

SocialEconomy

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

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Charities...

Public Benefit - Statutory Duty Guidance Published

The Charity Commission has now published its statutory guidance on public benefit. In the last issue of Social Economy, the timetable for the publication of the Umbrella Guidance and the supplementary guidance against each charitable head was given. We are pleased that the final version of the Umbrella Guidance has taken account of the many comments which have been made and trustees can be more confident that the guidance is in accordance with existing law.

The Charity Commission has divided its guidance into three different documents. Charities and Public Benefit: Summary Guidance for Charity Trustees is a four page summary of the key principles of the Charity Commission's general guidance about public benefit. This document should be issued to all trustees by charities and this guidance should be the touchstone for trustees when exercising their powers or duties on public benefit. It will assist trustees in fulfilling the new duty to have regard to the Charity Commission's guidance on public benefit.

Charities and Public Benefit is the full statutory guidance and, therefore, will give a more nuanced and deeper illustration of what the Charity Commission expects of trustees. The summary guidance is the day-to-day working tool of trustees but if there are difficult issues for interpretation, then trustees will need to refer to this detailed statutory guidance.

Finally, the Charity Commission has published an analysis of the law underpinning charities and public benefit which provides the summary of the principal cases from which the

guidance is derived. There has been concern from statements made by Charity Commission officials that the Commission was seeking to depart from the law on its guidance on public benefit, rather than set out the principles of case law on which public benefit should be based. Whilst there is room for interpretation of the guidance at specific points, on the whole the Commission has probably got the balance right. The Charity Commission's decision on the recent application for a charitable registration by Odstock Private Care Limited demonstrates that the Commission will follow existing case law.

Odstock Private Care Limited - Private Benefit

Odstock was established by Salisbury NHS Foundation Trust to undertake private healthcare work in Salisbury District Hospital. There is a statutory limit on the capacity of foundation

trusts to benefit from private healthcare work, and the hospital sought to earn more than the statutory limit through the establishment of a separate charitable company. It was intended that Odstock would enter into agreements with patients and insurance companies for the provision of private care and contract with the foundation trust for the provision of staffed facilities. Partly, the arrangement was to satisfy consultants' desire for private patient work. The Charity Commission rejected the application and that decision was then appealed for review by three Board members of the Commission.

Odstock was established so that its income would be derived from private patients who received the benefit of medical insurance. It appeared that Odstock was not in a position to accept poor patients for whom no fee was payable and, perhaps, more

importantly in this case, there was no evidence produced that through medical insurance plans some poor persons were able to obtain benefit.

The reviewers considered the Privy Council case of *Re: Resch* where, in an analogous situation relating to a public hospital and its associated charity, public benefit was found in that the poor were not excluded.

This decision of the Commission is comforting, since they have simply applied the case law as it stands, without gilding it. If better evidence had been produced, for example, that through employer paid medical insurance poor people could have used those facilities of Odstock, or some charitable bursary fund was offered by Odstock for private care, then it is Wrigleys' view that Odstock might have been found to have been charitable.
www.charitycommission.gov.uk



Charities (continued)

Consultation on Supplementary Guidance - Poverty and Religion

The Charity Commission, on 29 February, issued its draft supplementary guidance for public benefit and the Prevention or Relief of Poverty and Public Benefit and the Advancement of Religion. The consultation period on the draft guidance will last until the end of June 2008. The draft guidance on Public Benefit and the Prevention or Relief of Poverty is accompanied by an analysis of the law in this area, as well as a further document on the promotion of social inclusion. It's a pity that the Charity Commission did not publish its guidance on the relief of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage at the same time as issuing draft guidance on the prevention or relief of poverty, since the first head of relief in need is largely a derivation from relief of poverty. The distinction between these two heads is important, for example, in categories such as key workers for whom affordable housing might be difficult to obtain. It is possible that a housing charity for the prevention or relief of poverty would not be able to assist a key worker. However, a relief of need charity might be able to assist a key worker for whom affordable accommodation is difficult to come by. The draft guidance on poverty also includes public benefit of benevolent funds and family poverty trusts.

Charities with the advancement of religion for their objects will be interested in this draft guidance,

since religion, by virtue of the Charities Act 2006, includes religion which involves belief in more than one god and a religion which does not involve belief in a god. Wrigleys will be considering the draft guidance in the next edition of SocialEconomy.

Charities and Substantial Donors

The Finance Act 2006, Section 54, introduced a new hurdle for substantial donors to charities where the donor may have involvement with the charity subsequently. The Government's intention in the introduction of this section was to ensure charities were not used for tax avoidance. There is, however, concern for the scope of this section.

A substantial donor is a person who gives £25,000 or more to a charity in one year or £100,000 over six years. If a donor or a connected person, as defined in tax law, receives a benefit from the charity, then that benefit may be treated as non-charitable expenditure by the charity. The legislation is far

"A substantial donor is a person who gives £25,000 or more to a charity in one year"

reaching and can have a strange effect, for example, if a person gave a substantial donation to a charity working in the developing world and then the donor took a sabbatical to work with the charity and received a modest living allowance during the sabbatical, the living allowance would be defined as a benefit and the charity would have a tax liability under Section 54. It is, therefore, important when charities are working with substantial donors that they bear these rules in mind. (www.sheen-stickland.co.uk on account)

Charities in Scotland

The OSCR (Office of the Scottish Charity Regulator) has announced a consultation on its current guidance for meeting the charity test. Initial guidance was published at the time the Charities and Trustee Investments (Scotland) Act 2005 came into force in April 2006 but the OSCR has now itself obtained

more knowledge and experience of the provisions of the Act. To date, it has made decisions in over 1,600 applications for

charitable status. The consultation will last until 7 April 2008 with OSCR intending to publish a summary and analysis of the responses on its website by 30 April, with a view to revised guidance being published in the summer.

One particular area on which comments are invited is the concept of "disbenefit" i.e. whether "the (prospective) charity, in pursuing its purposes, causes disbenefit to the public, and the extent to which that is the case compared to the public benefit that is provided". Disbenefit is a concept that is not applied in England and Wales.

A joint statement has also been issued by OSCR and HMRC to clarify the requirement of "definition" clauses (defining the meaning of the words "charitable", "charitable purpose" or "charity") in constitutions of bodies on the Scottish Charity Register that also wish to seek tax relief from HMRC, and therefore must comply with both the provisions of what is "charitable" under both the Charities and Trustee Investment (Scotland) Act 2005 and the Taxes Acts. It has been agreed that not all charities on the Register that have been established under Scottish law need a definition of the

terms "charitable" or "charitable purpose" to be included in their constitution in order to be able to meet the requirements of HMRC and qualify for tax relief. For example, where the terms "charitable" or "charitable purpose" are not used in the constitution there is no need to add a definition. Any definition adopted prior to

February 2008 which is different to that contained in the joint statement do not need to change in order to benefit from

tax relief. (LMSC 14 January 08)

"The Commission has revised its procedures for dealing with complaints and customer feedback"

Charity Commission: complaints and customer feedback

The Commission has revised its procedures for dealing with complaints and customer feedback. The new system launched at the start of 2008 replaces the 2003 system. Key features of the new service are described as being:

- enhanced emphasis on local resolution aimed at resolving customers' concerns as quickly as possible with the original business team;
- the opportunity for a light-touch review of the outcome of a case where a decision is not eligible for a formal Decision Review but the customer remains dissatisfied with it. The review will be conducted by a Panel of Commission experts;
- an arm's length examination by the Commissioner's Customer Service Team of complaints about the standard of service provided by the Commission;
- active encouragement of all types of feedback about the Commission services.

www.charitycommission.gov.uk



Charities (continued)

New trustee guide to fundraising and FSB

The Institute of Fundraising has issued a new online guide called "Trustees Guide to Fundraising" to encourage trustees to play a more prominent role in supporting the fundraising initiatives of their charities. The guide covers such areas as trustee obligations, sustainable funding, fundraising techniques, tax-effective giving, as well as legal and ethical issues.

The Fundraising Standards Board which has been established by the Institute of Fundraising to assist in the self-regulation of charities to fundraising has now got 800 charities as members. Membership costs between £30 and £1,800 and commits signatories to uphold the Fundraising Standards Board's promise to follow the Institute of Fundraising's Codes of Practice. Complaints are handled in three stages: people are first told to resolve their differences internally within a charity. If that doesn't work - and the fundraising promise or any of the Institute's Codes have been broken - the Fundraising Standards Board mediates. If that also doesn't work, Fundraising Standards Board directors adjudicate.

In January 2008, the Fundraising Standards Board published its first adjudication rejecting a complaint against Cancer Research UK. The Fundraising Standards Board is seen as the charity sector's approach to avoid Government regulation and it will clearly need more charities to sign up for self-regulation within the next two years for it to be seen to work. **Third Sector 13 February 2008**

"new guidance would permit charities for the first time be able to devote most of their energies and time to campaigning contentious political issues"

Charity Commission Consultation on Financial Thresholds

The Charity Commission has published consultation proposals to increase various financial thresholds for charities. It is suggested that increasing thresholds will ease the burden of charities, but its also the case that it will ease the burden of the Charity Commission which has had year-on-year cuts in its

funding over the last three years, notwithstanding its increased obligations under the Charities Act 2006. Many of the changes which have been proposed relate to the accounting and annual return requirements of charities.

It is suggested that the income threshold for charities to have their accounts audited should be raised from £500,000 to £1 million or, if the assets of a charity are greater than £3.26 million and the income is £250,000, the charity would require an audit in those circumstances too. At the lower end, it's suggested that charities with incomes below £25,000 would not need an independent examiner and would not need to submit annual accounts to the Charity Commission at all. Furthermore, charities with income below £25,000 a year

would not be required to produce a trustees' annual report and those with income of less than £25,000 would not need to submit it to the Charity Commission. Whilst the number of charities which would be covered by these increasing thresholds is relatively small, there is concern that the standards of prudential controls in smaller charities might drop as a result of some of these proposed changes. www.charitycommission.gov.uk

The Big Give - How to find charities seeking donations

The Big Give; a website aimed at philanthropists to provide them with information about charitable causes to which they may wish

to donate, has upgraded its review and search facilities. More quality control will be enforced to stop some charities giving themselves unfair advantage in searches or to prevent poorly presented and low-value projects. Site users will also be able to grade the projects they know about - similar to the points system used in the Amazon website.

The Charity Commission, responding to users of Charity Commission information, has started to publish details of new registrations on a daily basis. This will permit umbrella advisory bodies, such as National Council for Voluntary Organisations, to target new charities more quickly.

needed to make distinct the definitions of "furthering" and "supporting" charitable purposes. The draft guidance has been delayed until March 2008, in part due to confusion created by a story appearing on 24 January in the Daily Telegraph, to the effect that the new guidance would permit



Political Campaigning

Charities and the issue of political campaigning have recently been in the news for two reasons. Firstly, the Charity Commission has written to 16 Muslim charities to remind them that its not permissible for charities to affiliate themselves with or support a particular political party or candidate. This was after the charities, in an open letter, set out their support for London mayoral candidate, Ken Livingstone, which was posted in The Guardian newspaper's blog on 3 January. The Commission has since been assured that those who signed did so as individuals not as charity representatives. **Third Sector 23 January 2008**

In addition; the Commission itself is producing a revised version of its guidance on campaigning. The new draft guidance makes a distinction between "campaigning activities which can further charitable purposes" and "political activities" which can be undertaken by a charity only in the context of supporting charitable purposes. Some of the Commission Board members had felt that further clarification was

charities for the first time to be able to devote most of their energies and time to campaigning contentious political issues. The guide will be called "Speaking Out": Guidance on Campaigning and Political Activities by Charities. **LMSC (21 & 24 January 2008 and 1 February 2008)**

Online Charity Application

It is now possible for prospective charities to apply for registration online. It is not yet, however, possible for all charities to use this service. The Commission has only launched what it's calling "the first stage" in a process to allow new charities to register. At present, only those charities which are able to use approved governing documents, as are produced by some large charities and umbrella bodies, are able to use the service. The system provides online guidance and allows applicants to save the application form and return to complete it at a later date. Using the online application system should reduce the time it takes for the Commission to assess the application and complete charity registration. www.charitycommission.gov.uk

Employment...

There is a duty to consult over the reason for redundancies

One of the big questions in redundancy is at what point is an employer obliged to start the consultation process. Guidance is drawn from the collective redundancy provisions set out in the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA) which requires consultation where an employer proposed to make 20 or more employees redundant at one establishment within 90 days or less. In these cases consultation must begin "in good time".

Since the case of Vardy (1993), Tribunals and employment advisers have worked on the basis that consultation does not include looking at the reason for redundancies. This substantially limits the value of consultation since it focuses on how redundancy may be implemented rather than whether it can, in truth, be avoided.

A recent case challenged and overturned this principal drawing upon the Information and Consultation of Employee Regulations which sets out a regime where employers may be required to consult about economic issues.

The Employment Appeal Tribunal (EAT) has now held that Vardy is no longer good law and subsequent changes in legislation have widened the scope of the consultation obligation to include ways of avoiding dismissals which meant consultation on the reason for the redundancy dismissal. The EAT took the view that redundancies were proposed at the point where the closure itself was proposed and not at the later stage arising as a result of the closure. (**UK Coalmining Limited -v- National Union of Mineworkers September 2007**)

How to lose your redundancy entitlement

Where an employee accepts an offer of alternative employment a statutory four week trial period runs. If the contract is terminated during that trial period the employee is deemed dismissed on grounds of the original redundancy and retains the right to the redundancy payment. An employee reluctantly accepted an offer of alternative employment when faced with redundancy. During the trial period the employee identified concerns about the suitability of the new role and two weeks after the end of the trial period the employee resigned.

The EAT held that the statutory provisions were clear and that where they applied there was no separate common law trial period. The trial period limit is four weeks and it can only be extended in limited

circumstances, for example to allow retraining for the new job. In this case the employee had failed to terminate within the statutory period and therefore had lost the protection and the entitlement to redundancy pay. **Optical Express Limited -v- Williams (July 2007)**

Even had the employee given notice within the statutory trial period they would only have been entitled to the redundancy payment if the new job was not suitable alternative work or they had acted reasonably in leaving it. These issues did not need to be considered. The loss of the redundancy entitlement and the provisions relating to statutory trial periods would not prevent a claim being brought generally in relation to an unfair dismissal, challenging the redundancy (or more likely the procedures applied to selection) itself.

Failure to follow policies rendered a dismissal unfair

An employer's failed to follow its own alcohol policy when dismissing an employee with an alcohol problem. Not surprisingly, this failure rendered the dismissal unfair. On a better note for employers it was also held that the employee's unacceptable conduct (including being unfit to work) was a relevant factor and could amount to contributory conduct for the purpose of assessing (reducing) compensation (**Sinclair -v- Wandsworth Council November 2007**)

Whilst this particular case dealt with an alcohol policy the same could be said of any policy introduced by an employer. If a policy exists it needs to be communicated and applied in a consistent manner. Alcoholism is expressly excluded from conditions which can amount to a disability under the Disability Discrimination Act, however its important to realise that medical conditions which may arise as a result of alcoholism may amount to a disability.

Immigration - Employer obligations and unfair dismissal

From 29 February 2008 there will be new criminal and civil penalties on employers who employ illegal



workers under Immigration legislation with fines of up to £10,000 for each employee working illegally. Draft codes of practice have been issued for employers by the Borders and Immigration Agency as to how to comply with these obligations. The case of Klusova adds to an employer's understanding.

An employee failed to produce satisfactory evidence of their right to work and was summarily dismissed by letter. The employee appealed but again failed to produce satisfactory evidence of their right to work. Subsequently the employee produced confirmation that an in time application for leave to remain in the UK had been made and that they

were entitled to continue in work until the application had been processed. The Court of Appeal held that as there was no actual restriction on the employee continuing to work (regardless of the employer's belief) the employer could not rely upon the argument that continued employment would contravene a statutory restriction, a potentially fair reason for dismissal. However, the genuine belief that it was unlawful did amount to some other substantial reason, and therefore was a potentially fair reason for dismissal. In this case the employer's failure to follow the statutory dismissal procedure rendered the dismissal automatically unfair in any event. The dispute resolution procedure does not apply to a statutory restriction dismissal but as the Tribunal had found that this did not apply the defence was not available to the employer. **Klusova -v- London Borough of Hounslow 2007, www.bia.homeoffice.gov.uk**

Third Party Pressure to Dismiss

In the case of Doby -v- Burns International Security Services

(1984) the Court of Appeal confirmed that pressure from a third party could justify dismissal but that "a very important factor" was whether there would be injustice to the employee and the extent of that injustice.

In a recent case the EAT overturned the Tribunal's finding that the dismissal had been fair. A shop fitter was dismissed after being effectively banned from the stores of the employer's major customer. Whilst the Tribunal had considered the steps taken by the employer to find alternative work there was no evidence that the question of injustice had been considered. It was recognised that had

"there will be new criminal and civil penalties on employers who employ illegal workers"

the issue of injustice been considered the same decision to dismiss may have been made, but as no finding on this point had been made by the Tribunal the decision could not stand. **Greenwood -v- Whiteghyll Plastics Limited (August 2007)**

Whilst the case is remitted to a different Tribunal, i.e. the issues would have to be reheard, there is a difficulty for employers in this situation. In considering the question of injustice the employer is forced to consider whether it may be more unjust to dismiss an employee, whether rightly or wrongly, falling on the wrong side of an influential customer against another employee who has otherwise done nothing wrong. For the employer the question is how far their obligation to look elsewhere goes and whether they can effectively "bump" someone else who, in their view, would not suffer as great an injustice. Does bumping in this situation amount to some other substantial reason? The safer course would be to consider injustice but to give greater weight to the injustice of bumping someone else.



Charity's responsibility to the environment

Trustees of charities and directors of charitable companies who want to address the environmental impact of what they do - but the objects of their charity are not environmental ones - might be interested to know that the Charity Commission is beginning to cast a more generous eye over environmental activities as a way for charities to, albeit indirectly, realise their objects.

At the Charity Commission's seminar 'Environmental Responsibilities and the Role of Charities', which took place last October, Charity Commission representatives advised delegates that the Commission would take a flexible approach to the issue. While reiterating the need for trustees to work within the constraints of their charity's objects, that despite legal constraints, the Commission advised it "would encourage flexibility and innovation" so that charities that did not have objects for the preservation of the environment could nonetheless carry out environmental work.

The Commission has given three interesting examples of how this could work in practice: A religious charity could take the view that, because God made the earth, the religious charity was a key stakeholder in the environment and could therefore take on environmental projects. Meanwhile, the Commission, in its online guidance has given the examples of a charity with 'relief of poverty' objects delivering environmental projects because it has evidence that the effects of climate change are contributing to the poverty in certain parts of the world, and a charity with 'relief of sickness' or 'promotion of health' objects researching the effects of pollution on the causes of sickness, or how environmental factors affect the recovery of those with a particular illness.

What is the reason then for all this 'flexibility'? The Commission says it's a combination of the importance of being green observing that, "there is increasing expectation for charities to look at this if they are to be seen as organisations upholding good values," and the increasing impact of environmental issues on the law.

The Government has a duty under its European Climate Change obligations to make a 60% reduction on 1990 levels in carbon dioxide emissions by 2050. It cannot do that without legislation. Hence, the new duty the Companies Act 2006 has imposed on directors: they must have regard to the impact of their company's operations on the community and the environment when they act to achieve their company's purposes. (The Charity Commission believes this duty will soon apply to trustees of unincorporated associations as well)

Trustees with an eye on their charity's sustainability or its carbon footprint, who do not wish to change their charity's objects, might do well instead to 'think outside the box' to see how environmental projects or policies might tie in with delivery of public benefit through their charity's objects or operations.

Community Renewables in Spain

We have previously reported on community-owned wind farms and community hydro schemes in the UK, but in Spain, the leading examples are in community solar gardens. The sunny Spanish climate helps as

does the subsidised price which producers of solar energy receive from sales of electricity to the Spanish electricity grid. Companies such as Acciona Solar develops, builds and services photovoltaic power plants. Small scale investors are organised to put down 20% of the purchase price of the development and the balance can be obtained by way of a bank loan which is repayable over ten years from the electricity sold. The plants are either located on otherwise unproductive land or in roof installations.

As with the UK and its grant regime for solar panels, the enthusiasm for solar panels is causing embarrassment to the Spanish Government which is seeking to rein in the subsidies, but risk taking a stop-go approach to the

development of the Spanish photovoltaic industry. Whilst it could be some time before community solar gardens are seen in the UK some of the community owned Scottish islands without grid connections may have community solar as part of their renewable mix. (new energy December 2007)





Housing and Regeneration...

Charitable Housing Associations

Over two thirds of registered social landlords are either registered charities or enjoy charitable status. Housing associations, depending on their status, may be regulated by the Charity Commission, Housing Corporation, Companies House or the Financial Services Authority if they are charitable industrial and provident societies.

The Housing and Regeneration Bill, currently going through Parliament, introduces legislation to combine the Housing Corporation and English Partnerships, the Government's property regeneration body. The new regulator of housing has the attractive title of the Office for Tenants and Social Landlords (OFTSL). It will have new powers to set compulsory standards for providers of social housing at the direction of the Secretary of State. The Charity Commission is concerned that the

new regulator might require a housing charity to undertake purposes beyond its powers, which would mean it would lose its charitable status. It is also concerned that the independence of charities would be undermined, even though this would not amount to a loss of charitable status.

The Charity Commission, as promised when introducing the Charities Act 2006, is seeking to make OFTSL the principal charity regulator for charitable industrial

and provident societies when the relevant part of the Charities Act 2006 comes into force. Interestingly, it is also suggesting that OFTSL becomes the principal regulator for charitable housing companies too. In both cases, if the principal regulator, through its monitoring, identifies a charity law issue that needs to be addressed, it can call on the Charity Commission's expertise. www.charitycommission.gov.uk



Companies...

Companies Act 2006 April Implementation

Many of the changes to be introduced in April 2008 relating to the Companies Act 2006 relate to accounting matters. The period allowed for filing accounts for private companies will be reduced from ten to nine months after the end of the relevant accounting reference period which, in respect of financial years beginning on or after 6 April 2008, it's very likely that on the next change to the charity's statement of recommended practice that the Charity Commission will

seek to reduce the obligation on charities for filing accounts to nine months too. Section 388 of the Companies Act 2006 introduces the requirement for the accounting records of the company on which audits are based to be kept from three years from the date on which they are made, however, it is good practice to keep accounting records for at least six years for taxation purposes, whilst for negligence purposes the retention period would have to be as long as 15 years.

Auditors are increasingly looking to reduce the limit of their liability by agreement with the company.

Under these new provisions of the Companies Act 2006, an agreement will not be possible unless it's fair and reasonable. The indemnity may be given for costs of an auditor successfully defending proceedings or in which relief is granted to the auditor by the court. The liability limitation agreement agreed by a company with its auditors can only be for a financial year at a time. The liability limitation agreement has to be authorised by a company's members in accordance with Section 536 Companies Act 2006 unless the members have waived the need for approval. Since the

agreement can be approved by a company's members both before or after the agreement is entered into, companies might expect auditors to try and fit these agreements with companies at the times of general meetings.

Finally, from 6 April 2008 it is no longer a requirement for a private company to have a company secretary. However, many articles of association provide for a company secretary. Company secretaries who are in office are not affected by this provision and can remain in their office until the appointment comes to an end.

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If you require legal advice on charity and social economy law

Please contact Malcolm Lynch at Wrigleys Solicitors, 19 Cookridge Street, Leeds, LS2 3AG, tel: 0113 204 5724, or visit www.wrigleys.co.uk