

SocialEconomy

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voluntary organisations and social enterprises

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Charities...



Does no-one have a conflict of interest (in the arts world)...?

Rightly or wrongly, it appears a truth, universally acknowledged, that a trustee of a charity who is involved in other organisations never has a conflict of interest. This (surprising) fact is confirmed by the general silence at meetings when trustees are asked to declare any interests they might have which could conflict with those of the charity. When one looks at the number of Charity Commission investigations or inquiries with mis-managed conflicts at their heart this maxim may have some merit. However, one cannot help but feel that perhaps, just perhaps, there are more conflicts out there that might meet the eye.

For example, does a conflict arise from sitting on the board of a similar, rival charity? Or a charity's trading subsidiary? Is it acceptable

to be involved in a company or organisation which is applying for grants from the charity? This latter example was the case with the Arts Council, where there was some confusion about the procedures required for managing conflicts relating to grant applications. The complication resulted in some of the trustees actually receiving grants, either directly or indirectly.

Conflicts of interest can be direct or indirect, actual or potential. They are not necessarily a problem, but must be dealt with properly. In the Arts Council report, the Commission reiterated the need for trustees to ensure that they have an appropriate conflicts of interest policy for their particular charity. The report sets out some useful lessons and can be found at: www.charitycommission.gov.uk/Library/rcr_arts.pdf.

Public benefit and sports

The Charity Commission has published the names of the sports and recreation charities that will be involved in its last round of public benefit assessments. Readers may recall that the Commission has already carried out public benefit assessments for charities advancing religion or education, arts charities and fee-charging charities.

This latest class of assessments was chosen following some research

published by the Commission suggesting that smaller charities, charities involved in certain activities such as sport/recreation, and those in operation before 2006, were most likely to have no awareness of the public benefit requirement at all.

The sports and recreation charities which the Commission will look at are:

- Wigan Leisure and Culture Trust (registered charity no. 1105278)

- Tintagel Memorial Playing Fields Association (registered charity no. 1088744)
- Birmingham City FC Football in the Community (registered charity no. 1086631)
- The Radlett Lawn Tennis and Squash Club (registered charity no. 1117605)

The results of the assessments will be published in the normal way at the end of the process. These are likely to be indispensable reading,

in particular, to sports and leisure charities which are set up as Industrial and Provident Societies, which have to date been exempt from registration.

For more information on public benefit and these visits, see the public benefit pages on the Commission's website, at:

<http://tinyurl.com/36ra2s6>.

Public benefit and schools – a never ending story?

Or perhaps not: Dominic Grieve, the Attorney General, has just made a reference to the Upper Tribunal on the question of public benefit and the position of fee-charging schools.

The Independent Schools Council has long claimed that the Charity Commission's guidance on public benefit is not consistent with charity case law and that it gives too much weight to the requirement for

bursaries. The matter will now be considered in the Upper Tribunal by Alison McKenna, the principal charity judge of the Upper Tribunal (who some of you may remember from Wrigleys' 2009 Governance Seminar) and judges from the Chancery Division.

Perhaps, we will finally have some clarity on what has become, for many, an emotive question. A copy of the questions raised can

be found on the Charity Tribunal's website at: www.charitytribunals.gov.uk/documents/RegisterofCases/QuestRefbyHMAG.pdf.

At the time of going to print, no date has been set for the next stage of the process, but details will be posted on the Charity Tribunal website when they become available: www.charitytribunals.gov.uk.



Will it be easier for charities to dispose of land?

Some of you may have been aware of the Cabinet Office consultation earlier this year on the proposal to extend the definition of "qualified surveyor" in section 36 Charities Act (currently limited to Fellows or Professional Associates of the Royal Institution of Chartered Surveyors or the Incorporated Society of Valuers and Auctioneers) so as to allow trustees to access a broader pool of professional expertise when

seeking the advice required by that section.

The consultation was sufficiently supportive for the Government to conclude that there are grounds to allow reports from Fellows of the National Association of Estate Agents, as well as scope to consider extending the inclusion of other property professionals, such as Fellows of the Central Association of Agricultural Valuers.

A significant number of the respondents, including the Charity Law Association working group, were critical of the lack of clarity and proportionality in the Charities Act 1993 where sales and other disposals of charity land are concerned (particularly as only leases for terms of seven years or less have any sort of "light touch" regulation). As a result the Government have decided to include these issues in the review of the operation of the 2006 Act

which is scheduled to begin next year. The extension of the definition of "qualified surveyor" is to be included with other changes the 2011 review recommends so as to ensure that the final result is cohesive and workable.

So - no relaxation as yet on the legislation affecting the thousands of sales and other disposals of interests in land made each year by charities, but the expectation of greater flexibility in future.

Academies

The Academies Act 2010 came into force on 27 July of this year, as a result of which, from 1 January 2011, Academy Trusts will be 'exempt' charities, which means that they will no longer have to register with the Charity Commission. Academy Trusts which have already registered with the Charity Commission will be removed from the Commission's register of charities on 1 January 2011.

Being an 'exempt' charity does not mean that the Academy Trusts do not have to comply with charity law. The Charity Commission still has jurisdiction in some circumstances (for example if conflicts of interest are not managed and there is a trustee benefit). However, being an 'exempt' charity does mean that an Academy Trust will no longer have to submit accounts and annual reports to the Charity Commission.

From January Academy Trusts will have the Young People's Learning Agency (YPLA) as their principal regulator, but it is expected that the YPLA will consult the Charity Commission on charity law matters. The message? If you are, or are about to become an exempt charity, make sure you know what provisions of charity law apply to you.

Too many basic mistakes



A recent Charity Commission report says that, whilst the overwhelming majority of charities are well governed and well managed, charity trustees are making "too many basic mistakes". The most recent edition of "Charities Back on Track", which is published by the Commission to allow lessons to be learned from

the cases they have reviewed, is the first to analyse the whole range of the Commission's compliance activity, including Assessment cases. This publication makes good reading for those interested in learning what can go wrong in the running of a charity.

The studies range from dealing with fraud, allegations of improper behaviour, mishandling of conflicts of interest and private or trustee benefits, to poor accounting practices. It is well worth reading, although at 74 pages, it is probably one to take with you on a long train journey. It can be found at: www.charitycommission.gov.uk/Library/track10.pdf.

Equality Act 2010 – Charity Commission guidance published

The Charity Commission has produced its guidance for charity trustees about a key section of the Equality Act 2010 that may have implications for them. The guidance, published ahead of the Act which came into force on 1 October 2010, is designed to complement the guidance already produced by the Government Equalities Office and the Equality and Human Rights Commission.

The guidance specifically covers the part of the Equality Act dealing with the ability of a charity to limit the group of people whom it helps, as set out in the “charity exemption”. It explains what both

existing charities and people seeking to register new charities need to know. The Commission explains that, whilst the general principle of fair and equal treatment for all applies to charities, the law does recognise that some charities are set up to help particular groups in society because of disadvantage or for clear social objectives. As the law specifically allows charities in these circumstances to depart from the principle, the Commission’s guidance is intended to summarise the position for charities.

The law is designed to avoid discrimination on the grounds of “protected characteristics”

(such as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation). Charities are, through the charity exemption, allowed to deviate from this where the governing document restricts benefits to people with a shared protected characteristic **and**:

- 1 there is a particular disadvantage which is linked to people with that protected characteristic which the charity is tackling; **or**
- 2 the restriction can be justified as being a fair, balanced and reasonable (“proportionate”) way of carrying out a legitimate aim.

The Commission’s guidance sets out how it believes the exemption should apply and is, therefore, important reading for any charity considering limiting its activities in a way which would otherwise be caught by the Act.

More detailed guidance is to be published by the Charity Commission by the end of the year to look at particular issues that may affect a small number of charities. The Commission’s guidance can be found at: <http://tinyurl.com/36r2aop>.

Employment...

Autumn and Spring are the traditional seasons for new employment law so we have summarised what became new law on 1 October and an update on what is planned for 2011.

Equality Act 2010

The vast majority of the Equality Act 2010 came into force on 1 October. This well publicised Act applies to employers plus providers of goods, facilities and services to the public, and replaces all the previous discrimination law into a single Act of Parliament. Although this is significant news for lawyers and HR professionals (and potentially some charities - see below), with a few exceptions it is unlikely to have a significant

day to day impact on most organisations or employees.

The changes include a consolidated definition of discrimination, harassment and victimisation; a new bar on employers asking pre-employment health questions (except in specified circumstances) and making pay secrecy clauses unenforceable. However, there are still a number of provisions that the old Government proposed and which the new Government is

now reviewing; notably provisions relating to positive action in recruitment and promotion.

Significantly for charities, the Equality Act also amends the exemptions that some charities may have traditionally relied upon to ensure that their (sometimes) focussed activities fall outside discrimination law. This topic is covered in more detail above under Charities.



Increase in national minimum wage

The following minimum wage rates took effect from 1 October 2010:

- Standard adult rate (extended to workers aged 21 and over): £5.93 (rising from £5.80).
- Development rate (workers aged between 18 and 20): £4.92 (rising from £4.83).
- Young workers rate (workers aged under 18 but above the compulsory school age who

are not apprentices): £3.64 (rising from £3.57).

- New apprentice rate of £2.50 per hour introduced (applicable to apprentices under 19 years of age or those aged 19 and over but in the first year of their apprenticeship).
- The value of accommodation offset also increases from £4.51 to £4.61.

Coalition Government's proposals

Key points and developments from the Coalition Government's ongoing employment law review programme:

A plan to extend the right to request flexible working to parents with children under 18 from April 2011. The new right will benefit an estimated 300,000 people. Consultation will be launched later in 2010 on a further extension of the right to flexible working to all employees.

The Additional Paternity Leave regulations are still under review

but will remain in force as an interim measure for parents of children due on or after 3 April 2011 (similar provisions apply to adoptive parents). As the regulations stand, they will give employed fathers a right to up to six months extra leave which can be taken once the mother has returned to work. Some of the leave may be paid if taken during the mother's maternity pay period.

Consultation to phase out the default retirement age is ongoing and it is hoped that more information will be published in

November. The Government's current proposal is to abolish the default retirement age on 1 October 2011, with transitional arrangements beginning on 6 April 2011.

Vetting and barring scheme review - following the Government's announcement in June that the vetting and barring scheme would be "remodelled", it has been reported that the Government will announce its decision by December 2010.



Companies...



Reporting on environmental and social matters

The Labour Government having introduced a requirement for social and environmental reporting in the operating and financial review section of company reports in the Companies Act 2006 later postponed it coming into effect indefinitely.

Whether or not the application of Social and Environmental reporting

in an operating and financial review would have enabled investors to predict the BP disaster in the Gulf of Mexico or not is a moot point. However, the Department of Business, Innovation and Skills has put in place a consultation which ends on 19 October 2010 under the title *Corporate Law and Governance: The future of narrative reporting; a consultation*. The consultation

paper also explores whether information regarding the disclosure of executive pay is clear enough too. If this form of reporting is introduced to businesses then it is likely that it may soon follow for charities. (www.bis.gov.uk/consultations).

Environment...

Community Ownership better than Community Benefit

A very important academic study by Grant Allan, Graham Ault, Peter McGregor and Kim Swales on the importance of revenue sharing for the local economic impacts of a renewable energy project is now obtaining the publicity which it deserves.

The researchers from the University of Strathclyde looked at the development of a 540 megawatt wind farm on the Shetland Isles proposed as a partnership between energy

utility SSE and Viking Energy, which is 90% owned by the Shetland Charitable Trust. Under current community benefit arrangements wind farm operators quite often provide community benefit payments ranging between £1000 and £5000 a year for each megawatt of installed capacity.

In the 50:50 joint venture proposed for the 514 megawatt Viking Wind Farm, the community benefit would have had to increase to £26,700 per megawatt in

community benefits, which is far beyond the range of any community benefit scheme. Not every community has the advantage which Shetland has of having oil industry revenue which will enable it to put £52 million or more into its share of equity in the project.

Communities might be able to set more realistic targets of owning a small number of turbines on larger sites as their starting point for involvement in community

renewable energy. If this is seen to be successful in the community, then there may be opportunities for increasing the number of turbines in future generations when, after 15 to 20 years, wind farms are re-powered. Malcolm Lynch at Wrigleys advised on the establishment of Baywind which was the first UK community to use this model of incremental ownership (Wind Power monthly 2010 - www.strath.ac.uk/media/departments/economics).



Green Investment Bank

The report of the Green Investment Bank Commission led by Bob Wigley Chairman of Yell Group PLC, published in July 2010 starts to shed some light on potential Government proposals for the Green Investment Bank.

The purpose of the Green Investment Bank is to provide a focus which might assist in creating £550 billion of investment which is required between now and 2020. The scale of this should be seen in comparison with the "Dash for Gas" in the 1990s when the United Kingdom moved from its dependence on oil and coal to gas, which required investment of "only" £11 billion.

If the Commission on the Green Investment Bank is listened to by Government then it will seek to obtain its initial capital from

existing quangos and funds involved in the environment funded by Government; wholesale and retail funds such as Green ISAs; and potentially, a levy on energy bills. The Green Investment Bank appears to be a big business idea to assist big business, which is possibly what is required for the scale of the problem. The democratisation of energy through the feed in tariff and the consequent potential for community renewables does not feature. There appears more support by the Green Investment Bank for energy efficiency financing which could be tapped into by communities.

It will be important if the Green Investment Bank proposal moves forward for it to develop a more explicit analysis of how it can support community energy (www.climatechangeinvestment.com).

Tax breaks for Energy Efficient Equipment



Businesses which are seeking to become more energy efficient might wish to look into the Enhanced Capital Allowances (ECA) Scheme which provides two things to assist businesses. The ECA Scheme offers a financial incentive for buying products for energy saving which can be as high as 28% of the purchase cost. It also provides a qualified list of energy saving products for businesses to select new equipment from. These products are intended to be the most efficient in the market. The Scheme is promoted by the Carbon Trust on behalf of the Department of Energy and Climate Change.

The ECA financial incentive comes in the form of 100% tax relief on qualifying capital expenditure on plant or machinery. There are some interest free loans available from the Carbon Trust for small and medium sized enterprises and for businesses below the energy use threshold of the Carbon Reduction Commitment. The loans are paid back over a period of one to four years from the energy savings they make and typically range from £14,000 to £130,000 a year. For further information contact www.carbontrust.co.uk.

Ethical investment...

Stewardship Code

The Stewardship Code, published in July by the Financial Reporting Council (FRC), aims to enhance the quality of engagement between institutional investors and companies to help improve long term returns to shareholders and the efficient exercise of Government responsibilities. The Code sets out good practice on engagement with investee companies to which the FRC

believes institutional investors should aspire. It is intended to create a sound basis of engagement between investment managers and companies. It is seen as complementary to the UK Corporate Governance Code for listed companies which was revised in June 2010. The Stewardship Code is a set of seven short principles, the first one of which is that institutional investors

should publicly disclose their policy on how they will discharge their stewardship responsibilities.

While some commentators have criticised the investment management industry for their short termism and failure to get to grips with some of the management issues which led to the financial crisis, it will be interesting to see to what extent investment

management companies sign up for the code. Charity trustees may wish to review the code and consider whether they should ask their investment managers whether or not they will be signing up to this code or explaining why they do not think the code, or particular principles of the code, should apply to them. See www.frc.org.uk.

Social investment...

Wensleydale Railway plc makes new share offer



A more clear cut social investment is the new Wensleydale Railway plc 2010 Share Issue. Launched on 25 September 2010, the Railway which re-opened a branch line closed to passenger traffic in 1954, seeks to invest further

in the track and its buildings so as to move the company into profitability.

Its goal is eventually to connect the Settle and Carlisle line to Northallerton for passenger, freight and heritage train services.

With an implicit social enterprise structure the Railway has been one of the largest investors in the eastern part of Wensleydale since it re-started rail services in 2003.

With four employees, it relies heavily on volunteers to operate

services on the 17 miles of line between Leeming Bar and Redmire. Enterprise Investment Scheme Tax Relief is available for investors.

www.wensleydalera railway.com

New developments in charity bond finance

The Social Impact Bond pilot launched in March 2010, by the organisation Social Finance, is an interesting development for the charity world. It works on the basis that the Government has suggested it can only afford to pay for reduced re-offending by prisoners in arrears. The pilot is designed to support reduced re-offending in Peterborough prison.

A number of charitable foundations have lent money (by way of bonds) to the charity seeking to reduce re-offending. If the services are successful and re-offending drops, bond investors receive a return representing a proportion of the costs of re-offending as well as the return of capital. The money for repayment is coming from the Big Lottery Fund and the Ministry of Justice. For a charitable foundation with the right objects, an investment in this Social Impact Bond could simply be charitable expenditure which might be viewed as a social investment. However, it might

also be construed as an ethical or socially responsible commercial investment if, as proposed, it is made on commercial terms. A charitable foundation thinking of making an investment of this sort should consider the Charity Commission's Guidance on Investment of Charitable Funds.

HM Revenue and Customs will also be interested in whether it is a social or commercial investment. It will, primarily, be interested in the rate of return on the investment and its commerciality. An interesting factor in determining the commerciality of the Social Impact Bond is that the evaluation of risk would appear to lie with the track record of the charity which is preventing re-offending, rather than more usual commercial factors. Of course, the commercial factors of return and security of return are important too.

The advantage of expenditure being considered as an approved charitable investment is that it falls within the investment budget of the

trustees of a charitable foundation. This could be important at a time when grant expenditure has greater demands placed upon it.

To have certainty in these investment hybrid cases, it is important for trustees not only to consider what powers the charity has to make the 'investment', but, also, what taxation classification should be adopted and whether to seek HM Revenue and Customs guidance on the taxation of a particular instrument before an investment is made.

For the charity which issues the Bond, the trustees need to be sure that before offering the Bond they will have a realistic chance of repaying it and covering their costs of service delivery. The costs of organising a bond of this type should not be underestimated. It will be interesting to see whether the private sector will be willing to follow the charity sector in making commercial investments in similar bonds.

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