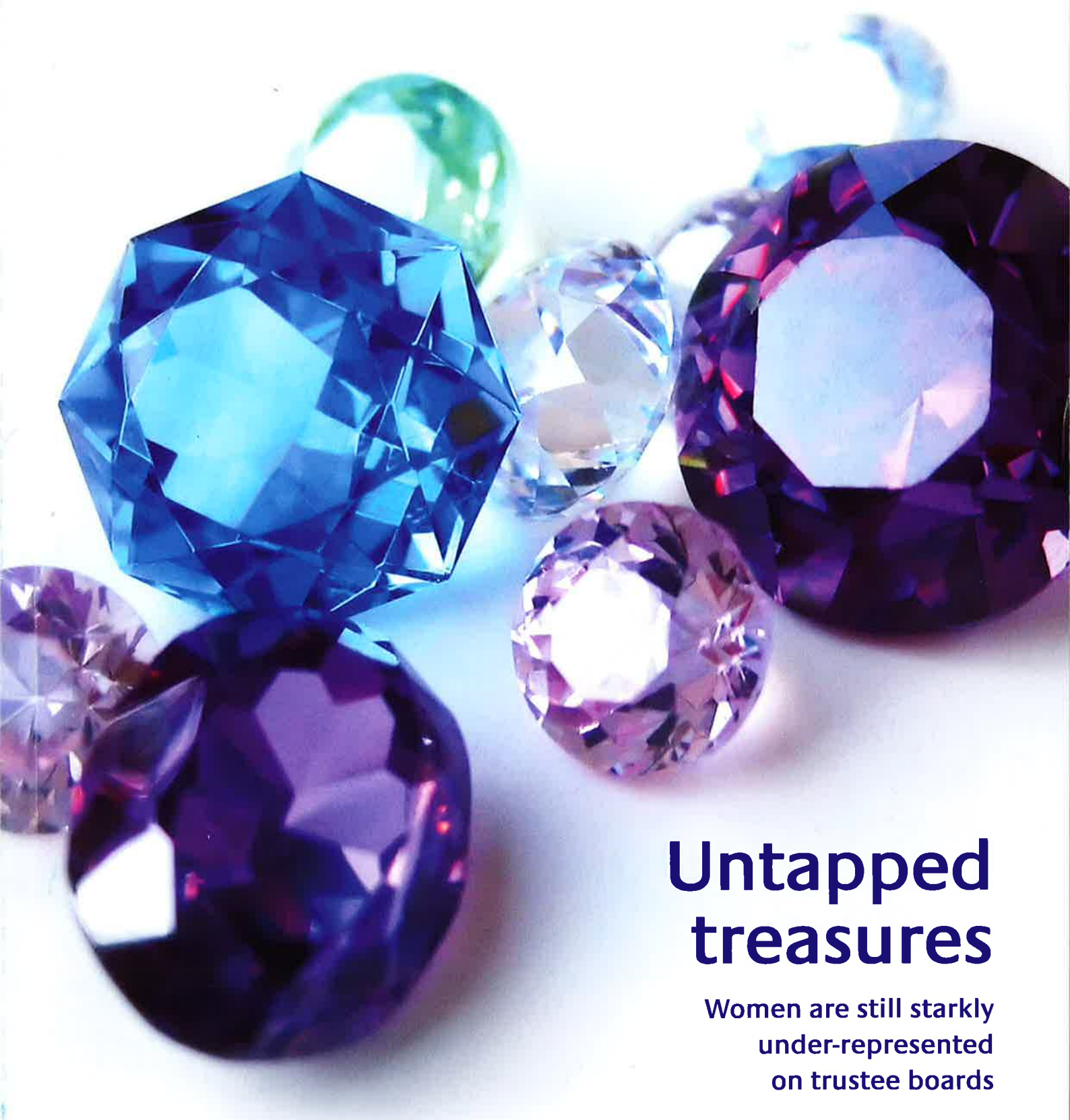


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# CHARITYFINANCE

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The voice of civil society



## Untapped treasures

Women are still starkly  
under-represented  
on trustee boards

in which a person is “performing services” does not matter – they may be an employee, agent or subsidiary, for example. The penalty is up to 10 years in prison, an unlimited fine and/or a ban on participation in EU public procurement tenders.

The guidance identifies six guiding principles for adopting adequate bribery prevention procedures which are:

1. Procedures proportionate to the corruption risk;
2. Top-level commitment to a zero-tolerance policy;
3. Assessment of corruption risk;
4. Due diligence on those performing services for your organisation;
5. Communication of anti-corruption policies both internally and externally (including training of staff where appropriate);
6. Monitoring and review of anti-corruption policies and procedures.

The Serious Fraud Office has indicated that, while having procedures in place is key to any decision to prosecute, they will also be greatly influenced by whether the alleged bribery comes to their attention as a result of self-reporting rather than as a result of an investigation.

The message is clear: with the expected implementation later this year for the offences under the Bribery Act on the one hand, and the limited scope of the prosecuting authorities for leniency on the other, it is essential that charities take steps now to comply with the Act.

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## Vicarious liability definition broadens?

Trustees of charities will be familiar with the legal concept of vicarious liability. The distinctive feature of this type of liability is that a person can be liable for the tort of another without being himself at fault.

If an employee commits a wrongful act, causing injury, then the employer is liable if the act was carried out “in the course of employment”. This is so well-established that it is part-and-parcel of commercial life, a risk that employers assume each time they take on an employee, and in practice employers will take out insurance. However, in a recent case, the *St William’s Group Litigation (Various Claimants v The Catholic Child Welfare Society and Others [2010] EWCA Civ 1106)* involving multiple claims by individuals against a convicted abuser and two religious charities, the Court of Appeal has confirmed that vicarious liability is not confined to the employer/employee relationship.

The spectre of persons being held vicariously liable for acts of others over whom they have no control, where insurance cover may well not be in place, will be of concern to those such as trustees of charities who may find themselves in such a position. Trustees will naturally wish to have a clear idea of the extent of their potential liability, and in the *St William’s* case some doubts have been raised in this area.

### Court of Appeal decision

The main question before the court was which of two charities was vicariously liable for child abuse which took place at a school in the period 1958 to 1990. In the frame were the employer of the staff, a religious charity, but also a second charity, a religious Order of brothers which provided teachers at the school from among its members, who went on to become some of the numerous alleged abusers. The claimants and the employer maintained that the brother-teachers were under the control of the Order while working at *St William’s*. The claimants argued that the Order was vicariously liable jointly with the employer, whereas the employer argued that liability had been shifted wholly onto the Order.

In addition to confirming that vicarious liability is not limited to the employment relationship, the judgment approved previous decisions that vicarious liability can exist as between one member of an unincorporated association and another, and that it is possible for there to be dual concurrent vicarious liability. In other words, two parties could both be vicariously liable for the tort of a third.

However, the court endorsed the finding of the judge at first instance that the Order did not run the school and it did not exercise effective control over a brother-teacher’s undertaking of his teaching job. The Order had not undertaken a duty of caring for the pupils at the school and then delegated or entrusted such duty to the brother-teachers. Those brothers who taught at the school were not doing so on behalf of the other members of the Order. It followed that the Order was also not vicariously liable for torts committed by any other person (i.e. non-brother) arising from his connection with the school.

While clarifying the law of vicarious liability, therefore, the Court of Appeal fought shy of extending it. However, the employer has been granted permission to bring an appeal in the Supreme Court. This is expected to be heard later this year.

### Widening of scope still possible

Should the appeal succeed, the risk of persons being held liable for acts of others over which they have no control would be considerably increased. Such an extension of the principle of vicarious liability would impact widely and would not be confined to abuse cases. Any organisation that could be said to have been able to exert some kind of control over a member could potentially be liable for the acts and omissions of a member.

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