

Unwelcome donations

When can charities refuse or return donations or other items? Neasa Coen explains the law



IN BRIEF

► This article looks at charity law issues in connection with the acceptance and return of donations.

The Charity Commission produced guidance in March 2024 on the acceptance, refusal and return of donations (see [Bit.ly/3VtDUch](https://bit.ly/3VtDUch)). This is the first formal guidance it has produced on the topic. The twin issues of refusal and return have been of interest to charities in recent years, as a result of increased focus on the commercial activities of philanthropists, greater expectations around standards of business and a heightened concern with sustainable business practices, with a particular focus on equality and climate change.

Examples of cases where donations have been refused by UK charities include the National Portrait Gallery's agreement with the Sackler Trust not to proceed with a large gift from the trust, and the refusal by Save the Children of a £750,000 donation from Neptune Energy.

High-value items, including artistic works, have also been returned to their countries of origin. See, for example, the return of a Benin Bronze by Jesus College, Cambridge to Nigeria's National Commission for Museums and Monuments in 2021. The Presidents Club case in 2018 also highlighted the issue of the return of donations.

The legal backdrop to refusal of donations stems from case law, with the main case being *Harries v Church Commissioners for England* [1993] 2 All ER 300, [1992] 1 WLR 1241. The judgment confirmed that charities were required to maximise their assets unless to do so would hinder the charity from pursuing its purposes or would discourage future donors from giving to the charity. This means, by implication, that a donation cannot be refused purely on the basis of reputational concerns but requires consideration of how reputational issues might be quantified so as to show a hindrance to the charity in pursuing its purposes or in encouraging future donors.

The Charity Commission's guidance considers return and refusal of donations in

a range of circumstances, and includes those listed below.

When & where necessary?

Examples cited include: donations which come from illegal sources or with illegal conditions attached; donations from a donor who lacks capacity to donate; donations where the donor cannot legally give (eg, because he/she does not own the property donated); and donations which are accompanied by an obligation to return the funds.

Ex gratia payments

The ex gratia regime allows trustees to return or waive the charity's rights to charity property (of whatever nature) where they could reasonably be regarded as being under a moral obligation to do so.

The case underpinning the law is *Re Snowden* [1969] 3 All ER 208, [1970] Ch 700, where moral obligations were considered against the backdrop of a legacy dispute where a testator did not intend the charity to benefit to the extent it had. In that case, a moral obligation was implied because the monies had been received by the charity as a result of an oversight or legal technicality.

Where there is a failed appeal

Generally speaking, it is possible to draft appeal paperwork with sufficient flexibility so that it allows funds to be retained by the charity in circumstances where a particular appeal fails. However, there are circumstances when charities raise funds without expressly considering the possibility of a failed appeal. In those circumstances, it is sometimes necessary for the charity to return the funds, unless Charity Commission consent to retain the funds for a different purpose can be obtained. This might occur where donations to the appeal are surplus to the funds needed to carry out the purpose, donations to the appeal are insufficient to carry out the purpose or the appeal, or there is a change in circumstances meaning that the charity cannot carry out the purpose of the appeal (for example, it is unable to purchase the land required to construct a building).

Best interests

The Commission's guidance states that a charity can refuse or return a donation if it is in the charity's best interests. This appears to be the Commission's statement of the principles set out in *Harries v Church Commissioners*, which contemplated the refusal of donations in circumstances where it would hinder the charity in carrying out its purposes or where it would discourage donors from giving. The 'best interests' framework certainly encompasses the two situations described in *Harries*, but it is wider, and to that extent it is difficult to contemplate whether it allows a broader range of circumstances to be considered in permitting the refusal of a donation.

When making a decision to return a donation based on the charity's best interests, the Charity Commission guidance highlights the need to identify the factors relevant to the charity and to have robust evidence to support the trustees' decision-making process. Factors identified by the Commission as being potentially relevant include: the value of the donation; the financial loss associated with refusing or returning it; the risks involving in accepting or refusing the donation and how serious they are; donors'/ stakeholders' views; and reputational damage and how long-lasting the damage might be.

The balancing of the various factors will, in certain cases, be an intricate exercise which will require careful consideration of the surrounding evidence. It is also likely that consideration will need to be given to the weight of evidence, particularly in relation to issues which require consideration of future events, as well as areas which relate to the views of those outside the charity (donors or other stakeholders).

The Commission's guidance contemplates the drafting of a policy on the acceptance, refusal and return of donations. It is of course important that any policy is capable of operating in a sufficiently flexible manner to envisage the changing nature of situations where trustees refuse to accept or wish to return donations.

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