

CharitylawUpdate

Winter 2009



Welcome to the Winter 2009 edition of the Charity Law Update.

This edition includes articles on the widely discussed and controversial subject of Public Benefit, the option of mergers and collaborative working to improve efficiency and relieve the pressures on funding and an article on new laws affecting charitable companies.

Our dedicated Charity and Not-For Profit team acts for many large national and international charities, as well as an array of charitable trusts, associations, schools, colleges, universities, religious organisations and other social enterprise partnerships.

If you would like to contact us with your comments and feedback please email charities@thomaseggar.com

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Public Benefit update

There has been much discussion and controversy about the new public benefit requirements for charities. The new laws (introduced by the Charities Act 2006) came into force on 1 April 2008. These provide a new statutory definition of charitable purpose, with an emphasis on providing public benefit. Providing public benefit has always been a requirement for charities, but there is no longer any presumption that any particular charitable purpose is for the public benefit.

The Charity Commission has issued guidance on public benefit. Charity trustees have a duty to have regard to it, and should expressly state in their Annual Report that they have done so.

Charity trustees must not only ensure that their charity provides the required level of public benefit, but also they must demonstrate it. This is done by describing in their Annual Report how they have provided public benefit, and showing how the benefit is related to the charity's aims.

What is Public Benefit?

There are two key principles:

1. There must be an identifiable benefit(s)

There are three elements to this principle:

- it must be clear what the benefits are;
- the benefits must be related to the aims of the charity; and
- benefits must be balanced against any detriment or harm.

2. The benefit must be to the public or a section of the public

There are four elements to this principle:

- the beneficiaries must be appropriate to the charity's aims;

- where the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted by geographical or other restrictions, or by ability to pay any fees charged;
- people in poverty must not be excluded from the opportunity to benefit (poverty is taken in the context of the geographical area and section of society in which the charity operates. It means people who cannot satisfy a basic need without financial assistance); and
- any private benefits must be incidental.

It does not matter if people in poverty do not in fact take up the opportunity to benefit, so long as the opportunity is meaningful and reasonable.

Fee charging

The application of those principles to charities providing services such as residential care or education creates particular problems because of fee-charging.

Fees for the actual services or facilities provided, as well as ancillary costs (such as membership fees or cost of equipment), are relevant. The Charity Commission will look more closely at charities whose fees are high.

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Examples of public benefit a fee-charging charity could provide include:

- free or subsidised places;
- additional services or facilities to those who cannot afford the fees - such as offering the use of facilities or staff to other charities or groups offering similar services; and
- working with third parties and offering lowcost limited use of the facilities offered.

Trustees are encouraged to be transparent about their funding schemes or other public benefit activities, and take reasonable steps to advertise them.

Initial assessments

The Charity Commission will be reasonable about the amount of public benefit expected, and will take into account the circumstances of each individual charity. The results of the initial round of assessments appears to show that compliance with the principle that 'people in poverty must not be excluded', is crucial. The school that failed the initial assessment did not provide a sufficiently high level of free or heavily subsidised places.

Consequences

A charity that fails to demonstrate sufficient public benefit cannot simply cease to be a registered charity. Instead, the Charity Commission will work with the trustees to ensure that the requirements are complied with in future. If the trustees refuse to co-operate, then they could be removed as trustees and replaced with new trustees who are prepared to comply.

If this proves impossible, it raises the question of whether the organisation should have been a charity in the first place. Ultimately the organisation may be wound up, but a charity's assets must always be applied for charitable purposes, even if that means transferring them to other charities.

It is essential that public benefit is at the forefront of the minds of charity trustees throughout the year, not just at the time of the annual report.

For more information, please contact Penny Wright on 01635 571010 or email penny.wright@thomaseggar.com



Mergers and collaborative working

In times of economic uncertainty, many charities are anxious about falling income affecting the benefits and services they provide. In response to this, some charities are considering merging or working together in order to improve efficiency and relieve pressure on funding.

Before plunging into a merger, it is important to think carefully about the possible pitfalls, such as:

- incompatibility of aims and activities of the two organisations;
- different ethos/culture of organisations, and potential personality clashes;
- staffing issues - careful compliance with the Transfer of Undertakings if redundancies result;
- disagreement over future name and structure of merged organisation;
- possible adverse tax and VAT consequences;
- property issues, such as consent from landlord;

- impact on existing funders and stakeholders; and
- opposition from members, donors, beneficiaries and staff.

The Charity Commission has new powers to give advice on mergers, and an early approach is recommended, followed by a thorough process of legal, operational and financial due diligence.

The new Register of Mergers is intended to prevent the problem of failure of legacies to organisations under their pre-merger name, although this is not fool-proof and its flaws are yet to be remedied.

For more information, please contact Penny Wright on 01635 571010 or email penny.wright@thomaseggar.com

In Brief

Political activity

A limited amount of political activity and campaigning is permitted to charities, so long as they comply with the Charity Commission's guidance. With a general election imminent, charities must be extremely cautious to ensure that they remain impartial and that there is no suggestion of links with any political party.

Charitable Incorporated Organisations

The new Charitable Incorporated Organisation (CIO) is expected to become available during Spring 2010. This is intended to benefit from the limited liability of a company, without the burden of dual regulation that companies are currently subjected to. New charities being set up may choose to be a CIO. Existing charities - whether limited companies, unincorporated associations or trusts - will be able to convert to a CIO. Implementation of the new rules has been delayed.

For more information, please contact Penny Wright on 01635 571010 or email pennywright@thomaseggar.com

The equality act looms... are you prepared?

The draft Equality Bill is due to become law in Autumn 2010. It will consolidate and strengthen existing discrimination law. All organisations, charitable or otherwise, with employees should be aware of its terms.

The Equality Bill introduces many changes and new definitions, including:

- statutory protection against associative and perceptive discrimination;
- expansion of employer's duty to make reasonable adjustments for people with disabilities;
- amendments to definitions of 'disability' and what is 'justifiable';
- requirement to report on gender pay differences; and
- employer's right to take 'positive action'.

Positive action

This is one of the most eye-catching changes. The provisions go considerably further than existing law. It applies where an employer has two candidates, who are as qualified as each other, and A is in a protected group which is disproportionately badly represented, and B is not. The employer could recruit/promote A rather than B under the Bill. This provision is not intended to introduce positive discrimination - such a policy would fall foul of the discrimination legislation.

The burden is on the employer to show that the selected individual is from a protected group, and that s/he is 'as qualified' as the other applicants.

The area that employers (and the courts) are likely to find most difficult is the definition of 'as qualified'. Since no two job applicants or employees ever have exactly the same academic/industry qualifications or experience, some sort of judgement will need to be made, which could in turn leave employers open to claims of discrimination.

The obligation to monitor what groups are disproportionately represented is likely to cause headaches.

Pay reporting

From 2013, it is proposed that employers with over 250 employees will have to publish information about differences in pay between female and male employees, (different requirements exist for employers in the public sector). Until that time, reporting will be voluntary. Organisations will therefore need to record this information, and establish what counts as "equivalent roles". It is not yet clear what penalty, if any, would be imposed for not complying with this requirement.

Clash of equalities

One of the unintended outcomes of strengthening discrimination legislation is that it makes a clash between discriminations more likely. The Bill contains specific exceptions which clarify the position to a certain extent, but in many cases it will simply be a case of deciding each matter on the specific facts.

One such exception is for organised religions. It will be lawful for someone involved in 'promoting or explaining' religious doctrine or participating in acts of worship to discriminate on certain grounds (such as sex and marital status), but this discrimination must still be proportionate. It will not be acceptable for someone employed by the religion in a different type of role to be subject to the same requirements, for example, to require that a cleaner in a cathedral must be heterosexual.

Equality legislation is becoming more and more stringent and it will be interesting to see how this area develops in the future and how the human rights issues are balanced against each other.

Conclusion

These provisions are only some of the many new requirements introduced in the Bill and there is a significant element of 'wait and see' in terms of case law and government policy. However, there are some steps that organisations can take, such as implementing or reviewing equal opportunities policies, and training staff and volunteers.

The Equality Bill is extremely wide ranging and it will be very difficult for organisations to be familiar with all its terms. The most important thing is to be aware that the legislation exists, and to keep it in mind when making employment decisions, taking advice where appropriate.

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New laws affecting charitable companies

Memorandum of Association

For new companies, from 1 October 2009, the memorandum will simply state that the subscribers wish to form a company under the Companies Act 2006 (the 'Act') and have agreed to become members. Constitutional information which used to be set out in the memorandum is now in the articles.

Existing companies are not required to amend their articles to reflect this change, but they may. Provisions that were in the memorandum under the Companies Act 1985 will be treated as forming part of the articles of the company from 1 October 2009. If you do not want such provisions in the articles, delete them. For example:

- the concept of authorised share capital, which previously had to be stated in the memorandum, has been abolished. From 1 October 2009, there will be no restriction on the amount of shares a company can allot unless otherwise restricted by the articles of association; and
- unless the articles specifically restrict the objects of the company, its objects are unrestricted. The Charity Commission will look very closely at the objects, as the inclusion of one non-charitable object will disqualify the company from registering as a charity.

Articles of Association

If you are incorporating a private company limited by guarantee after 1 October 2009, the new 'model articles' apply, unless you adopt 'tailor-made' articles, excluding or modifying them. Companies incorporated under the Companies Act 1985 may have chosen to adopt Table C, which was amended on 1 October 2007 to reflect Companies Act 2006 changes coming into force at that time.

You will need to familiarise yourself with the model articles to understand which

articles are not appropriate for a charity and need to be excluded or modified. For example, they include a provision allowing the directors to be remunerated as a matter of course and do not provide as to how the company's assets will be dealt with on dissolution.

The model articles require each member to be approved by the directors and for prospective members to fill out a membership application form.

The model articles provide that a member may at any time withdraw from the company by giving at least seven days' written notice to the company. Membership is not transferable and will cease on death. You may, however, want to allow transfers where a member has paid a significant membership fee, which would be valuable to a transferee.

The articles may now provide for a member to nominate another person or persons to exercise all or any specified rights of the member in relation to the company, and that anything required or authorised by any provision of company law may be done by the nominated person. This provision could be useful where a charitable company is a shareholder of a non-charitable trading subsidiary, as it could, for example, nominate a person (perhaps one of the charitable company's directors) to exercise membership rights.

For more information, please contact Caroline Armitage on 023 8083 1206 or email caroline.armitage@thomaseggar.com

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