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Charities...

Giving – A Government Green Paper



The Giving Green Paper published by the Cabinet Office in December 2010 is part of the Government's think pieces for its Big Society vision. The Government explains that there are three limbs to its role in building the Big Society. Empowering communities through the Localism Bill referred to in this edition of Social Economy. Opening up public services

so that they can be run by the private sector, including charities, social enterprises, co-operatives and private companies. Encouraging social action including money, assets, knowledge, skills and time.

The Giving Green Paper is intended to encourage debate about this third limb

of encouraging social action. It has the ambition to achieve a culture change towards a more "giving" society.

The paper explores the role of technology and the proposed National Citizen Service, initially for 16 year olds to volunteer. There are a lot of interesting ideas in this consultation which

is directed at both charities and social enterprises. It is possible, if you submit your responses before 9th March 2011 that you may be able to influence the Government's agenda in some small way. (Giving Green Paper, Office for Civil Society, Cabinet Office.)



Advertising Standards and the Internet

From 1 March 2011 the Advertising Standards Authorities code of practice will be extended to cover marketing communications of organisations on websites and in other non-paid-for space under their control, including social networking sites like Facebook and Twitter.

The UK code of non-broadcast advertising, sales promotion and direct marketing (the CAP code) includes rules on misleading advertising, social responsibility and the protection of children.

The code will not apply if the charity is just describing the ideas which it promotes, but it will cover requests for donations and potentially references to its services, where they are paid for and for comparisons with other service providers.

The Advertising Standards Authority does have a free advice service on advertisements which you can use before placing them and this might be helpful for charities.

Tainted Love - Substantial Donors

Draft rules to replace the current anti-avoidance legislation on substantial donations to charities were published by HM Treasury on 9 December 2010.

The new legislation will affect donations to charities and community amateur sports clubs received on or after 1 April 2011, even where the arrangements were put in place prior to that date. Broadly, donors will be caught by the legislation if one of the main purposes of the arrangements is for the donor or a person connected with the donor to receive an advantage from the charity. Under current rules, which have been in place since 2006, only donations of at least £25,000 in any 12-month period, or £150,000 or more in any six-year period are regulated. This "substantial donor" test will no longer apply under the new Bill apart from where some transitional provisions apply, and the concept of a "tainted donation" can extend to a donation of any size.

A further difference under the proposed legislation is that, unless the charity was party to the arrangement and aware of the donor's purpose, the donor, rather than the charity, will be liable to

repay the tax relief claimed by the charity. Under the present rules, in contrast, transactions between the charity and the donor may be deemed to be non-charitable expenditure, with the result that charities can lose their entitlement to claim the usual relief from taxation on the amount concerned. The current regime has attracted criticism for its complexity, its ability to catch innocent transactions and the fact that it discourages large donations. However, the new legislation is no less complex and the definition of "arrangements" within the legislation is very wide, referring to "any scheme, arrangement or understanding of any kind, whether or not legally enforceable, involving a single transaction or two or more transactions". It remains to be seen whether the provisions permitting the recovery of relief's from donors and the removal of a minimum safe threshold may discourage donations to a greater extent than the earlier legislation.

Comments on the draft legislation had to be submitted to HM Treasury by the 9 February 2011. For HM Treasury's explanation of the provisions in the Bill, please see: http://www.hm-treasury.gov.uk/d/tainted_charity_donations.pdf.



Fundraising Regulations Review

If your charity raises funds through collections, you may be interested to know that the Government is planning to review the law regulating collections for charity later this year, as part of a wider charity law review. Francis Maude (Minister for the Cabinet Office) expressed concern that the existing laws can be "very burdensome" on bona fide charities, and yet they are

"not particularly effective" at preventing bogus collectors. This is part of an attempt to reinstate provisions which were drafted into the Charities Act 2006 but not brought into force.

This announcement comes at the same time as moves by the police to develop a national strategy to tackle charity collection crime.

Charities and Investment Consultation



The Charity Commission has recently published its revised draft guidance on charities and investment.

The draft guidance does not make any major changes to Trustees' ability to invest ethically, as the legal basis for ethical investment remains the same, i.e. it is permitted where:

- certain investments would conflict with the aims of the charity;
- making particular investments would hamper a charity's work, e.g. by making beneficiaries less likely to accept help or alienating supporters; or
- in other situations only where there is no significant detriment to the charity.

However, the Commission has also introduced a new and complex categorisation of investments as financial, ethical, mission connected, mixed-purpose and programme-related. Whilst the replacement of three pieces of overlapping guidance with one alone is a welcome clarification, it remains to be seen how easy Trustees will find getting to grips with the somewhat sharp distinctions between these various categories. There are some minor, technical mis-statements of the law which are being raised by parties to the consultation.

The Commission still maintains that "programme-related investment", i.e. investment for purely ethical considerations with no thought of financial reward, is

not investment in the strict sense and must be carried out under the charity's general powers to further its objects, including the public benefit requirement.

As for other changes, the Commission continues to classify direct investment in commodities (such as gold and wine) and commercial property development as trading, rather than investment, but is willing to countenance indirect investment in commodities via a collective investment scheme.

The consultation on this guidance is open until 28 February and is available on the Charity Commission's website: http://www.charitycommission.gov.uk/About_us/About_the_Commission/Char_invest_index.aspx.

Charities in Northern Ireland



The Chief Executive of Charity Commission for Northern Ireland hopes to be registering charities in the summer of 2011.

The Northern Ireland Assembly is to pass legislation to determine whether charities will be assessed for their public benefit on the basis of their purposes in England and Wales or their activities as in Scotland. The initial legislation did not make that clear. There will be no minimum income threshold below which charities do not have to register in Northern Ireland. The new Northern Ireland Charity Commission will seek to register those charities which are registered with HM Revenue & Customs first.

Charities and Benevolent Funds



The Attorney General has announced that he will be making a reference under the Charities Act 2006 to the Charity Tribunal to decide whether charitable trusts whose beneficiaries are defined by relationship between an individual or company, such as employee benevolent funds, meet the public benefit requirement.

The Charity Commission indicated that it would publish special guidance in this area but it is expected now that they will wait until the outcome of this application.

Charities which are potentially affected have the right to apply

to be 'interveners' to put forward their views for the tribunal.

If your charity is concerned by this then please do not hesitate to contact Wrigleys who are currently making an intervention in the reference on the Commission's public benefit guidance for independent schools.

Academies Update

In our September issue, we reported that from 1 January 2011 Academy Trusts will be “exempt” charities and that the Young People’s Learning Agency would be their principal regulator. Since then, the Government has announced that it is putting those plans on hold, pending further consideration of which agency should act as principal regulator.

As we understand it at the time of going to print, a timetable for considering the issue has not been set, but the Charity Commission expects Academy Trusts to become exempt charities in the first half of this year. As things stand, there is no pressure on existing Academy Trusts to register with the Charity Commission in the meantime. Unfortunately, the message for now is: watch this space again.



Local Government...

Localism Bill



Headlines around the Localism Bill have highlighted the introduction of local referenda to which councils should respond. However, there are a number of matters in the bill which, if they come in to law, may affect charities and social enterprises.

Some regions of England may doubt whether the abolition of the regional development agencies, covering population areas greater than Wales or Scotland, and return of powers to Whitehall, really assists with the devolution of power to local people.

Competence, control and localism

The Localism Bill, by contrast, appears a more nuanced balance between the engagement of citizens in their local areas; and in major conurbations the emasculation of the local Councillor and the concentration of power in directly elected Mayors. In some authorities, including those with Mayors, powers of the Local Authority will be concentrated in the hands of a Mayor. In other authorities, including those with Mayors there will be a partial devolvement, particularly in planning matters, to citizens.

It is also proposed that Local Authorities, subject to limitations, are given the same powers to act as if it were an individual. The general power of “competence” will replace, in England, the current power of “well being”.

In exercising the power of competence Local Authorities will still need to apply their statutory discretions reasonably and fairly, to comply with duties to act in good faith and act in accordance with existing limitations on Local Authority powers. Commercial activities must be undertaken through companies.

Persons engaged in community developments

The proposed listing of “community land”, being land not simply owned by the Local Authority but by anyone, and the opportunity for the local community to put plans forward for such designation, is an interesting development. The designation of land as an asset of community value is a designation that will last for five years and creates a moratorium on disposal of that land without informing the community, who can then be treated as a potential bidder in relation to that land. This power will clearly be of concern to land owners but will give encouragement to persons seeking to save the library, local pub and other community facilities.

Local referenda are to be introduced in order to seek to influence a Local Authorities’ policies. Once a referendum has been held, a Local Authority will need to say how it will act in the light of that referendum. It does not mean that the Local Authority will automatically follow with actions as a result of the referendum.

Heritage

Concerns have been expressed by heritage bodies about powers for neighbourhood communities to define what kind of planning they wish to see in a neighbourhood development order, pursuant to which planning permission would not be required. There is concern that a Local Authority’s powers to block developments that would affect the setting of a listed building or conservation area should not be abolished.

Rate Relief

The powers of a Council in respect of discretionary rate relief are also affected. The existing categories for discretionary rate relief are replaced in a way which will be helpful for organisations which are not established or conducted for profit; either for recreational purposes or charitable, philanthropic, religious and purposes or purposes concerned with education, social welfare, science, literature or the fine arts.

Employment...

Public Sector Outsourcing to the Third Sector

Thought by many as good news for growth in the Third Sector, the Government announced in December that it was withdrawing immediately the Code of Practice on Workforce Matters, to help facilitate awards of public sector contracts to small and medium-sized businesses.

Known as the “two-tier code”, the Code of Practice was established in 2003 to protect pay, pensions and other conditions for workers involved in services that were outsourced from public sector bodies.

The aim of the Code was to avoid a situation where a supplier recruits new joiners on less generous terms than those of the former public sector employees. Although a sound principle for fairness by avoiding ‘two-tier’ workforces, the Government claims that the Code had increased the costs of public sector outsourcing and acted as a barrier to SMEs, mutuals, co-operatives, charities and social enterprises bidding for public sector contracts.

The Government has issued replacement principles, intended to offer more flexibility to employers.



Are your Trustees & Senior Employees “Fit and Proper Persons”?



The Finance Act 2010 requires all new charity trustees and senior managers of charities to pass a “fit and proper persons” test administered by HMRC.

It is important that employer charities are aware of this development, which affects those new appointees to management positions which entail control of the charity's finances and tax affairs. Unhelpfully, there is no definition of “fit and proper” in legislation and HMRC will be unable to disclose the basis for concerns without an individual's consent.

HMRC has stated that it will assume that all persons appointed by charities are fit and proper unless there is evidence to the contrary. Its advice to charities is to “take appropriate steps on appointing personnel” - this to include requiring new recruits to read HMRC's Basic Guidance and to sign a copy of its Model Declaration, in order to demonstrate that proper consideration has been given to their suitability.

We recommend that charities review their standard contracts of employment for senior managers and consider making it a condition of employment that the employee must be and at all times remain a fit and proper person – and reserving a right to terminate the contract if HMRC makes a declaration that they are not. Charities should also check their disciplinary procedures and other policy documents to determine whether any amendments are needed.

Employment law developments for 2011

Employment law in 2011 will remain a ‘watching brief’ as final decisions are still to be made on several topics, but here is a reminder of the main legislative highlights for this year:

Retirement – The Government has confirmed that it will abolish the current Default Retirement Age of 65 on 1 October 2011, with transitional arrangements beginning in April 2011.

In response to concerns raised by employers during the consultation process, the Government stated that in its view, the dismissal of older workers should be handled by discussion and agreement, or through the usual performance management procedures.

It is anticipated that an exemption will be introduced to allow some discrimination on grounds of age in the provision of employee benefits such as medical insurance, where the premiums for older workers become prohibitively expensive.

Equality Act 2010 – The majority of the provisions of the Equality Act 2010 came into force on 1 October 2010. However, there are elements of the Act that have not come into force and remain unconfirmed. We now expect the provisions relating to positive action in recruitment and promotion in April 2011, however, the Government is still considering whether to continue with some of the remaining elements introduced by the last Government.

Extension of flexible working – With effect from 6 April 2011, flexible working rights will be extended to parents of children aged under 18 and will come into force on 6 April 2011. Currently the right applies to parents of children aged under 17, as well as parents of disabled children aged under 18 and carers of certain adults. Further proposals will also extend the right to request flexible working to all employees. Under the proposals, implementation is planned for April 2012.

New Parental Leave Rules – In our March 2010 issue we reported that a new right to take up to 26 weeks' Additional Paternity Leave (on top of the current two weeks' Ordinary Paternity Leave entitlement) was

expected to come into effect from October 2010.

After a short delay, the new right is now expected to apply from April 2011, and will affect the parents of babies due on or after 3 April 2011. Additional Paternity Leave will be available to be taken between 20 weeks and one year after the child is born or placed for adoption, where the mother has returned to work. Additional Statutory Paternity Pay may be payable. Nick Clegg recently announced that the Government will be consulting on a “proper” system of shared parental leave to be introduced in 2015.

Social Enterprise...



An Electronic Age for Co-operatives and Mutuals?

HM Treasury issued on 6 December 2010 a shortened consultation on electronic communications in the mutual sector. Companies have, for many years, had opportunities to use electronic communications in dealing with their members. Since 2003, building societies have also had significant scope to communicate with their members electronically. Co-operative and community benefit societies, friendly societies and credit unions were not included within that modernisation.

The current position therefore is that there is some doubt when societies are under statutory obligation to inform a member

of something in writing; whether it is possible or not to use email or website publication. In other parts of the law it is clear from the legislation that the information must be provided in paper form through the post.

There was a consultation upon this same matter in 2007, but implementation by HM Treasury has been slow and a further consultation on the same matter commenced again in December.

It is anticipated that the order and regulations would come into force on 1 April 2011 which will allow societies whose financial reporting year ends on 31 December to start to use their provisions for their 2011 AGM.

It is with great concern that this modernisation measure for societies is not extended to the FSA itself in its registration function for mutual and co-operative societies. There is no plan for electronic filing by the FSA, notwithstanding the Government's stated aim of giving support to the mutual and co-operative society sector and the Government's strategy for the Government of "digital by default" and raceonline2012.com initiative (HM Treasury Electronic Communications in the Mutual Sector: Consultation document December 2010).

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