making clear that your policy and procedure apply to NEDs, trustees and volunteers (even though they do not benefit from legal protection), making clear that such individuals are expected and encouraged to raise concerns
- raising and maintaining awareness among staff of the policy
- developing a culture of openness and accountability where staff feel safe to make disclosures, know who to approach, and are confident that they will not face retaliation
- offering support to staff who raise concerns and keep them informed about action taken to address them
- providing training on raising and recognising concerns
- appointing a freedom to speak up guardian or whistleblowing champion to encourage raising concerns and provide confidential advice and support to whistleblowers
- reporting concerns to the Charity Commission where appropriate

**Sources of further information**
The Whistleblowing Commission, established in 2013 by the charity Public Concern at Work (now known as Protect) has produced a Whistleblowing Code of Practice which sets out best practice for whistleblowing policies, appropriate training in handling whistleblowing complaints and review and monitoring of whistleblowing in the workplace.

BEIS has published Whistleblowing: Guidance for Employers and Code of Practice which explains employers' responsibilities with regard to employees who blow the whistle.

NCVO has a range of resources and case studies aimed at charities on their website.

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# Lease or **licence?**

A topic we often get asked about from charities is how best to document a short-term occupancy of a property – should we lease or licence the property? A licence can seem a quick, easy way to grant a right to occupy property, but problems can be created by its inappropriate use. A lease may be considered as a more "formal" arrangement, but is its use always necessary? To determine whether a lease or licence is more appropriate for a particular occupancy, let's look at some first principles.

**A lease** is the grant of a right to the **exclusive possession** of land for a determinable period of time. Note "exclusive possession": the key element of a lease in this context. Someone is said to have exclusive possession if they can enjoy the property as though they were the landowner, and exclude both the landlord and third parties from the property. A lease therefore creates an interest in land, a licence does not.

**A licence** simply gives permission to a licensee to do something on the licensor's property that would otherwise be an unlawful trespass. It is therefore a personal contractual right or permission and does not give the licensee the right to exclude the licensor from the property.

**A tenancy at will** is another possibility for a short-term occupancy arrangement and can be very similar to a licence. A tenancy at will exists where there is a tenancy on terms that either party can bring it to an end at any time. It is again a personal relationship between the original landlord and tenant, and cannot be transferred. It is useful where parties are in negotiation for the grant of a lease and want to document a short-term occupational arrangement whilst the lease is negotiated and completed. Great care is needed as if not properly drawn up it can instead create a periodic tenancy, which can have serious consequences when it comes to terminating the arrangement.

**Labelling a document a lease or a licence** has little bearing on what it actually is: if exclusive possession is granted by the arrangement a lease can come into existence. Cases over many years have debated the distinction. The leading case is a decision of the House of Lords in Street v Mountford, 1985. To summarise: *"If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence". That decision has been reinforced in recent cases, the effect is "if the arrangement has the characteristics of a lease then it is a lease, irrespective of what you have called it"*.

**But why is all this important?**
The crucial issue is the occupier's **security of tenure**. When properly drawn up, a licence and a tenancy at will do not give the occupier security of tenure. Generally speaking, a tenant who occupies property under a lease for the purposes of its business has statutory rights to renew its tenancy at the end of the term. The landlord can only oppose that renewal on certain limited statutory grounds.

A lease *can* be granted that does not give the tenant security of tenure, but this can only be done either by "contracting out" the lease from the security of tenure provisions **before the lease is granted**, or by granting a lease that is exempt from those provisions (which, in most cases relevant to occupation by a charity, really means only granting certain tenancies for not more than six months).

This can make licences and tenancies at will seem attractive when the occupier wants a short-term arrangement.

**What happens if a tenancy inadvertently arises from the arrangement?**
A lease can only be contracted out of security of tenure **before it is entered into**. If the parties believe they are only entering into a licence they will not go through the statutory required procedure to contract that arrangement out of the security of tenure provisions. If it is subsequently held to be a tenancy, because the occupier actually enjoys exclusive possession, the tenant will have security of tenure, making it difficult for the landowner to terminate the arrangement.

**Can a licence ever be safely used?**
It might seem not, but remember, a court will look at all the landowner's rights and powers when determining whether an arrangement contains a grant of exclusive possession. Whilst they are not conclusive, here are examples of provisions in documents that courts have interpreted as meaning only a licence had been granted:

- provisions preventing the occupier from interfering with the owner's right to possession and control of the premises. Such a provision is inconsistent with the grant of exclusive possession
- provisions allowing the landlord to make alterations to the premises. That would require a significant degree of physical control over the premises inconsistent with an occupier's exclusive right to possession
- the absence of a right for the landowner to enter the property. If it is a licence the landowner retains control of the premises at all times, so no need for a right to enter
- provisions entitling the owner to require the occupier to transfer to other property selected by the owner. This has been held to negate the grant of exclusive possession
- provisions that restrict the use of the property to certain hours or only part of a day

These can all be used to drive a document towards being a licence, but if in reality the occupier enjoys exclusive occupation, to the exclusion of the owner, then no matter how many are used, the arrangement will have been the grant of a lease.

**Adverse tax consequences** can also arise from inadvertently creating a tenancy. Tenancies at will and licences are exempt interests, outside the scope of SDLT (LTT in Wales), so no SDLT or LTT is payable, and no return is required. However, the grant of a lease is not an exempt interest. If the arrangement is in fact a lease, it may be subject to SDLT or LTT.

**Adverse VAT implications** may also arise if not properly considered and dealt with in the arrangement.

**Conclusions**
A lease gives a tenant certainty as an occupier, and the landowner a secure period of income. If the lease is properly contracted out (or is of a certain type for not more than six months), the landlord will be entitled to possession of its property at the end of the term, with protection from spurious claims from the tenant. If flexibility is required, a mutual rolling break clause can be used.

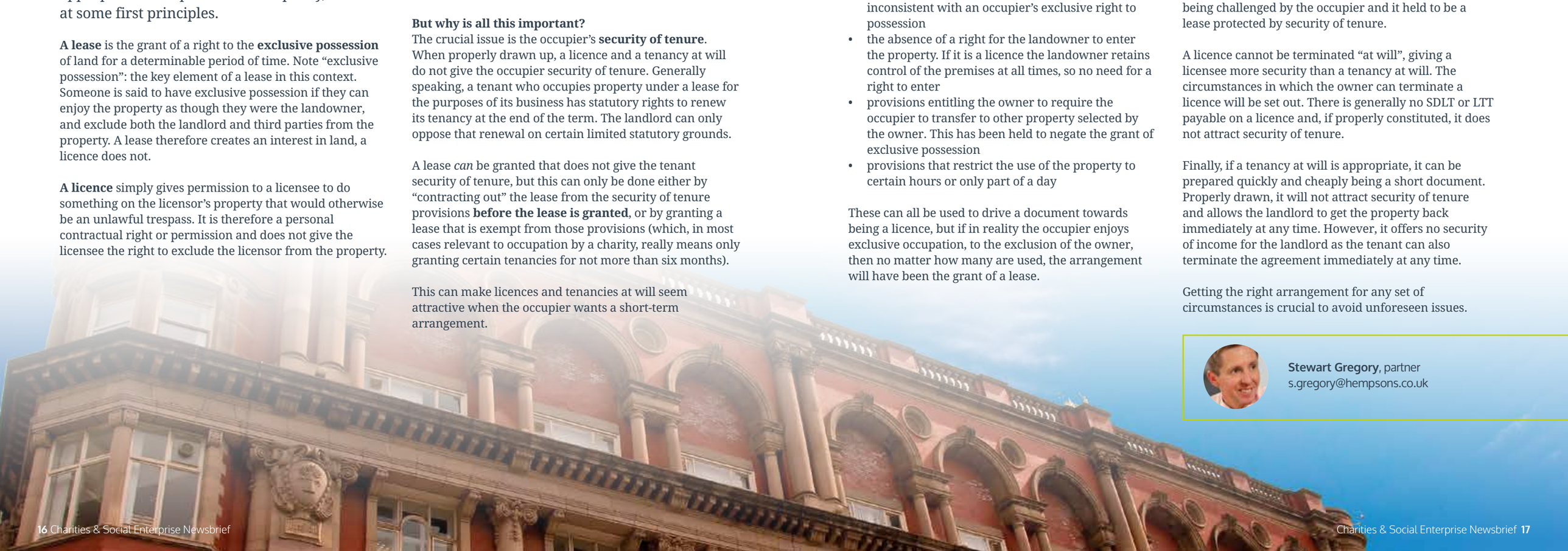
Leases usually take longer to negotiate than licences, costing more to produce.

No matter what the document is called, if exclusive possession is granted, the owner risks the arrangement being challenged by the occupier and it held to be a lease protected by security of tenure.

A licence cannot be terminated "at will", giving a licensee more security than a tenancy at will. The circumstances in which the owner can terminate a licence will be set out. There is generally no SDLT or LTT payable on a licence and, if properly constituted, it does not attract security of tenure.

Finally, if a tenancy at will is appropriate, it can be prepared quickly and cheaply being a short document. Properly drawn, it will not attract security of tenure and allows the landlord to get the property back immediately at any time. However, it offers no security of income for the landlord as the tenant can also terminate the agreement immediately at any time.

Getting the right arrangement for any set of circumstances is crucial to avoid unforeseen issues.





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# About Hempsons

Hempsons is a leading national law firm specialising in health and social care, charities and social enterprise. Our highly experienced specialist lawyers provide cost-effective solutions for NHS trusts and commissioning bodies, GPs, dentists and other primary and social care providers and charities across the UK. We provide our clients with support down to the last detail, whether the issue is big or small, complex or simple. With offices in London, Manchester, Harrogate, Newcastle and Southampton, we are your ideal legal partner. You can find details of our services, our lawyers and their specialisms on our website: **www.hempsons.co.uk**

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