



Moral maze

NEASA COEN OUTLINES
CONSIDERATIONS FOR CHARITIES IN
THE UK WHEN ACCEPTING, REFUSING
AND RETURNING DONATIONS



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In recent years, charity trustees have increasingly had to grapple with issues around refusing and returning donations. This stems from a combination of increasing attention on the commercial activities of philanthropists, higher levels of scrutiny on business, greater transparency in reporting and accounting and an increasing concern with sustainable business (particularly in connection with inequality and climate change).

Refusal of a donation (before it has been accepted by a charity) needs to be distinguished from return of a donation (following its receipt by a charity) as each gives rise to distinct legal issues and considerations.

REFUSAL OF A DONATION

Although charities are not generally subject to anti-money laundering legislation, they are required to comply with the UK *Proceeds of Crime Act 2002* and will need to consider any criminal implications of accepting gifts. However, the charity law issues around refusal of donations give rise to different considerations and, arguably, a greater layer of complexity. Although some charity constitutions may contain a power to refuse donations, trustees still need to take care around exercising those powers. The legal backdrop to the refusal of donations stems from case law (as in *Harries v The Church Commissioners for England*),¹ whereby charities are required to maximise their assets unless to do so would hinder the charity from pursuing its purposes or discourage future donors from giving to the charity.

There is no formal guidance from the Charity Commission for England and Wales (the Commission) on the refusal of donations. The regulator's view is that it does not wish to hinder the discretion of trustees to take decisions against the backdrop of their particular charity. The Institute of Fundraising, however, produced guidance in 2018² emphasising that donations should only be refused in exceptional circumstances. The guidance also highlighted that ethics and values cannot be the decisive factors and that the charity needs to be able to demonstrate that the acceptance of the donation would be detrimental to the achievement of its purposes. This may occur, for example, through the loss of donations from other supporters and funders at least equivalent, over the long term, to the value of the donation, the loss of volunteers whose services would be at least of as great a value as the donation, and the loss of, or inability to recruit, staff.

This means, by implication, that a donation cannot be refused purely on the basis of reputational concerns. Instead, the decision-making process would need to consider how reputational

issues might be quantified in relation to the achievement of the charity's purposes. Practically speaking, it will be challenging for many charities to provide firm evidence to support this.

It is possible for a charity to request an order of the Commission to allow it to refuse a particular donation or to seek advice from the Commission that, in taking a particular decision, it is acting within its trusts. These routes may be helpful in cases that are difficult to assess, where large sums of money are involved or where the trustees fear that a decision may subsequently be challenged in the courts.

RETURN OF DONATIONS

Once a donation has been received it becomes the property of the charity in question. Generally, its return will require the charity to obtain an order of the Commission under the *ex gratia* regime, which allows trustees to return a donation where they can demonstrate that they believe themselves to be under a 'moral obligation' to do so.

In *Re Snowden*,³ moral obligations were considered against the backdrop of a legacy dispute where a testator did not intend the charity to benefit to the extent that it had. In those circumstances, a moral obligation was implied because the monies received were the result of an oversight or a legal technicality. The case law has, therefore, applied the concept of 'moral obligation' against a backdrop that is quite different to one where a donation is being returned because of concerns about the circumstances in which the funds were raised. While it is clear from the case law that a moral obligation overrides the lack of a legal obligation, the test remains unclear when applied against different factual circumstances.

In the current climate, charities should consider having a policy in place for the acceptance, refusal and return of donations. The policy should analyse the circumstances in which it might be acceptable to refuse or return donations; consider the wider context of the making of donations (e.g. donations from vulnerable persons); and provide guidance to staff around the distinction between return and refusal. In drafting such a policy, the key skill will be to ensure that it provides a useful framework while remaining sufficiently flexible to allow consideration of future issues given the evolving landscape in this area.

#UK #CHARITIES

1 [1992] 1 WLR 1241 2 *Acceptance, Refusal and Return: A practical guide to dealing with donations*, bit.ly/3aqNIDY 3 [1970] Ch 700