

# Social Economy Issue 108



A bulletin of legal information for charities, voluntary organisations and social enterprises.

## Charities

### Charitable Incorporated Organisation registration begins

**The Charity Commission began to process applications of Charitable Incorporated Organisations (CIO) from 10 December 2012 with registrations starting from 3 January 2013.**

Initially registrations are limited to new charities and unincorporated charities converting into CIOs. Companies Limited by Guarantee, Community Interest Companies and Industrial and Provident Societies will be able to convert to CIOs when further sections of the Charities Act 2011 are brought into force.

The Charity Commission is currently only registering charities which have an income over £5,000, so proof of that income will be required with the registration. Since January, 122 charities have been registered as CIOs.

Whilst CIO status has the advantage of having a single place of registration, it is not designed for charities which are likely to trade and potentially borrow money for that purpose. However, for organisations which have employees and are unincorporated, this will be an option worth considering.

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## HMRC launch “Charities Online”

**This new online service enables charities and community amateur sports clubs (CASCs) to claim Gift Aid, tax repayments on other income and Gift Aid Small Donations Scheme top-up payments by using an online form. New intelligent forms (iForms) will replace the current ChA1 HMRC Charities application form, ChV1 Charities variations form and CASC(A1) registration form.**

Following the introduction of Charities Online, the existing R68(i) Gift Aid form will be replaced by three new options for claiming payments from HMRC Charities:

### 1. Claim online

There is an online form which is submitted to HMRC electronically once it's completed. It is possible to list the details of up to 1,000 donors with each individual online claim by attaching a spreadsheet to the online form. There is no limit to the number of claims that can be submitted.



### 2. Claim using external software

Charities and CASCs can use software on their own computers to submit claims and the details of up to 500,000 Gift Aid donors can be listed in any one day. It is necessary to check whether such external software is compatible with the new Charities Online system and information about the technical specifications can be found at: <http://www.hmrc.gov.uk/charities/online/demonstrator.htm>.

### 3. Claim using a new paper form (ChR1)

For those charities and CASCs which do not have internet access, it is still possible to submit a paper form. The details of up to 90 donors can be listed for each paper claim. The paper forms are available to order from HMRC now.

It is important that charities and CASCs start using Charities Online and further information can be found in the charities section of the HMRC website: <http://www.hmrc.gov.uk/charities/online/index.htm> where there is a demonstrator site on which charities can learn how online submission works.

## Investment of Permanent Endowment

There has been some disagreement between charity lawyers and the Charity Commission over whether the Charity Commission has had power to permit charity trustees to invest on a total return basis where the charity has permanent endowment investment assets. The Trusts (Capital and Income) Act 2013 will remove this uncertainty.

Section 4 of the Act will permit charity trustees to decide that investing on a total return basis is in the interests of the charity and the charity should therefore be freed from restrictions on investment of capital. The Charity Commission will produce regulations pursuant to which the trustees will invest instead of on the basis of the trust deed, when they make the decision.

Whilst the Act is in force, the Charity Commission is to produce and consult on regulations before these provisions can be used by trustees.

## HMRC Charities fit and proper person form ChV1

**HMRC Charities has recently updated its guidance on completing the charities variations form ChV1. This form is used to inform HMRC of significant changes to a charity or community amateur sports club (CASC).**

For example, ChV1 should be used to tell HMRC about the details of the “authorised official” (the person authorised to deal with your charity’s or CASC’s tax affairs), the “responsible person” (the person with legal responsibility for running your organisation) and your organisation’s bank.



Detailed guidance on how to complete the form, including information about when to use the form, can be accessed at <http://www.hmrc.gov.uk/forms/charity-stubb.htm>.



## Free portable criminal records checks for volunteers

Following the creation of the Disclosure and Barring Service (DBS), on the merger of the Criminal Records Bureau and Independent Safeguarding Authority on 1 December 2012, the Home Office has announced that the new criminal record checking system will be free to volunteers.

The new system enables volunteers, such as charity trustees and school governors, to apply once to the DBS for a certificate and then go online to check that their existing certificate is up to date. This Update Service will mean that criminal records disclosure certificates will become 'portable' for the first time by allowing individuals to re-use their criminal records checks. It is hoped that this new, free and portable criminal records service will encourage more people to volunteer for a variety of organisations, as they will no longer need to apply for multiple checks when applying for different volunteering opportunities.

The Update Service will also be available for paid employees for an annual subscription fee, which will be less than the cost of a new criminal records check.

Individuals and organisations can register their interest in finding out more about the Update Service at [www.gov.uk/disclosure-barring-service](http://www.gov.uk/disclosure-barring-service). CRB certificates that have already been issued will remain valid.



If your organisation engages the services of volunteers, you may be interested in Wrigleys' HR Response Service which can provide you with advice and documents relating to volunteers. For more information please go to <http://www.wrigleyshr.co.uk>.

**Criminal records disclosure certificates will become 'portable' for the first time.**

## ICO publishes guidance on the secure disposal of IT equipment

The Information Commissioner's Office (ICO) has recently published "IT asset disposal for organisations: Data Protection Act" which provides detailed guidance about what organisations need to consider when disposing of IT equipment that may contain personal data.

The ICO's guidance advises organisations to add a section to their existing security policies to address the process of IT asset disposal and personal data deletion. It also warns that even if an organisation uses a specialist asset disposal company which compromises personal data, the organisation that engaged the company's services may still be responsible for this breach of the Data Protection Act 1998.

It is therefore important that all organisations that handle personal data ensure that assets are disposed of correctly. It is clear that if personal data is compromised during the asset disposal process, even after it has left your organisation, you may still be responsible for breaching the Data Protection Act 1998. This is particularly relevant in relation to IT asset destruction and recycling processes.

The ICO's guidance is available at: [http://ico.org.uk/for\\_organisations/data\\_protection/topic\\_guides/online/it\\_disposal](http://ico.org.uk/for_organisations/data_protection/topic_guides/online/it_disposal).



# Data protection: First charity fined by the Information Commissioner's Office

**The Information Commissioner (the “Commissioner”) has, for the first time, fined a charity for a serious breach of the Data Protection Act 1998 (the “Act”) by imposing a fine of £70,000 on Norwood Ravenswood Limited (working name “Norwood”).**

Since April 2010, the Commissioner has had the power, in accordance with section 55A of the Act, to impose a fine of up to £500,000 on a “data controller” for serious contraventions of the Act. A “data controller” is a person who determines the purposes for which, and the manner in which, any personal data are, or are to be, processed and includes for example, charitable bodies and voluntary organisations.

The large fine imposed on Norwood was deemed reasonable and proportionate by the Commissioner given the particular facts of the case. In December 2011, one of the charity’s social workers left sensitive reports, relating to four young children in care, outside the London home of their prospective adopters, who were out when the social worker called.

When the prospective adopters returned home, approximately 30 minutes later, the documents had disappeared. Despite an extensive search, the reports were not recovered. The reports on the children contained detailed, confidential and highly sensitive personal information relating to the children and their birth families, including details of any abuse or neglect and medical histories.

Although at the time of the security breach the charity had an overarching data protection policy in place, there was no specific guidance on sending personal data to prospective adopters and the social worker in question had not received any training on data protection. The Commissioner therefore found Norwood to be in breach of the seventh data protection principle of the Act detailed in Schedule 1 to the Act, which is:

“Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.”



A notice of intent, which informs the recipient of the Commissioner’s intention to issue a fine, was served on Norwood in August 2012 and was followed by a monetary penalty notice in October 2012, which imposed the fine of £70,000.

The Information Commissioner’s Office has published detailed guidance about monetary penalty notices on its website at <http://www.ico.gov.uk/enforcement/fines.aspx>. In particular, it is worth charities being aware that before the Commissioner is able to issue a fine for breaches of the Act, he or she must be satisfied of the following:

- a) There has been a serious contravention of s4(4) of the Act (which requires the data controller to comply with the data protection principles set out in Schedule 1 to the Act); and
- b) The contravention was of a kind likely to cause substantial damage or substantial distress; and either:
  - (i) the contravention was deliberate, or
  - (ii) the data controller or person knew or ought to have known that there was a risk that the contravention would occur, and that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent the contravention.

The Norwood case serves as a warning to the charity sector that it must comply with the Act, by having thorough policies and procedures in place and by providing training for staff and volunteers, to ensure that sensitive data is kept securely. Failure to do so could have major financial, as well as reputational, consequences.

**The social worker in question had not received any training on data protection.**



# Employment

## The Supreme Court decides that a volunteer with no contract is not protected by discrimination law

**In *X v Mid-Sussex Citizens Advice Bureau and Others* [2012] UKSC 59 the Supreme Court upheld the Court of Appeal's decision that a Citizens Advice Bureau (CAB) volunteer who had no contract, was not covered by the Disability Discrimination Act 1995 or the Equal Treatment Framework Directive (2000/78/EC).**

The volunteer was not “in employment” within the definition of the Disability Discrimination Act. Nor was it the intention of the draftsman of the Framework Directive to provide protection to volunteers in this position. The Court declined to make a reference to the European Court as it believed its interpretation of the Framework Directive was “not open to reasonable doubt”.

In this case X worked with the CAB for 4-5 hours per week. She signed a “volunteer agreement” which stated that it was “binding in honour only... and not a contract of employment or legally binding”. When she was asked to cease her volunteering work she sought to bring a claim under the Disability Discrimination Act. The employment tribunal, the EAT and the Court of Appeal rejected her claims on the basis that she had not been in employment within the meaning of section 68 of the Act.

The Supreme Court was unanimous in dismissing the appeal. The following were the grounds:

- X did not have protection under the legislation because she did not have a contract with the CAB as required by the definition of “in employment”
- Nor was she a protected office holder
- The Framework Directive is not unlimited in its scope and extent and it is carefully defined and protects against discrimination only in specified circumstances
- If X's contentions had been correct and some, but not all, were covered by the Framework Directive: “the Directive would surely have given some indication as to where the line should be drawn”
- It was clear from the legislative history of the Framework Directive that it was not intended that Article 3(1)(a) of the Directive should encompass voluntary work
- The European Commission continually reviews the implementation of the Directive by Member states and has never suggested that the apparent absence of protection for volunteers in the implementing legislation of the UK or other member states amounts to a failure properly to implement the Directive

This reasoning, which applies to the Equality Act 2010, will be a great relief to charities. The CAB's defence of the claim was supported by ACEVO, Groundwork UK and Volunteering England on the basis that a finding in favour of X “would undermine the nature of volunteering, create practical barriers and additional costs for charities and organisations in which volunteering occurs”.

On the other hand, the Court appeared to accept that some volunteers may have protection, noting that “volunteers also come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within Article 3(1)(b) but....the appellant did not”.



# Local Government

## When a beach becomes a village green

**The Court of Appeal has ruled in favour of two Sussex Councils who argued successfully that West Beach in Newhaven could be considered a village green. Village greens fall under the The Commons Act 1965 as amended and to be replaced by the Commons Act 2006.**

Before these Acts the courts had established that the regular use of land over more than 20 years without contradiction by the land owner had established customary rights. The Commons Registration Acts brought in systems of registration of common land and village greens, placing a duty on county and district councils to keep registers. S15 of the Commons Act 2006 confirms by statute that the use of land by a significant number of



the inhabitants of a locality in lawful sports and pastimes for 20 years or more may allow registration.

Newhaven Port and Properties argued that the beach was part of the operational land of the port. The Parish Council and

East Sussex County Council lost their case last year, but won, on a majority decision on appeal. Newhaven Port and Properties have indicated they will now go to the Supreme Court.

## Employee Ownership and the Budget

**The Government made several announcements regarding employee share ownership in the budget, none of which are a huge leap forward, and at least one of which has been seen as highly controversial.**

The controversial one has been the “employee shareholder” employment status which will come into effect on 1 September 2013, if the Government can get it passed by the House of Lords. The House of Lords has initially rejected it. The purpose of the Government is to permit an employer to provide at least £2,000 of employee shareholder shares free from income tax and NICs to a maximum value of £50,000 in exchange for the employee giving up certain employment rights, such as protection from unfair dismissal.

Supporters of employee share ownership such as the Employee Ownership Association have indicated they are not in favour of this proposal because it associates the loss of employment rights with employee ownership rather than employee ownership being seen as an extension of employee engagement.

The positive proposal was to introduce a new capital gains tax relief on the sale of a controlling interest in a business to an employee ownership structure. This relief is related to an “off the shelf” employee owned company model to be produced by the Department of Business Innovation and Skills. The intention is for the relief to be introduced in 2014. This will be a very welcome development.





# Co-operatives

## Proposed consultation on IPS legislation

This year's Budget contained an announcement that the Government proposes to consult on options for raising the limit on subscriptions for withdrawable shares in industrial and provident societies (IPSs), and introducing insolvency procedures for IPSs and credit unions. The consultation is expected to take place this summer.

The limit on withdrawable shares of industrial and provident societies is £20,000 for any person except another industrial and provident society. There is no longer any limit on transferable shares.

The Budget does not contain further detail about the proposals, but they may involve a review of whether it is appropriate to extend the administration procedure to IPSs which are in financial difficulties, and could be of benefit to some IPSs, but has historically been opposed by the social housing sector.



The Insolvency Act 1986 provisions relating to the winding up of companies apply to industrial and provident societies, it is only the administration provisions which currently do not.

The Law Commission is currently working on a consolidation of co-operative law legislation which it is expected to be

introduced in 2013. Hopefully, this will highlight to the Law Commissioners, HM Treasury's continuing failure to bring forward modern law which can only be remedied by the Department of Business becoming a Department of all business (including the mutual sector).

## Financial Services Authority Restructuring

**From 1 April 2013, the Financial Services Authority ceased to exist and its functions were transferred to the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority ("PRA").**

The legislation governing the transfer of functions as regards mutual societies is the Financial Services Act 2012 (Mutual Societies) Order 2013.

Going forward, the FCA will act as Registrar for mutual societies. The PRA has responsibility for the prudential regulation of banks and financial services organisations.



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