



Charities Update
Autumn 2015

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CHARITY LAW UPDATE

CHARITIES (PROTECTION AND SOCIAL INVESTMENT) BILL

Included in the Queen's Speech and introduced into the House of Lords on 28 May 2015, the Charities (Protection and Social Investment) Bill is intended to protect charities from people who present a risk of abuse and give the Charity Commission for England and Wales new and tougher powers to tackle serious abuse of charities. The Bill will also give charities a new legal power to invest their funds in a way that provides a financial return whilst furthering the charity's aims.

The explanatory notes to the Bill state that it is intended "to provide stronger protection for charities in England and Wales from individuals who are unfit to be charity trustees" and "equips the Charity Commission with new or strengthened powers to tackle abuse of charities more effectively and efficiently". The chairman of the Commission, William Shawcross, welcomed the Bill stating "this is a vital piece of legislation if we are to have the powers that we need to stop individuals abusing charities. We must be able to take action where abuse occurs".

The Bill is currently being debated in the House of Lords and is at the "third reading" stage, which is scheduled to take place on 14th September 2015. It will then be debated in the House of Commons before receiving Royal Assent.

Main Features of the Bill

Official warnings by the Commission and winding up

The Bill will give the Commission the power to issue formal warnings to charities which breach charity law to ensure they take corrective action. The Commission will have to notify charities that it intends issuing a warning, and trustees will be given an opportunity to make representations to the Commission before it is made. It is proposed that this power will then extend to enabling the Commission to direct a charity to be wound-up if a warning would not be an adequate penalty. This would only be exercised following an investigation, where it is concluded that to wind-up the charity would be more appropriate than rectifying the existing issues.

Automatic disqualification from being a trustee

At present, s.178 Charities Act 2011 sets out the situations in which charity trustees will be automatically disqualified.

The Bill adds a new list of offences which will automatically disqualify a person from being a charity trustee to include money-laundering, bribery, perjury, perverting the course of justice, contempt of court and various offences related to terrorism.

Power to disqualify someone from being a trustee

This is one of the most important parts of the Bill and gives the Commission a wide discretionary power to disqualify a charity trustee. Under s.10 of the Bill, a new s.181A Charities Act 2011, would be introduced, which would grant the Commission additional powers to disqualify someone from acting as a trustee of a charity by making a 'disqualification order' against a person (effective for not more than 15 years) if:-

1. they are unfit to be a trustee;
2. the order is desirable in the public interest; and
3. at least one of the following six conditions set out in the Bill applies:-
 - a) A person has been cautioned for an offence against a charity or in the administration of a charity for which a conviction would bring automatic disqualification;
 - b) A person has been convicted of an offence in another country as above;
 - c) HMRC has found a person not to be "fit and proper";
 - d) A person was responsible for, contributed to, or facilitated misconduct or mismanagement in a charity;
 - e) A person involved in a corporate trustee was responsible for, contributed to, or facilitated misconduct or mismanagement in a charity; or
 - f) Other conduct is or is likely to be damaging to public trust and confidence in a specific charity or the charity sector as a whole.

Power to prevent a disqualified trustee holding another position of power in a charity

One of the current loopholes identified by the Charity Commission and addressed in the Bill is that a disqualified trustee can still take on senior management roles in the charity without the commission having any power to stop them from doing so. If the Bill is passed in its current form, individuals disqualified from trusteeship will also be barred from "holding an office or employment in the charity with senior management functions".

Social investment

In addition to the Commission's proposed new powers, the Bill introduces proposals for incorporated charities or the trustees of unincorporated charities to be able to make 'social investments', that is, investments that are not aimed solely at raising funds, but also at furthering the charity's purposes. It is hoped that such power will enable charities to invest their funds in a way that furthers their charitable purpose as well as providing a financial return.

Preventing "aggressive" fundraising

The law currently requires charities to enter into agreements when using professional fundraisers. The Bill proposes that these agreements will need an added layer setting out how the fundraiser will ensure that people are protected from unreasonable intrusions into their privacy, unreasonably persistent approaches for donations and from undue pressure to donate.

Analysis

The Bill will provide the Commission with greater regulatory powers, which will undoubtedly help reduce abuse in the charity sector. However, there are concerns as to the breadth of these powers and how these powers will be used, particularly with regard to the power to disqualify people from charity trusteeship.

The Charity Commission has responded by publishing a policy paper offering reassurances that it recognises the potential significance of this power and that it will only be used when there is a clear case that it is needed and it has fully explained its intentions in advance. There will be a notice period within the process and a right of appeal. The Joint Committee has also noted that actual abuse (as opposed to persistent mismanagement and honest mistakes) is rare and that these powers are unlikely to be used by the Commission more than a handful of times a year.

With regard to the powers proposed for charities to make social investments, the reality is that charities have been making social investments for many years. However there has been some uncertainty over their ability to do so, particularly their duties to adhere to the investment criteria set out in the Trustee Act 2000. The Bill may remove these uncertainties and give charities a specific power to make social investments, whilst imposing clear duties on the charity when using this power.

A REVIEW OF FUNDRAISING PRACTICES: THE FRSB INTERIM REPORT AND SUBSEQUENT DEVELOPMENTS

Following the tragic death of Mrs Olive Cooke in May 2015, the Fundraising Standards Board ('FRSB') launched an investigation into the tactics and methods adopted by charities in the UK for fundraising practices. This was due to early reports suggesting she took her own life due to being overwhelmed by charity requests and the subsequent revelation that the fundraising agency GoGen had been targeting dementia sufferers.

The Institute of Fundraising ('IoF') announced that it would review its Code of Fundraising Practice, which represents the standards expected of all IoF members, set by the fundraising community, and its guidance. In addition it was to hold a joint summit with the FRSB to address concerns relating to telephone fundraising in light of Mrs Cooke's death, GoGen and subsequent complaints raised by members of the public.

FRSB Interim Report

The FRSB released an Interim Report on 9th June 2015 setting out its key findings. Their investigation was two-limbed, focusing firstly on 'the circumstances leading to Mrs Cooke reportedly feeling overwhelmed by contact from charities', and secondly, 'the identification of key learnings from public complaints generated in the wake of Mrs Cooke's death'.

The Report revealed a disconcerting lack of trust from the public in charity fundraising practices generally and specifically, in the charities that they personally supported. It highlighted the approaches being made to vulnerable and elderly people. Of particular concern were complaints that the Mailing and Telephone Preference Service (MTPS), was ineffective, and that, in spite of being MTPS registered, donors continued to receive correspondence and telephone calls.

The FRSB's overarching recommendation was that the IoF's Code of Fundraising Practice should be strengthened to ensure that the public are more in control of the relationship they have with charities. Recommended amendments to the Code included provision that the public must be given regular opportunities to articulate how and when they wish to be contacted and whether they wish to have their personal information shared with any third parties.

The FRSB suggested that when opting in or out of the MTPS, clear and accessible information should be provided, enabling the donor to expressly give or withdraw consent, similar to the manner in which SMS opt-outs are designed.

The FRSB emphasised the importance of strengthening the Code by introducing compulsion so that more clauses that currently read 'ought to' or 'ought not' should be replaced with 'must' or 'must not'. This would convey certainty and transparency.

Institute of Fundraising Guidance and Information Commissioner's Office Update

The IoF responded by conducting its own review and changed its Code so that fundraisers must no longer make direct marketing calls to MTPS registered numbers except where donors inform them by giving their express consent (for the 'time being'). This no longer leaves open the option to call a MTPS registered number simply because the donor had previously been in contact with the fundraiser. It also extinguishes the possibility of calling a MTPS registered number for fundraising purposes under the guise of an 'administrative' call.

The Information Commissioner's Office has produced guidance on direct marketing including the definition of 'consent'. For consent to be valid, it must be:

- Given freely;
- Specific;
- Informed; and
- Indicate positive agreement.

Other changes to the Code include the insertion of a new clause specifying that a charity must not accept donations from someone who lacks legal capacity and that charities cannot knock on doors where there are "no cold-caller" stickers.

The IoF is concerned about the effect that the measures will have on charities. It will impact on their income, particularly during emergency appeals. Charities will no longer be permitted to contact individuals or corporations who have existing and long-standing relationships with them unless they consent. The IoF has expressed its desire to have the regulations re-reviewed so that charities are not hindered from maintaining contact with their current supporters and to ensure that the changes are not unduly restrictive, nor disproportionate.

Future Developments

In light of the recent developments, the Scottish Council for Voluntary Organisations is carrying out an informal review of fundraising practices in Scotland. The Public Administration and Constitutional Affairs Committee will also be holding an evidence session in September 2015 following their own investigations into fundraising in the charity sector. New guidance for chief executives and trustees on managing fundraising practices will be produced shortly with input from a combination of sector advisors including NCVO, ACEVO, the Charity Finance Group and the Charity Commission.

The Charities Bill will now require all new contracts that are made between charities and fundraising agencies to state how they propose to give vulnerable people protection and implements the requirement for charities with an income in excess of £1m to publish details of their fundraising activities including the number of complaints received.

Summary

Charities should ensure that they follow the newly amended Code of Fundraising Practice should they wish to fundraise and/or market in public either directly, or indirectly. Firstly, by checking telephone numbers against the MTPS register and secondly, ensuring that MTPS registered individuals / corporations have given their valid consent for the time being to being called. Charities should design clear opt-out communication systems. They should actively ensure that administrative calls to MTPS registered individuals are not used to fundraise.

If consent has not been obtained for MTPS-registered individuals, charities will be in breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 and subject to enforcement action. In extreme cases they could face a fine of up to £500,000.

BATH RECREATION GROUND TRUST

The Upper Tribunal (Tax and Chancery Chamber) recently handed down its judgment in the long running saga relating to the use of the Bath Recreation Ground by Bath Rugby, a professional rugby union team. The Trustees of the Bath Recreation Ground Trust (“the Rec Trust”) has appealed a decision of the First-Tier Tribunal which had amended a Charity Commission Scheme relating to the administration of the Rec Trust.

In 1956, the Recreation Ground in the centre of Bath was acquired by the Mayor and Alderman of Bath upon trusts which were determined, in 2002, by the High Court, to be charitable. Unaware that it held the land on charitable trusts, the Local Authority had constructed a leisure centre and car park on part of the land and leased another part to Bath Rugby Club.

The trusts on which the land was to be held required it was not to be used otherwise than as an open space and for recreational purposes and that no one sport should be preferred over another when using the land.

In order to deal with the breach of the issues relating to the use of the land contrary to these trusts, the Charity Commission made a Scheme to regulate the future use of the land which included the power for the trustees to enter into a land swap with the rugby club which was said to own suitable amenity land outside the city centre.

This Scheme was amended by the First-Tier Tribunal and the appeal before the Upper Tribunal was brought on the following alleged errors of law:-

- There was insufficient evidence in front of it to justify the assertion that the true charitable purpose of the gift was to preserve the land in specie as an open space; and
- It was wrong to distinguish the Rec Trusts from those considered in *Oldham MC v AG*;
or
- In the alternative, if the land is to be held in specie, the Tribunal should have regarded the provisions in the Scheme relating to the lease to the rugby club as cy-pres provisions.

The Charity Commission was also a party to these proceedings and supported the appeal on the grounds that:-

- There was insufficient evidence that the 1956 conveyance required the land to be retained in perpetuity by the trustees or that factors associated with the land required its retention; and
- The Charity Tribunal should have considered whether a cy-pres occasion had arisen given it was the Commission view that such an occasion had arisen as a result of the irresolvable breach of trust created by the lease to the rugby club.

The Commission also confirmed that the Scheme had been made on the understanding that section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996, namely that for the purposes of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

The respondents argued that:-

- The unique situation means that there was a public benefit in preserving the land as an open space;
- The Tribunal were correct not to sanction the breach of trust;
- The playing of professional rugby was “an illegal use of the land”;
- Rather than a cy-pres scheme, the rugby club should be forced to leave the land.

The Upper Tribunal held that:-

- The 1956 conveyance did not create a trust to preserve the land in specie as an open space;
- The Charity Tribunal did not have sufficient evidence before it to determine that the qualities of the Recreation Ground were factors which would make possible the creation of a charitable trust for its preservation in specie as charitable land.
- As a result of the above, it did not need to rule on the remaining grounds of appeal but commented that in the event the lease to the rugby club was validly granted, a cy-pres situation had arisen and that a cy-pres scheme would be needed in relation to that land if the Trustees are to have a power of sale or a power to swap land.

The Upper Tribunal has invited the parties to make representations as to how this matter should now proceed with a view to resolving this long-standing issue but the key points to draw from this decision are the importance of trustees of land taking proper advice as to the trusts on which the land is to be held and that the Charity Tribunal must be careful when seeking to fetter the discretion of the trustees of charitable land.

PRACTICE POINTS

CONVERTING TO A CHARITABLE INCORPORATED ORGANISATION

CIOs have been available to use as a legal structure since 2013. Approximately 5,000 have been registered since their introduction. Here we set out the benefits that unincorporated charities should take into account if they are considering converting to a CIO.

Benefits of conversion to a CIO

- Limitation of financial risk for the charity's trustees. This will be particularly relevant once the charity grows to a point that it is entering into contracts and hiring employees.
- The charity will have legal personality of its own. This means it can hold land and intellectual property in its own name. Title documents do not have to be changed every time the trustees change. A CIO can also enter into contracts and be sued in its own name.
- Unlike a charitable company limited by guarantee, which is required to make filings with both the Charity Commission and Companies House, CIOs only have to make filings with the Charity Commission and are not regulated by Company Law.
- Unlike companies, CIOs can use simple receipts and payments accounts if their income is below £250,000 a year.

Would a company be more appropriate?

There are however some circumstances that mean a company will still be the more appropriate incorporated structure. In particular, charities working or receiving funding internationally may find that a CIO is a lesser known structure, simply because it is relatively new. For charities that require financing and need to secure their borrowing, unlike the Register of Charges at Companies House for companies, CIOs have no public register for charges. This may make lenders less inclined to make loans to a CIO if they are unable to show that the charity's assets have been secured.

CIO conversion process

Although termed a "conversion" the reality is that the old charity ceases to exist in favour of the new CIO that is created. The CIO is given a new charity number.

The process for an unincorporated charity becoming a CIO can be straightforward. The new CIO will first need to be registered at the Charity Commission. It will have a new CIO constitution agreed in draft by the charity trustees. The original charity will then need to formally agree to transfer its business to the new CIO. It will need to identify the individual assets, liabilities and commitments that will be transferring and take steps to ensure these are transferred properly. Once this process is complete the original charity will need to be deregistered by notifying the Charity Commission. The old charity may need to submit final accounts to the Charity Commission and ask to be added to the Register of Mergers. Alternatively the old charity may remain on the register as a shell. Various parties may need to be notified, including HMRC, banks, and funders.

For some charities the process can entail additional work. The trustees may need to deal with the transfer of land or complex assets or liabilities (for example, permanent endowment) or the transfer of employees. In addition to charity law and procedure, the trustees will need to take proper advice in respect of other areas of law such as employment (TUPE) and pensions law. Charities should ensure that no material agreements or financial arrangements are compromised by the conversion process.

Can companies convert to CIOs?

Provisions to allow companies limited by guarantee to convert to CIO status were included in the Charities Act 2011. This would be a “conversion” in the proper sense, in that the old charity would not need to transfer its business or close, but would simply change form. This would enable such charities to keep their existing charity number. The Office for Civil Society needs to introduce regulations to bring the relevant provisions into effect. Until such time, companies limited by guarantee are unable to make use of this procedure.

UNIVERSITY OF CAMBRIDGE WINS LANDMARK VAT DECISION AND SIX FIGURE REBATE

The University of Cambridge successfully defeated an appeal by HMRC at the Upper Tribunal (Tax) which will enable it to reclaim VAT incurred on investment management fees for a period spanning 25 years. In a judgment released at the start of June the Tribunal held that the University’s investments were held for the benefit of the University as a whole. As such, the costs of the investment activity were part of the University’s general overheads and a portion of the fees charged by the University’s investment managers could be attributed to the taxable supplies made by the University. Part of the VAT incurred on these fees could be reclaimed.

Prior to 2009 the University had not claimed that the management of the investments was an activity within the scope of VAT nor one that was directly connected to taxable supplies. HMRC had resisted the University's claim and appealed to the Upper Tribunal following a decision in the First Tier Tribunal in the University's favour.

Like many organisations, the University is able to deduct VAT incurred on supplies of goods and services that it uses for the purpose of making taxable supplies on which VAT is charged. The VAT on expenses incurred is usually referred to as 'input tax' and the VAT charged on the supply of goods and services is referred to as 'output tax'. Some supplies are exempt from VAT, and VAT incurred on goods and services purchased that are used for the purposes of exempt supplies cannot be deducted. Similarly some output VAT costs are considered to be completely outside the scope of VAT and input tax incurred directly and solely for outside the scope activities cannot be recovered.

The supply of many charitable goods and services is exempt, including the provision of education, which was the main activity of the University. However, charities often make some supplies rated for VAT and are therefore able to recover input tax where this is higher than their output tax. The University made rated supplies including commercial research, sales of publications, services to colleges, consultancy services, archaeological investigations, conservation and restoration, catering, accommodation, bar sales and the hiring of facilities and equipment. It used part of its £991 million investment portfolio, generating more than £40 million each year, to fund some of these activities.

Where goods and services are purchased and used for a mixture of exempt supplies and VAT rated supplies, the input tax can be apportioned between the exempt and VAT rated transactions. This is called the partial exemption special method and HMRC usually agrees with charities the method of its calculation.

In order for the input tax to be reclaimed, a charity needs to show that there is a direct and immediate link between the input and output tax or that the costs incurred (and the input tax) are part of general overheads. In either case the costs should form a component of the price of the goods or services supplied by the charity. HMRC had argued that the investment costs incurred could not be properly linked to each of the University's specific taxable activities and were in fact cost components of carrying out investment activity. As investment itself was not a business activity that the University could be said to be carrying out, the component costs could not be linked nor reclaimed. Both the First Tier and Upper Tribunals disagreed. They held that although the investment activity itself was not within the scope of VAT, it was not carried out for its own sake, nor for a specific supply. Instead, it was carried out for the benefit of the University's general business activities and the investment management fees formed a cost component of these other activities. The University was therefore able to bring the fees into an apportionment it had with agreed with HMRC as part of the partial exemption special method.

The decision will benefit charities who make taxable supplies and can link their input tax costs to their general business activities. This will apply if the input tax is directly connected to a taxable supply or if it will benefit the charities general business supplies. It may extend to other professional costs and charges which are a necessarily incurred as part of generating general income, products or services for trading supplies. It is unlikely to apply if the input tax is incurred solely to carry out a specific exempt activity or an activity either outside the scope of VAT or the charity's general business activities.

NEWS FROM THE PWW CHURCH AND CHARITIES TEAM

RECENT AND UPCOMING EVENTS

FSI - Big Advice Day

PWW was sponsored and exhibited at the Big Advice Day hosted by the Foundation for Social Improvement which took place at The Loft in Islington on 16th June 2015.

The event was particularly aimed at those charities with a turnover of under £1.5 million and provided up to 160 delegates access to expert speakers who delivered sessions on a variety of topics essential to small charities. PWW took part in giving 1 on 1 free advice sessions to delegates and we are pleased to report that a total of 282 hours of advice was given by various organisations.

We enjoyed meeting and giving advice to many of the delegates on the day and look forward to discussing various issues raised in the future.

ACEVO Annual Conference

PWW is sponsoring and will be exhibiting at the ACEVO Annual Conference which will be held at the Park Plaza, Victoria on 19th November 2015.

This year, the Annual Conference will be focusing on the changes that are taking place within the charity sector and what challenges the leaders of this sector will be facing. Confirmed speakers include Peter Lewis, Chief Executive of the Institute of Fundraising, Vicky McDermott, Chief Executive of Papworth Trust and Matt Hyde, Chief Executive of the Scouts Association.

We look forward to meeting with delegates on the day.

Trustee Training Seminar

PWW recently hosted the Trustee Training seminar focusing on Trustee Benefits and Conflicts of Interest. For those of you who were not able to attend, the session materials for this seminar are now available to download from our website.

The next Trustee Training seminar will be taking place in November 2015 and we will be inviting delegates to take part in due course.

The information provided in this note is guidance only and is not in any way meant to be the provision of an opinion or legal advice.

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