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SocialEconomy

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

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Charities...

Are charity trustees fit and proper persons?



Following the introduction of HMRC's new 'Fit and Proper Persons Test' for managers (not just trustees) of charities in the April 2010 budget, which could see the loss of a charity's tax reliefs if a charity appoints someone who is not a 'fit and proper person' to hold office with any sort of financial responsibility, there has been something of a public falling out about rules and the regulation of charities generally.

The Charity Commission is the official regulator of charities in England and Wales (in Scotland it is OSCR), and has clear rules and

guidance on tackling fraud within charities. However, in an open letter to a firm of solicitors who had challenged the new test, HMRC said that "the charity regulators' checks are clearly not sufficient for effective tax administration."

HMRC has produced guidance on the application of the rules, which can currently be found at: www.hmrc.gov.uk/charities/guidance-notes/chapter2/fp-persons-test.htm.

The guidance was revised in early July to try to deal with some of the concerns raised and a very

short consultation ensued (the draft was sent out by HMRC on Friday 2 July and responses were required by Monday 5 July – but we are assured by HMRC that our feedback is important to them). At the time of going to print the final draft had not been published. However the revised draft did provide some comfort that if HMRC considers that a charity has someone on the board of trustees or management team who is not a 'fit and proper person', the charity should be given the opportunity to remedy the position before losing its tax exemptions, which is a useful clarification, and there is to be

a presumption that managers are fit and proper persons, which is helpful. It has also reduced the number of people caught in the definition of 'managers' to those who might exercise any financial control.

If your charity either employs people who have had criminal convictions, or has trustees who have had criminal convictions on the board, we would recommend that you take advice, to make sure your tax exemptions are protected.

The Official Custodian for charities

Land belonging to an unincorporated charity, such as a trust or association, cannot be held in the name of the charity because it has no legal identity. It needs to be held in the names of individual holding trustees. When these individuals change, costs are incurred to record the change in land ownership. If this is not done, there is a risk that land will remain vested in individuals who no longer have links to the charity and may be difficult to trace.

An article in Issue 94 of Social Economy warned that a change of holding trustees for an unincorporated charity now triggers compulsory first registration at the Land Registry of any unregistered land vested in the new trustees. You were invited to consider

vesting property in the Official Custodian for Charities ('the Official Custodian'). Such a vesting will not trigger first registration and future changes of trustee will no longer affect the legal title to land. The charity trustees continue to manage the land as before, but legal title is with the Official Custodian as custodian trustee.

The Official Custodian is a corporation created by statute to hold land on behalf of charities. In practice a member of the Charity Commission's staff (currently Ken Brew, the Commission's principal accountant) is appointed to this role by the Commission. If land is to be held by the Official Custodian, it has to be vested in him. This is usually done by an Order of the Commission following an application by the charity.

Even if your land is already registered, there is still a case for vesting it in the Official Custodian to avoid the need to register future changes of holding trustee. A Land Registry search conducted in 2004 revealed 3,603 parcels of registered land vested in the Official Custodian with an estimated value in excess of £1 billion. This asset value appears in the accounts of the charities concerned – the total funds disclosed in the 2008/9 accounts of the Official Custodian are less than £4,000.

If you would like help with an application to the Charity Commission for a vesting order, please contact Valerie James or Tim Wrigley at Wrigleys.



Developing the Big Society

The Big Society Programme is available from the Cabinet Office website: www.cabinetoffice.gov.uk. It is perhaps a litmus test paper against which future support for voluntary and, community, co-operative and social enterprise activity can be judged in the coming years.

At its heart is trying to get more people involved with society. Some structural change will need to be considered to get this to work. Whilst there is a proposal for a national citizen service initially for 16 year olds, there is an argument that there should be a duty on all employers, as there is with jury service, for a certain number of day's activity for volunteering to be permitted on a paid basis.

With community enterprise involving Industrial and Provident Societies, the Government needs to change the Government Department responsible for community benefit societies to release the dead hand of HM Treasury. If there is to be a transfer of state functions to communities, the Government needs to tackle what happens to pension scheme rights of Government employees. We fear that civil servants may have kept Ministers in the dark about this last one since they did not deliver results in this area for the last Government. There are some interesting ideas in the Big Society but some enablement is required. www.cabinetoffice.gov.uk.

Vetting and barring scheme on hold



The Government has announced that they are halting registration with the Vetting and Barring Scheme, which was due to start on 26 July.

The Government has stopped registration to allow it to remodel the scheme, but please note that the requirements which came into force in October last year remain in place.

Further announcements are to be made later in the year, so watch this space for developments. For more information, see: www.direct.gov.uk/vetting.

The danger of unincorporated charitable status

With the new legal status of the Charitable Incorporated Organisation having slipped back once more to 2011, those charities which are unincorporated should look once again at the dangers of remaining with that status.

Third Sector has highlighted this year how the administrators of the

YMCA employee pension fund are taking the Chair of a local YMCA to court over a disputed £18,200 liability. Whilst it is the Chair against whom action is being taken, there is no reason why it could not be taken against all the trustees, or even all the members of the unincorporated association.

Penalty points and updated guidance for fundraisers

Fundraisers are to be hit by more regulation if the Public Fundraising Regulatory Association ('PFRA') get their way. The PFRA plans to adopt a 'penalty points' system in relation to face-to-face fundraising, for charities and fundraising agencies who break its rules. These breaches could result in the imposition of fines and other sanctions. Minor breaches such as failing to use allocated

fundraising sites will be punished with the issue of penalty points, as well as more major mistakes such as losing donors' data.

When an organisation has obtained a set number of points, it may have to pay a fine or retrain its fundraisers. This will result in increased costs, but it does show the importance of giving good training to face-to-face fundraisers from the start. If this new system

acts as a deterrent for breaches of the rules, then it can only help to improve the public's trust and opinion of this type of fundraising. For more information on this new 'penalty points' system visit: www.thirdsector.co.uk. The Charity Commission (separately) has updated its guidance on fundraising for charities. See www.charitycommission.gov.uk/publications/cc20.aspx.



Education...



Freedom from local authority control?

Academies are rapidly becoming the popular choice of operating vehicle for many state schools. The freedom from local authority control is a big incentive for schools to be taken over by academy trusts.

Now the Government is giving state schools even more reasons to become academies in the Academies Bill 2010, which is currently making its way through Parliament. In its current form the Bill proposes to allow academies to depart from the National

Curriculum and have even more freedom over funds. Primary schools will have the opportunity to become academies. And grants will be given to help the conversion process.

Schools considering conversion to academies can begin the process now, even before the new legislation is in force. Wrigleys Solicitors are following the progress of the Bill closely and can provide more information on this. Please contact Chris Billington for further information.

Social Investment...

Community investment using the business model

After a year of the Community Shares Programme, enthusiasm for community share schemes is high. *Community Shares: One Year on* reports on the progress made with the two-year Programme. The purpose of the action-research project was to investigate how member of the public can invest in enterprises serving a community purpose.

According to the Programme, the definition of 'community investment' is "the sale, or offer for sale, of more than £10,000 of share or bonds to communities of at least 20 people,

to finance ventures serving a community purpose."

In recent years, the number of community share schemes has risen rapidly. In the first half of the last decade there were, on average, only four such schemes started each year. In 2009 some 28 enterprises began community share schemes. Projects are wide-ranging, from farming and renewable energy, to football, pubs and community retail stores.

The Community Shares Programme report has noted a

dramatic shift from communities using charity models, to using the traditional business model. This has made such investments more attractive where the community can strive to maximise profits.

To find out about a number of successful community share schemes, visit the Community Shares Programme website at: www.communityshares.org.uk or talk to Malcolm Lynch or Philip Williams at Wrigleys Solicitors. Malcolm advised the first community share issue by Baywind Energy Ltd.



Raising the CIC dividend cap

The Government evidently does listen to the public's opinion. As a result of last year's consultation into Community Interest Companies (CICs), the Government has responded to concerns that the dividend and interest caps, imposed on paying dividends to shareholders, is deterring many investors.

As a result, CICs are now able to pay dividends of up to 20 per cent of each share. This is a change from the previous cap of five percentage points above the Bank of England base rate.

Low interest rates had made CICs very unattractive investments.

To add to the increase in the dividend cap, the Government has also raised the loan interest cap. This governs the performance related interest payable and has been raised to 10 per cent of the average amount of the CIC's debt. This was previously set at four percentage points above base rate.

These changes have been met with a positive response and it is hoped that investment in CICs will rise as a result.



Employment and more...

Equality Act 2010 - the impact for charities



The Equality Act has been law since April, although the provisions are not yet in force and are not expected to be so until at least October 2010. The Act has the aim of simplifying existing discrimination law in the fields of employment and the provision of goods, facilities and services. When the Act finally comes into force, it will replace legislation such as the Sex Discrimination Act, Race Relations Act and so on.

The Equality Act will also introduce some significant new changes, including in relation to the discrimination law exemptions available to charities. Much has been written about the Equality Act and what it will mean to individuals, businesses and other organisations; however, this article concentrates on the

charities' exemption and what it may mean to charities which will need to rely on it.

Most of the previous discrimination legislation contained an exemption for charities provided that the acts they were carrying out that restricted beneficiary classes were in pursuance of their "charitable instrument". For example, a charity engaged in supporting female victims of domestic abuse, can lawfully exclude men as beneficiaries provided that activity was consistent with their charitable instrument (such as the articles of association or other governing document). Under the new Equality Act, a similar exemption is included, except that the new wording narrows the scope of the exemption by requiring charities to show that any restrictions are not merely included within a

charitable instrument, but also that the restrictions that the charity places on their activities are "a proportionate means of achieving a legitimate aim", or "for the purpose of preventing or compensating for a disadvantage". Similar wording has also been applied to the 'general occupational requirement' defence that is used by organisations during job recruitment to restrict or exclude individuals with or without a stated protected characteristic, for example in relation to a particular religion or sexual orientation.

The problem for charities and organisations, and those advising them, is how to interpret terms such as "legitimate aim" and "proportionate". It is possible to speculate and form a view on interpretation, and these terms may be familiar to some, as they were included in some of the former legislation such as the Sex Discrimination Act. We know that evidence is likely to be required to prove a legitimate aim (which may require statistical analysis), and to prove proportionality, a charity will probably need to show that there was no alternative course of action other than to restrict benefits to persons with that particular protected characteristic. Unfortunately though, until the terms are defined or cases are

pursued through the courts, both charities and advisers are unable to come to a definitive assessment of compliance.

It is hoped that clarification will be provided by the Equalities and Human Rights Commission (EHRC) within its planned statutory codes of practice and non-statutory guidance. The EHRC has already conducted a lengthy consultation on several draft codes of practice and guidance which included very useful input from a specially formed working group at the Charity Law Association on the charity exemption issues.

The consultation has since closed and the final codes of practice and guidance were scheduled for publication in July this year, in time for the planned commencement of the Equality Act's core provisions in October 2010. Unfortunately, that timeline has been thrown into doubt by the new Government.

In the meantime, we are keeping a watchful eye on communications from the EHRC and the Government Equality Office for developments. It is anticipated that the Charity Commission will publish guidance specifically aimed at charities, most likely, jointly with the EHRC.

Social Enterprise...

Welcome to Co-operative and Community Benefit Societies

March 18 2010 saw the Co-operative and Community Benefit Societies and Credit Unions Act 2010 receive Royal Assent. This Act is another stage in the Heath-Robinson modernisation of the legal framework surrounding Industrial and Provident Societies (IPS), not least, by the name of the two specific legal forms permitted under those Acts, co-operatives and community benefit societies, replacing the name industrial and provident societies.

Very importantly, the new Act states that the Company Directors Disqualification Act 1986 will apply to IPSs, making a significant change advocated over 20 years ago. This will provide a mechanism by which directors can be banned from taking up such positions when they have

previously breached the duties involved in being a director. A further provision of the new Act gives the Treasury the power to apply to Societies aspects of the Companies Act, with modifications, in respect of company names, investigations, dissolutions and restoration to the register.

In relation to credit unions, the Treasury now has the power to make provisions for credit unions which correspond to any provisions applying to building societies. Changes are expected soon in the limits on the amount of shares a person can invest in a Society. The Co-operative and Community Benefit Societies and Credit Unions Act 2010 can be viewed at www.opsi.gov.uk/acts/acts2010/ukpga_20100007_en_1.

Community Benefit Societies and the Charity Commission



It was expected that charitable community benefit societies with income of more than £100,000 a year would need to register with the Charity Commission this year. However, it has been announced that the timetable has been put back until 2011.

Hopefully, this may leave time for the Charity Commission to consider

further their approach to the payment of interest to members of charitable societies and other complex areas. This will leave time for the Charity Commission to register universities and higher education institutions in Wales, colleges at Oxford, Cambridge and Durham, student unions and some other exempt bodies.

Presbyterian Mutual Society – a failure of HM Treasury?

The Presbyterian Mutual Society (PMS) is a Northern Ireland Industrial and Provident Society. It was not authorised and regulated by the FSA but issued withdrawable share capital and Bonds. At the time of its collapse in 2008 it had assets of £300 million.

The Treasury Select Committee examined the reasons for its failure and published a report into it in February this year. Essentially, with very heavy promotion by the Presbyterian churches in Northern Ireland, it was acting rather like an unregulated building society with both residential and commercial properties. With the benefit of hindsight, some poor investment decisions were made and investors were never warned that investment with the Society was unprotected. Unfortunately, unwinding it will prove a long process and many individuals had placed large

amounts of their savings with the organisation which they will lose.

The FSA, in its evidence to the Select Committee, said it believed PMS was conducting regulated activities without the necessary authorisation or exemption. Unlike in England, Wales and Scotland the FSA is not the registrar of Industrial and Provident Societies. This role is carried out by the Department of Enterprise, Trade and Investment in Northern Ireland.

Whilst the Select Committee placed some blame on DETINI, the overall department responsible for Industrial and Provident Societies within the United Kingdom is HM Treasury, which is also responsible for policy on financial regulation. Its repeated failure over many years to seriously modernise industrial and provident society law, as was required over 10 years ago in the *Report Private Action, Public*

Benefit, demonstrates that it is not the appropriate department to lead on policy in this area.

The result of the demise of PMS is that regulation of credit unions in Northern Ireland will move to the FSA. The new Government needs to transfer responsibility for Industrial and Provident Societies to the Department of Business, Innovation and Skills in order that they can be regulated with the same degree of effectiveness as other businesses; that like companies there is one law of Industrial and Provident Societies governing the whole United Kingdom; and registration is with the Registrar of Companies so that there can be on-line examination of these societies. www.parliament.uk.

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