

SUMMER 2011

CHARITY & SOCIAL ENTERPRISE LAW UPDATE



IN BRIEF

Senior Partner, **Stephen Lloyd**, introduces our summer Update with a brief overview of a proposed new social investment vehicle – the Social Enterprise Limited Liability Partnership (page 3).

Charities are advised to differentiate the fundraising content on their websites since the Committee of Advertising Practice Code's remit has been extended (News, page 4).

Public procurement has been 'dysfunctional', says **Julian Blake**, but developments in Europe may see charities benefiting from a new emphasis on social value (page 5).

The Bribery Act comes into force in July. **Lisa Marie Roca** explains how charities and social enterprises may be affected (page 6).

Sean Egan provides a brief overview of Cloud Computing and notes the potential for charities to benefit from sharing IT resources (page 7).

The Charity Tribunal case on relief of poverty charities with a restricted beneficial class may have worrying implications for benevolent funds. **Robert Oakley & Laura Soley** report (page 8).

Following BWB's successful defence of the first Court of Appeal case on the status of volunteers, **Victoria Cook** looks at the developments for charities and volunteers alike (page 9).

A draft Defamation Bill aims to provide greater protection to publishers, reports **Alex de Jongh** (page 11).

Inheritance tax changes could encourage charitable legacies from the relatively well-off, says **Eva Abeles** (page 13).

John Hodge of Balfour + Manson welcomes the Scottish Charitable Incorporated Organisation (page 14).

Tesse Akpeki provides practical leadership advice for charity leaders (page 15), while **Chinonso Denwigwe** outlines the e-filing option for charities (page 17).

Our regular Focus section includes Health from **Stuart Marchant**, Education from **Mary Groom** and Sport from **Thea Longley** (pages 18 and 19).

Finally, we Roundup developments at the Charity Commission (page 20) and Charity Tribunal (page 21); cover the progress of charity law reform in Northern Ireland (page 22); and **Bill Lewis** provides his valuable insight into proposed reforms to the Gift Aid and other tax regimes (page 22).

CONTENTS

EDITORIAL	3
NEWS IN BRIEF	4
FEATURES	
PROCUREMENT	5
BRIBERY ACT	6
CLOUD COMPUTING	7
BENEVOLENT FUNDS	8
VOLUNTEERS	9
DEFAMATION BILL	11
INHERITANCE TAX	13
SCOTTISH CIOS	14
TOP TIPS FOR LEADERSHIP	15
CHARITY SECRETARIAL	17
FOCUS	
FOCUS ON: HEALTH AND EDUCATION	18
FOCUS ON: SPORT	19
ROUNDUP	
CHARITY COMMISSION	20
CHARITY TRIBUNAL	21
NORTHERN IRELAND	22
TAX AND VAT	22



Front Cover: Eden Project

As advisors to the Eden Project, we have helped this charity with a range of commercial work, including restructuring and financing.

To learn more about the Eden Project please visit www.edenproject.com

COMMENTS

Please contact us with any comments or suggestions.

Previous updates are available at:
www.bwbllp.com/Updates/Default.aspx?Location=1&ID=0

Let us know if you would like to add a name to the distribution list for this or other departmental updates; if your contact details have changed; or if you would prefer to receive our update by post/email. Contact Mona Rahman at m.rahman@bwbllp.com

SOCIAL ENTERPRISE LLP

Stephen Lloyd, Senior Partner, introduces this edition of our Update with a brief discussion of the potential for the Social Enterprise LLP – a new vehicle for social investment.

Social Enterprise LLP ('SELLP') is a proposal for a new legal vehicle designed to facilitate social investment. The objective is to create a simple to use, inexpensive legal structure, combining charitable, government and private sector funding under one umbrella, to achieve social goals, while at the same time enabling the payment of financial returns.

A limited liability partnership is an ideal structure for an investment vehicle involving charities, because it is transparent for tax purposes, i.e. profits are distributed pre-tax, unlike a company which pays dividends post tax. The participating members in the partnership pay tax in accordance with their status: so a charity can receive partnership income free of tax, while a taxable member of the partnership will pay tax on their partnership income.

The proposal is that the SELLP will be established to achieve charitable purposes, as defined under English law, but will not be a charity itself. It must have at least one member that is a UK charity who would hold a minimum of 30% of the equity. It is also proposed that the charity must not be connected with any investor and would have a

golden share, allowing it to veto any changes to the structure. We are also proposing that it should file an Annual Report stating how it has fulfilled its purposes with the CIC Regulator. The SELLP would be an appropriate vehicle to run Social Impact Bonds in a simple way.

The SELLP is similar to the European Fund for South East Europe, established by the German development bank KfW under Luxembourg law to bring a mixture of donor agencies, international financial institutions and private investors to invest in micro-finance institutions in South East Europe. It is also based on the idea of the low profit limited liability company (L3C) which is developing in the United States.

We are also suggesting that the SELLP should be regulated by the CIC Regulator and can be implemented through simple changes to LLP legislation, in the same way that the community interest company was created through simple changes to company law. The proposal is currently under consideration by the Cabinet Office.



Stephen Lloyd

Senior Partner

Stephen is 'laid-back and vastly experienced' and is ... admired for his "brilliance on the trickier points of charity law" – *Chambers UK 2011*

Stephen Lloyd has been working with Arthur Wood, of Global Impact Advisors and Marc Owen, author of the original US draft legislation for the low profit limited liability company (L3C), on developing the idea of the Social Enterprise Limited Liability Partnership under UK law. Stephen realised that this would be the simplest way in which the developments in the United States could be replicated in the UK. US companies are similar to UK partnerships. The use of partnership legislation in the United States to create a special purpose vehicle designed to comeingle charity and non-charity funds to deliver charitable outcomes has the potential to create new sources of investment for charitable purposes and is therefore worth seeking to replicate in the UK.

LEGAL NEWS

Consolidation of charity legislation

A new Charities Bill, designed to consolidate existing charity legislation, has been introduced into Parliament. The legislation is not intended to change the law substantially, and the Bill will consolidate much of the existing Charities Acts 1993 and 2006. However, the parts of the Charities Act 1992 and 2006 that relate to charity fundraising will not be consolidated, on the grounds that they also relate to non-charitable bodies. The consolidation exercise is different to the review of the Charities Act 2006, which is due to take place in 2011.

Localism Bill

The Localism Bill is currently making its way through Parliament, and is now in the consultation stage. The Bill proposes major changes to the way in which local government is run, and introduces 'community empowerment' provisions, which are designed to contribute significantly to the Government's agenda on decentralisation.

For more information see <http://www.bwbllp.com/Updates/Localism-Bill-E-Bulletin.html?Location=1&ID=0>

Cuts in public funding

Two recent developments put public funding cuts under the spotlight. First, in January and February 2011 two separate public authorities had their decisions to make funding cuts quashed by the High Court, on the grounds that the authorities had failed to have due regard to their

statutory equality duties. These public authority duties were extended from 1 April 2011 to cover additional protected characteristics under the Equality Act 2010. See <http://www.bwbllp.com/Updates/Funding-cuts-quashed-after-public-authority-fails-to-meet-its-public-sector-equality-duties.html?Location=1&ID=0> for more information.

A similar decision was made by the High Court on 31 March in relation to Birmingham City Council's decision to cut funding to advice services in the city.

Second, on 13 April the Department for Communities and Local Government (DCLG) launched a new consultation on draft "Best Value" guidance: the intention is that the final document will set out clear guidance for local authorities who are considering cutting funding to local voluntary and community organisations. For more information see <http://www.bwbllp.com/Updates/Local-Authority-Funding-Cuts-to-the-Voluntary-Sector.html?Location=1&ID=0>

Please contact Melanie Carter on m.carter@bwbllp.com if you have any queries on the scope to challenge funding cuts.

Extended CAP Code applies to charity fundraising

On 1 March 2011 the Advertising Standards Authority took on an expanded remit as the Committee of Advertising Practice (CAP) Code was extended to apply to marketing messages on websites

and social networks. The new rules will apply to charities where they are fundraising and soliciting donations, but not to charity campaigning and lobbying. BWB's Rupert Earle suggests that, for this reason, fundraising content should be on separate differentiated pages from the remainder of a charity's website.



Second edition of *Getting it Right Legally* guides

The University of Gloucestershire has published the second edition of two user-friendly legal guides for community organisations: *Getting it Right Legally 1 – legal status and structure for community organisations* and *Getting it Right Legally 2 – contract and grant relationships between funders and community organisations*. The publications contain practical guidance and model documents. BWB has written the legal content. **The publications can be downloaded for £18 each from www.playwork.co.uk.**

'BUYING SOCIAL' – THE POSITIVE SIDE OF PUBLIC PROCUREMENT

Recent developments in Europe offer hope that procurers will prioritise social value when awarding public service contracts.

There is no getting away from the all too familiar dysfunctional aspects of public sector funding agreements, which are compounded by similarly dysfunctional aspects of the European public procurement and state aid rules; and in turn further compounded by the impact of austerity budget cuts. But European law also sends positive messages over the barriers and obstacles.

At the end of 2010 the European Commission published *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*.

The theme is that the 'unique European social model' is at the heart of the process of European integration, so that economic progress and social cohesion are 'complementary pillars of sustainable development' and 'socially responsive public procurement (SRPP)' can be an active means of promoting desirable public intervention.

This should mean due recognition for public benefit service providers, other than simply as undifferentiated market suppliers. It should also have a particular bearing on the Coalition Government's 'mutualisation' policy, as delivery of public services outside the public sector is promoted, while their intrinsic public benefit nature must be preserved.

There are opportunities here for charities and social enterprises and enlightened commissioners to refocus on their complementary public benefit purposes and to overcome the economic policy mantra that

being non-profit distributing is irrelevant for the purposes of procurement.

Actually, such status 'is not in itself enough to avoid classification as an economic activity' and by implication has distinctive features that may be of importance when it comes to economic activity in the delivery of public services. Charities and social enterprises know well what those features are, because they are what they and their supporters are dedicated to. However, they are hardly ever articulated in the context of competitive procurement.

A commissioner can explicitly request these as added social value features, which may count with price and quality in the assessment; and they can also be set as defining conditions of contract delivery.

Charities and social enterprises can respond to procurements in such terms, including by answering unasked questions creatively within the asked questions.

Ideally this would lead to the social dimension becoming so central to public service delivery that private suppliers would have to meet genuine public benefit standards to win procurements. That is a reasonable answer to fears about the private sector hijacking the mutualisation agenda and, indeed, this answer was given by a representative of the Cabinet Office at BWB's recent seminar on 'Mutualisation'.

Julian Blake looks at encouraging signs



Julian Blake

Partner and Joint Head of Charity & Social Enterprise Department
Julian is 'extremely pragmatic and vibrant' and 'very influential in international charity work' – *Chambers UK 2011*

'Ideally this would lead to the social dimension becoming so central to public service delivery that private suppliers would have to meet genuine public benefit standards to win procurements'

FIND OUT MORE

Stephen Lloyd's introduction to our Spring 2011 Update covered the issue of the Coalition move to mutuals in some detail.

You can download a copy here:
<http://www.bwbllp.com/Updates/Charity-Social-Enterprise-Update-Spring-2011.html?Location=2&ID=1>

THE BRIBERY ACT 2010 - FAILURE TO PREVENT BRIBERY

All 'commercial organisations' will need to ensure that they have procedures in place to prevent bribery when the Bribery Act comes into force.

Lisa Marie Roca explains how charities and social enterprises may be affected



Lisa Marie Roca
Solicitor
Lisa Marie trained and qualified at BWB and now advises on public and regulatory law issues, including regulatory codes and procedures, judicial review challenges and statutory appeals.

On 1 July 2011 the Bribery Act 2010 ('the Act') comes into force. The Act makes huge changes to the previous law in this area and creates four offences: bribing another person (section 1); being bribed (section 2); bribing a foreign public official (section 6); and, the focus of this article, failure by a 'commercial organisation' to prevent bribery (section 7).

A 'commercial organisation' is defined in section 7 of the Act as any partnership or body incorporated in the UK carrying on a business in the UK or abroad, and any foreign partnership or incorporated body carrying on business in the UK. The section 7 offence is committed regardless of where in the world it takes place, and carries an unlimited fine.

The guidance states that: "it does not matter if [the organisation] pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made". While the Courts will be the ultimate arbiter of the definition in the Act, charities should be aware that they may well fall within the scope of section 7.

Helpfully, section 7 also sets out a defence for organisations that are able to prove that they had adequate procedures in place to prevent bribery occurring, even if they have failed to prevent the bribery itself. The Secretary of State has recently issued guidance on what may be considered to be adequate procedures.

The guidance is intended to assist 'commercial organisations' and is

formulated around the following six principles:

- proportionate procedures;
- top level commitment;
- risk assessment;
- due diligence;
- communication; and
- monitoring and review.

Each principle is set out in great detail in the guidance document, together with suggested procedures, and some useful case studies. The guidance makes it clear that small or medium-sized organisations are not expected to adopt the same procedures as large multinational organisations but should comply with the principles in a proportionate way.

It is also acknowledged that the guidance is not prescriptive; an organisation that has not implemented the suggested procedures may still be able to show that they had adequate procedures in place to prevent bribery occurring, and the courts will take into account the facts and circumstances of each case.

It should be noted that there has been some criticism of the guidance from those who believe it goes too far in trying to water down the Act, and that the wording may allow organisations to evade prosecution on technical arguments. However, it should be remembered that the Courts will enforce the Act, not the guidance, and so organisations will want to ensure that their anti-corruption policies are considered 'adequate' in light of the guidance, in addition to being fully compliant with the Act.

FIND OUT MORE

The full guidance can be found here <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>

For further information please contact Lisa Marie Roca on lm.roca@bwbllp.com or Alex de Jongh on a.dejongh@bwbllp.com.

CLOUD COMPUTING

Joint purchasing of IT systems and services may offer significant benefits for charities and social enterprises.

Cloud Computing promises much but most organisations are not actively considering it as a means of delivering IT solutions. It may well have substantial benefits for small and medium-sized organisations as well as multinational corporations.

Cloud Computing is an umbrella term to cover the notion that an organisation's needs can be provided not by it purchasing its own hardware and/or software but through accessing a third party's facilities. Cloud Computing can range from delivering infrastructure only to delivering all needs including infrastructure, platforms and software. The paradigm for its advocates is that organisations can do away with their server room and rely totally on large IT companies such as Microsoft for all their needs.

Advantages

- **Costs** – organisations no longer need to purchase or lease equipment but can rely on their provider to do it centrally and on a much larger scale.
- **Flexibility of capacity** – an organisation launching a major appeal might need massive short-term additional capacity, which could be put in place at short notice.
- **Disaster recovery** – the provider will have robust back-up services beyond those that can be readily purchased by an individual organisation.

Disadvantages

- **Contracting arrangements** – these are currently complicated and one-sided. Standard, bulky agreements favour the provider and providers are reluctant to provide minimum contractual service commitments. These drawbacks seem decisive but providers would point to the fact that they have satisfied customers and are looking to make the contracts and the contracting process more user-friendly.
- **Data protection** – particularly where the provider houses its servers outside the EU. If the provider is inflexible in its contract terms an organisation may need to retain servers to store its personal data so that it is not transmitted outside the EU.

The Longer Term

Providers like Microsoft clearly believe that Cloud Computing will become a major if not the dominant means of organisations buying IT solutions. However, most organisations will wait until Cloud Computing has demonstrated that it can deliver the benefits that it promises.

Charities and social enterprises will often have similar needs and a sense of engagement with each other, so there is real scope for joint purchasing of similar facilities. Not-for-profits that have high volume business will probably be catered for by the Cloud sooner rather than later, but others who have significant IT needs but limited budgets are likely to have a better chance of accessing the benefits if they can work co-operatively in identifying standardised needs.

Sean Egan says that smaller charities can also benefit from the move to Cloud Computing



Sean Egan

Partner
Sean is Partner in our Theatre & Arts department, and also advises across a wide range of IT-related issues. 'He receives praise for his excellent client service skills' and 'using him you're not just getting a contract lawyer'.
– *Chambers UK 2011*

'Charities and social enterprises will often have similar needs and a sense of engagement with each other, so there is real scope for joint purchasing of similar facilities'

FIND OUT MORE

Information about Cloud Computing is available from many service providers. The BBC also provides an unbiased explanation of the terms here: <http://www.bbc.co.uk/news/10097450>

BENEVOLENT FUNDS UPDATE

What are the implications of the Attorney General's reference to the Charity Tribunal concerning Benevolent Funds and other relief of poverty charities?

Rob Oakley and Laura Soley consider the Reference and what action an affected charity can take



Robert Oakley

Partner

Having trained at BWB, Robert joined the team as a newly qualified solicitor in 1999 and became a partner in 2006. He advises clients across a broad range of contentious matters.



Laura Soley

Senior Associate

Laura advises charities on a range of issues, with a particular focus on charitable trusts.

The Attorney General has asked the Charity Tribunal to consider whether certain relief of poverty charities are still charitable following the implementation of the Charities Act 2006 (which removed the presumption of public benefit in relation to relief of poverty charities) and, in particular, whether they still meet the public benefit test.

The charities likely to be affected are those which relieve poverty of members of a class or group of beneficiaries who are defined or linked by reference to:

- a) employment with a particular employer;
- b) another contractual connection (e.g. under a service contract);
- c) membership of an association or society or similar;
- d) a family connection;
- e) a similar connection.

The outcome may also affect restricted funds held by other types of charities, which can only be used to benefit a restricted beneficiary class (e.g. a care home provider charity may hold a restricted fund for the purpose of providing financial assistance grants to the occupants of a particular care home).

Helpfully, the Attorney General has confirmed that, in general, a benevolent fund that relieves poverty of a class of beneficiaries defined as being all the persons working in a particular industry or profession or occupation should not be affected by the Reference, although this is only a general rule and there will be exceptions, which may depend upon how the beneficiary class is defined.

In the worst case scenario the Tribunal could decide that affected charities are no longer charitable – that they do not provide a public benefit. If so, either the purposes of those charities may have to be broadened to include a much wider class of beneficiaries, or they could be removed from the Register of Charities and their assets transferred to another charity with similar aims. As such, the Tribunal's decision could have far-reaching consequences for many charities.

Anyone wishing to be joined to the proceedings as a party had to apply to the Tribunal by 20 March 2011. Nevertheless, a charity who wishes to have its voice heard can still consider joining a consortium of other charities in a similar position supporting a lead charity that has been joined as a party. The lead charity will make submissions to the Tribunal on behalf of all the charities in the consortium. This means that the charity's voice is heard by the Tribunal but the costs for each charity will be reduced as they can be shared between the consortium charities.

We are currently acting for a group of charities, including a number of employee benevolent funds, affected by the reference. The British Airways Welfare and Benevolent Fund (an employee benevolent fund) and the Chartered Accountants' Benevolent Association (an occupational benevolent fund) are acting as lead charities and have both applied to be joined as parties to the proceedings. They will make representations to the Tribunal on behalf of all the charities in their

Is your charity affected?

If you think that your charity might be affected and would like to join in, please do contact us to discuss the possibilities further.

Rob Oakley – r.oakley@bwbllp.com

Laura Soley – l.soley@bwbllp.com

Your usual BWB contact will also be happy to help.

respective groups and would be happy to discuss working together with other charities in a similar position who would like to join them.

Alternatively, a charity or a representative of a charity can apply to the Tribunal for permission to 'intervene', which is a

process that allows a person to make submissions to the Tribunal without becoming a party to the proceedings.

The Tribunal is soon to give a ruling as to which of the applicant charities will be joined as parties to the Reference and will then set a timetable. A final hearing later in the year is anticipated.

FIND OUT MORE

You can find out more about the Reference on the dedicated page of our website:

<http://www.bwbllp.com/Updates/Attorney-General-s-Reference-to-the-Charity-Tribunal-concerning-Benevolent-Funds-and-other-Relief-of-Poverty-Charities.html?Location=2&ID=1>

VOLUNTEER STATUS – WHERE ARE WE NOW?

The employment status of volunteers has continued to be a contentious issue for the sector, particularly in recent years, with a number of high-profile cases of volunteer dissatisfaction.

X v Mid-Sussex CAB

On 26 January, in the case of *X v Mid-Sussex CAB*, the Court of Appeal gave its first judgment on the issue of the employment status of volunteers and, in particular, whether European law gives protection to volunteers from acts of discrimination on grounds of disability.

The case concerned a volunteer who alleged that she had received less favourable treatment because of her disability. The case was struck out by the Employment Tribunal, which held that the volunteer was not able to bring a claim because she did not have a contract with the CAB (the merits of the claim were not assessed). The volunteer appealed to the Employment Appeal Tribunal and again to the Court of Appeal. Her appeal argument was that the European equal treatment

legislation covers 'occupation', which, she argued, should include volunteering. The volunteer contended that either she could rely directly on the European legislation, or the UK's domestic legislation should be interpreted to extend to volunteers.

The Court of Appeal concluded that it was clear that the European legislation did not include protection for volunteers and the appeal would not be upheld. The appellant's application to the Court of Appeal for leave to appeal to the Supreme Court was refused.

Volunteer Rights Inquiry

The Judgement in *X* referred to the interim report of the Volunteer Rights Inquiry, established by Volunteering England in November 2009 to investigate concerns that had been raised by some

Victoria Cook reports on two developments in 2011 that will shape the future of volunteering



Victoria Cook

Solicitor
Victoria advises predominantly employer clients on a broad range of employment law and HR issues including restructuring and carrying out redundancies, employment status and all types of discrimination.

Victoria Cook acted for the CAB in the case of X and was a member of the Volunteer Rights Inquiry Panel.

‘While the concerns of volunteers needed to be addressed, there was significant resistance from organisations and volunteers to the introduction of additional regulation’

volunteers about their treatment. In March 2011 the Inquiry published its final recommendations and its call to action.

The Inquiry recognised that, while the concerns of volunteers needed to be addressed, there was significant resistance from organisations and volunteers to the introduction of additional regulation. It was felt that this was not proportional to the needs of a diverse sector and may in fact act as a barrier to volunteering. There was support for the introduction of a Volunteer Complaints Commissioner but the Inquiry considered that organisations should be given the opportunity to improve and strengthen their standards before introducing such a body.

The Inquiry has therefore recommended improvements in best practice in volunteer management and conflict resolution and has invited organisations to sign up to its 3R promise. This is:

- to endeavour to get good practice right from the beginning of the volunteer relationship;
- to offer means to achieve reconciliation if things go wrong;
- to accept responsibility for its volunteers and their wellbeing.

Over 60 organisations have signed up to the 3R promise to date.

The future

While X may close the current legal chapter on whether volunteers can bring discrimination claims, it is important to remember that existing domestic

legislation would give volunteers legal protection against discrimination if there is a contract between the individual and an organisation. This would include any form of written contract and situations where a contract could be implied by the conduct of the parties (for example, if volunteers are paid anything in addition to expenses actually incurred or if volunteers are required to volunteer for a minimum length of time).

The capacity for volunteering in a variety of arenas is likely to increase. 2011 is the European Year of Volunteering and the 2012 Olympic and Paralympic Games is likely to bring a new focus and enthusiasm to volunteering. As is highlighted by the Inquiry, there is a body of good practice guidance that voluntary organisations should seek to follow both to protect the organisation from potential claims and to ensure that the volunteer relationship is productive and rewarding for the volunteer and the organisation.

FIND OUT MORE

BWB’s successful defence of the first case in the Court of Appeal to consider the status of volunteers is covered in a news item here:

<http://www.bwbllp.com/News/Detail.aspx?NewsID=171>

Extensive coverage of the case included articles on the Civil Society website here:
http://www.civilsociety.co.uk/governance/news/content/8154/court_of_appeal_rejects_volunteer_discrimination_case

DRAFT DEFAMATION BILL

Defamation law and procedure in England and Wales are widely criticised as outdated, costly, and open to abuse by powerful interests, resulting in a ‘chilling effect’ on freedom of speech.

At the 2010 election all three main parties pledged to reform the libel laws in the new Parliament. A new draft Bill has now been published. It will be of interest to charities, many of which will have experience of dealing with defamatory allegations (which increasingly come from disgruntled individuals using ‘guerrilla’ tactics on the internet) and may have recourse to the law to protect their reputations.

Equally, many charities’ campaigning activities expose them to the risk that claims for libel will be threatened or made against them. The Bill’s foreword states that it is ‘particularly concerned to ensure that the threat of libel proceedings is not used to frustrate... the valuable work undertaken by non-governmental organisations’.

The draft Bill, which is open for consultation until 10 June, draws on many of the ideas put forward in Lord Lester’s 2010 Private Member’s Bill. The clauses of most interest to charities, NGOs and public bodies are the following:

‘Responsible publication’

The Bill creates a statutory defence similar to, but arguably intended to widen, the common law defence of Reynolds qualified privilege. This will protect a publisher who cannot show that what it published was true (or honest comment) but can show that it acted responsibly in publishing material on a matter of public interest. ‘Neutral reportage’ – even-handed coverage of both sides of a controversy – will also gain statutory protection.

‘Substantial harm’

The Bill provides that a statement is not defamatory unless it causes, or is likely to cause, substantial harm. This provision does no more than restate the common law, which already recognises that trivial allegations may not be actionable because they do not meet a ‘threshold of seriousness’. Putting this on a statutory footing may, however, help to deter frivolous threats and claims.

‘Single publication’

Claims for defamation must normally be commenced within one year of the date of the offending publication. Currently, however, online material is deemed to be published every time it is viewed, so each ‘hit’ triggers a fresh one year limitation period. This puts online publishers, particularly those with large online archives, at a significant disadvantage. The Bill introduces a ‘single publication’ rule, preventing claimants from suing more than a year after the date of the original publication, even if the material remains online. This will not protect republication in a materially different manner, or by other publishers.

‘Libel tourism’

The Bill seeks to address concerns that foreign interests with tenuous links to the jurisdiction have been able to use English libel law to silence critics. The Bill requires the court to be satisfied that England and Wales is clearly the most appropriate jurisdiction in which the claim may proceed. However, this only applies where the defendant is domiciled outside the EU, Switzerland, Norway and Iceland.

Alex de Jongh reports on the draft Bill that aims to reform this area of law



Alex de Jongh

Solicitor
Alex is a solicitor in BWB’s Dispute Resolution group, with a specialism in media disputes. He frequently provides pre-publication advice to charities on potential libel risks posed by campaigning materials.

‘The Bill’s foreword states that it is “particularly concerned to ensure that the threat of libel proceedings is not used to frustrate... the valuable work undertaken by non-governmental organisations”’

FIND OUT MORE

For more detail see

<http://inform.wordpress.com/2011/03/18/opinion-the-government%e2%80%99s-defamation-bill-%e2%80%93-insufficiently-radical-part-1-alastair-mullis/>

Defences

The common law defences of justification and fair comment are replaced by statutory defences named ‘truth’ and ‘honest comment’. The former restates the common law requirement that a defendant must show that an allegation is substantially true. The latter aims to broaden a defence that has been perceived as excessively onerous for defendants, who have been required to indicate the facts on which an expression of opinion is based. That requirement is now removed.

The Government is consulting on other issues that may be addressed in some form in the final Bill. These include:

Corporate reputations

The consultation seeks views on whether corporate claimants should be restricted in their ability to sue for defamation (as Lord Lester’s Bill proposed). This arises out of the concern that companies may be able to stifle criticism by virtue of financial clout alone. Such a provision would be welcomed by campaigning groups. Incorporated charities who may need to use the law to protect their reputations would hope that any restriction would not apply to not-for-profit companies (which would mirror the position in Australia). Charities and community interest companies may wish to respond to the consultation on this point.

Discussion forums

The consultation seeks views on strengthening the defences available to ‘secondary publishers’, such as those hosting online discussion forums or other ‘user-generated’ website content. Many charities publish such material online; if they are to benefit from the existing ‘innocent dissemination’ defence they must avoid vetting it before publication and ensure that they can take it down quickly in response to a complaint. The new law may create a less onerous regime, but may make life harder for charities when they are the subject of defamatory material on the internet.

Restrictions on public bodies

The common law prevents central and local Government bodies from suing for defamation (although their employees may do so). The Government is consulting on extending this prohibition to other public bodies and bodies exercising public functions.

The Bill does not yet address one of the most notorious aspects of defamation proceedings – the cost – although the consultation discusses new mechanisms that might help to control costs. It is likely that other proposed reforms to the funding of civil litigation in England and Wales will also address this issue.

We will report on changes to the Bill as it passes through Parliament and into law.

INHERITANCE TAX CHANGES AND THE IMPACT ON CHARITIES

A reduction in inheritance tax for donors who leave more than 10% of their net estate to charity was announced in the 2011 Budget.

In a positive development for charities seeking to maximise their income from legacies, George Osborne announced in the 2011 Budget that the estates of donors who die on or after 6 April 2012 and leave charitable legacies amounting to 10% or more of their 'net' estate will benefit from a reduced rate of inheritance tax of 36% (instead of 40%). The 'net' estate of a donor is their taxable estate: i.e. what is left after all inheritance tax exemptions, reliefs and the 'nil rate band' have been deducted.

The case study below illustrates how this tax incentive is likely to operate in practice.

Mr Smith leaves a total estate of £10m to his children on his death. Assuming he is entitled to no tax reliefs apart from the £325,000 nil rate band, 40% tax will be payable on his taxable estate of £9,675,000 (ie tax of £3,870,000) leaving his children with £6,130,000.

If Mr Smith leaves £1m to charity, under the current rules, no tax will be paid on the charitable legacy so his estate will bear tax at 40% of £8,675,000 (ie tax of £3,470,000) so the children will receive £5,530,000 and the charity £1m.

Under the new rules, since a gift of at least 10% of the taxable estate is left to charity, the concessional tax rate of 36%

would apply: 36% of £8,675,000 is £3,123,000, so the children would receive £5,877,000 and the charity £1m.

The practical effect of the proposed new rules in this scenario is that Mr Smith's children would only be worse off to the tune of £253,000 than if he had left no money to charity at all, compared to £600,000 under the current rules. The charity would still receive the same amount: it is HMRC who would lose out under the new rules to the tune of £347,000.

This incentive may encourage those already considering leaving a bequest of less than 10% of their taxable estate to leave a more substantial sum to charity, to ensure that the balance of their taxable estate benefits from the new lower rate of 36%. But it is unclear whether the change will tempt those who have never considered making any charitable gift in their will to do so in the future.

The jury is out over whether the tax incentive offered is enough to create a 'new social norm', among the relatively well-off and wealthy at least, and we await the details of the initiative with interest (the Government will be consulting on the detailed implementation of the measure over the summer). However, it is certainly a step in the right direction.

Eva Abeles wonders whether the proposed changes are enough to create a new social norm – for the wealthy at least?



Eva Abeles
Solicitor
Eva advises charities in relation to governance and constitutional issues and provides general charity law advice, with a particular focus on charitable trusts and endowments.

'It is unclear whether the change will tempt those who have never considered making any charitable gift in their Will to do so in the future'

Eva has written an article along similar lines in *DSC Legal Eyes*, available at <http://www.dsc.org.uk/NewsandInformation/News/LegalEyesBudget2011-InheritanceTaxchangesandtheimpactforcharities>

FIND OUT MORE
Our cross-departmental Legacies and Probate Disputes team is able to advise on all matters relating to charitable legacies and contested probate. <http://www.bwbllp.com/departments/LegaciesandProbateDisputes.html?a=a&More=True>

	Estate	Charitable donation	Tax	Children's portion
Current	£10m	£0	£3,870,000	£6,130,000
	£10m	£1m	£3,470,000	£5,530,000
New	£10m	£1m	£3,123,000	£5,877,000

SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS

Having wondered for a long time whether the Scottish Charitable Incorporated Organisation ('SCIO') would ever come to fruition, the regulations have now been passed – and it is possible to form a SCIO.

John Hodge welcomes the arrival of the SCIO, but says it is too early to tell what its impact will be



John Hodge

Balfour + Manson, Edinburgh

John is the head of the Charities Team at Balfour + Manson, and a member of the Commercial and Corporate Team. He specialises in understanding the particular requirements of clients and helping them to fulfil their business needs. He has experience in applying this expertise both for commercial organisations and also for the not-for-profit sector.



The legislation for the SCIO is contained in the Charity and Trustee Investment (Scotland) Act 2005. A SCIO has the benefit of being a corporate body, similar to a company, but without having the requirement to be registered in terms of the Companies Act. Previously, most charities wishing to take advantage of corporate status would use a company limited by guarantee. As these are formed under the Companies Act, such charities were then subject to regulation both by Companies House and by the Office of the Scottish Charity Regulator (or OSCR). For that reason, it was felt that it would be more appropriate to have a body that was specifically designed for charities, with the advantage of corporate status but without the disadvantage of dual regulation.

Unfortunately, while the legislation makes provision for companies limited by guarantee and industrial and provident societies to convert to SCIOs, there is no provision in the legislation for other forms of charity to convert. Such charities would need to wind up and transfer their assets and liabilities to a newly formed SCIO.

Charitable companies limited by guarantee will also need to consider whether or not the SCIO offers advantages to them. Certainly, reconstituting as a SCIO would dispense with the need to make Annual Returns and lodge accounts with Companies House. However, while in the past the need for audited accounts

was driven by the provisions of the Companies Act, it is now the requirements of OSCR that are the more onerous. Complying with Companies House requirements does not impose a significant burden on a company limited by guarantee.

A SCIO has the advantage of having a relatively concise statutory basis, namely sections 49 to 64 of the Charity and Trustee Investment (Scotland) Act 2005. This compares with the 1,300 sections in the Companies Act 2006, not to mention all the other legislation affecting companies. However, over the years, these sections have been well tried and tested. There is also a danger (and we have seen some evidence of this) that banks and other lending institutions may be slightly reluctant to lend to SCIOs as they are less sure of the procedures.

The SCIO is an interesting new development in the formation of charities. Already the first SCIO has been formed and there is no doubt that there is an enthusiasm in certain quarters for it. Only time will tell whether it will replace the company limited by guarantee as the preferred model for incorporated charities.

FIND OUT MORE

The corresponding regime for charities in England and Wales is due to be introduced later this year – see page 20 for more information.

TOP TIPS FOR EFFECTIVE LEADERSHIP

Effective leaders encourage a two-way dialogue between those leading and those following – encouraging respect, trust and mutual responsibility. Approaches and solutions are tailored to each unique situation. Form follows function, which increases the probability of processes, procedures and structures leading to impactful outcomes.



Engagement, participation and ownership are critical. Outstanding leaders ask ‘where are we going?’ and listen to the answers proffered.



The focus is on gaining common understanding, identifying common ground, understanding disagreements and respecting differences of opinion. Dissent is welcome. The decision-making process means that as many people as possible sing from the same song sheet.



The view of the individual is important. Each individual is asked – ‘where are you going?’ Explorations of this nature help achieve alignment of vision, goals and priorities.



What is going well?

Significantly, good news is not missed. The effective leader creates opportunities for the board and staff to understand positive aspects of performance that would otherwise be missed. The supportive climate provides positive recognition for achievement.



What are key suggestions for improvements?

Enhancing efficiency and effectiveness has, at its basis, continuous learning and improvement. New opportunities and challenges become launch pads for growth and outreach. ‘What are the key opportunities for improvement?’ The answers point to both constructive suggestions for the future as well as suggestions and thinking from the past that may need to be modified.



OnBoard consultant

Tesse Akpeki provides some welcome guidance for charity leaders



Tesse Akpeki

OnBoard Consultant Tesse is a consultant, trainer and CEDR-accredited mediator. She was formerly head of governance and trustee services at NCVO and has worked extensively with third-sector organisations nationally and internationally.

How can I help?

Asking the right questions is key to effective leadership. Exploring situations using incisive questioning can help make the most effective use of limited time. When the chair asks this question of his or her board members or the chief executive asks the senior management team, those being asked can feel supported and empowered. During the chief executive appraisal or board review the chair or chief executive can gain insight into better ways to support those who they lead and to lead to new understandings. S/he can ask 'Am I on the right track?' 'Do you feel this approach will help you become more effective?'



What suggestions do you have for me?

Focusing on improving one to two key behaviours can enhance the leader's effectiveness. S/he benefits from self-awareness, self insight and self-care. Monitoring, review and assessment on a regular basis provide the framework and discipline to increase effectiveness. The journey is a continuous one, especially for leadership that thrives in times of challenges, crisis and uncertainty. The Chinese symbol for the word crisis indicates both danger and opportunity. When the stakes are high and the outcome in doubt, purpose can emerge from painful and uncertain situations and effective leadership shows up.



Governance Development

For more information visit
www.on-board.org

OnBoard is a unique collaboration offering governance development, training and support. We combine leading third-sector consultants David Carrington and Tesse Akpeki with charity and social enterprise legal expertise from Bates Wells & Braithwaite. Together we provide training, advice and support for mission-led development.

Upcoming Events in 2011:

8 June: OnBoard/Santander Seminar: Governing in Uncertain Times – the opportunities, and the challenges

15 September: Duties of Charity Trustees

17 November: Leading from the top: The duties, roles, responsibilities and expectations of the Chief Executive and Chair

24 November: Governing and Leading Effectively

To find out more or to book a place, please contact us:

OnBoard
2-6 Cannon Street
London EC4M 6YH

Tel: 020 7551 7724
Fax: 020 7551 7800
Email: info@on-board.org

CHARITY SECRETARIAL: ELECTRONIC FILING

Both Companies House and the Charity Commission are encouraging electronic filing of all documents.

Both Companies House and the Charity Commission have been reviewing their website services to encourage the use of electronic means as the preferred method of communicating with them. For instance, the revised Companies House filing fees statement as at 6 April 2011 shows considerable reductions on

web-filing fees and an increment on the fees for paper filing.

These are the main documents which can be filed electronically by a registered charity established as a company limited by guarantee, and their associated deadlines.

Chinonso Denwigwe outlines the current filing regime



Chinonso Denwigwe
Senior Paralegal
Chinonso assists solicitors in the Charity & Social Enterprise Department in all aspects of work for charities and social enterprises.

Document	E-filing?		DEADLINE	
	CH	CC	Companies House (CH)	Charity Commission (CC)
Annual Return	✓	✓	Within 28 days of the 'made-up date' which is usually the anniversary of either the incorporation date or the made-up date of the previous annual return registered at CH.	10 months after financial year end.
Annual Accounts	X	✓	22 months from the date of incorporation (for the first accounts) and nine months after financial year end subsequently.	10 months after financial year end.
Appointments and Resignations	✓	✓	Within 14 days of change.	Either on submission of the next annual return or as soon as possible. If the charity is also a company, the appointment or resignation should be filed at CH first.
Changing the registered office (or 'public address' for the Charity Commission)	✓	✓	Within 14 days of change.	As soon as possible.
Changing the financial year end	✓	✓	Before the filing deadline of the accounts for the period that you wish to change.	Before the filing deadline of the accounts for the period that you wish to change.
Changing the organisation's contact details, email addresses for Charity Commission use and for public display, trustee details, website address, description of activities and bank or building society account details	X	✓	Not applicable.	As soon as possible.

Registering for electronic accounts

In order to access the online services at Companies House and the Charity Commission your organisation must have an electronic account with the relevant Regulator. These can be created fairly easily via the appropriate websites.

For Companies House, go to <http://www.companieshouse.gov.uk/>. Follow the 'file documents online' instructions and apply for a security code on the 'sign in and registration' page. This will allow you to request an authentication code which will be used for all online filing matters from Companies House.

For the Charity Commission, go to <http://www.charity-commission.gov.uk>. Follow the 'forgotten your password' links to ask for a password to be sent to an email address which has already been registered with the Commission.

HMRC also plans to introduce online filing for Gift Aid claims: see Bill Lewis' article on page 22 for more details.



Stuart Marchant

Partner

Stuart joined BWB as partner in 2010. He has a wealth of experience advising public, private and third sector clients on operational issues to do with the provision of care to people in need of services.

Creating Not-for-Profit Providers of Health and Social Care

On 30 March 2011, the King's Fund, in association with the NHS Alliance, the Department of Health and Co-operatives UK, hosted a conference on Creating Not-for-Profit Providers of Health and Social Care. The packed agenda was designed to look at how social enterprise can, either alone or working with public and independent sector organisations, maximise the opportunities created by the NHS and community care reforms and the drive towards a Big Society.

The conference showed that social enterprises can be strong performers in the future of health and social care provision as well as vibrant businesses in their own right.



Mary Groom

Partner

Mary has worked at BWB since qualifying as a solicitor in 1998, prior to which she was a science teacher. She works with academies, education charities and maintained schools on their establishment and subsequent legal requirements.

Exempt charity status for schools and colleges

We reported in our Spring Update that the Government had postponed implementing the proposed exempt charity status for

HEALTH

The timing of the conference coincided with Andrew Lansley's announcement of the Government's 'Any Qualified Provider' initiative which supersedes Any Willing Provider. Despite the current 'pause' in the health and social care reforms, there is a definite emphasis on pluralism of providers so long as it does not spell the downfall of the NHS.

An important focus for any current conference on the reformation of the health service is the role of GP commissioning consortia, and this one was no different. It is clear that GP consortia, as custodians of huge budgets, will be looking to commission more effectively to meet the needs of their local areas, in consultation with statutory Health and Wellbeing Boards who have a public health and community care remit.

Political rhetoric speaks loudly about the attraction of a 'John Lewis' model for health and social care organisations as providing a way to achieve employee engagement and efficiencies, but there are a large number of different models of organisation that will suit the individual and corporate needs of providers.

EDUCATION

academies as no decision had been reached over the appointment of a Principal Regulator.

After a period of uncertainty, it has now been announced that the Secretary of State for Education is to become the Principal Regulator for academies and free schools under the Charities Act 2006. Additionally, changes will be made to the charitable status of the governing bodies of foundation and voluntary schools and sixth form college corporations so that these organisations

BWB's Stephen Lloyd led a session with Linda Barlow (Legal Officer of Co-operatives UK) on legal responsibilities and organisational structures. The participative session was based around the delegates' main concerns, and provided answers to questions such as:

- How to comply with procurement rules? (See Julian Blake's article on page 5 for more on the opportunities afforded by procurement.)
- Are there mechanisms for various organisations to come together under the umbrella of one organisation?
- How should redundancy issues be addressed?
- How should returns be divided up in social enterprises?
- What are the TUPE implications of leaving the NHS?

These are exciting times, despite uncertainty about both the details and the pace of the reform agenda. Providers should be thinking very hard about how they can maximise the opportunities that are being presented.

will become exempt charities with the Secretary of State for Education as the Principal Regulator.

FIND OUT MORE

See the [BWB Education Bulletin](http://www.bwbllp.com/Updates/Exempt-Charity-Status-for-Schools.html?Location=2&ID=15), available from <http://www.bwbllp.com/Updates/Exempt-Charity-Status-for-Schools.html?Location=2&ID=15>

SPORT



Thea Longley

Partner

Thea advises sports clubs and sports governing bodies on charitable and CASC status, registration, restructuring, constitutional issues, contract work and funding. Thea is recommended by *Legal 500*.

Charity and Sport – a work in progress!

Charity Commission consultation

The Charity Commission published their consultation on the promotion of amateur sport at the end of February; responses must be submitted by 31 May 2011.

This represents a fantastic opportunity for those working in this sector to influence Commission policy, particularly as it is clear from the consultation document that the Commission has finally accepted that the Charities Act 2006 did move the law on in this area.

Knotty issues that the Commission are now grappling with include:

- How to define a sport and game? – the question of what can be a charitable game that promotes mental health is likely to be particularly tricky, and includes issues around online gaming.
- How to define amateur? – the consultation document suggests that the Commission might be willing to accept small-scale payments to players to play if it can be shown that doing so furthers participation more generally.

However we will have to wait for the final guidance to be published before the position is clarified.

Public benefit

The publication of the consultation coincided with the publication of reports on the public benefit provided by four recreation and leisure charities and also the news that Hitchin Bridge Club was the first bridge club to achieve registration under the promotion of amateur sport head.

Radlett Lawn Tennis and Squash Club was the only sports charity to 'fail' the public

benefit test. This was primarily because of their adult subscription rate of £339.

However the Charity Tribunal case on fee-charging in relation to public schools (see page 21) could impact on the Commission's policy on fee-charging charities and might perhaps let the club off the hook.

FIND OUT MORE

For more details on the public benefit reports and Charity Commission consultation please see our newsflash on Amateur Sport and Charitable Status at <http://www.bwbllp.com/Updates/Amateur-Sport-and-Charitable-Status.html?Location=2&ID=18>

If you would like any more details about the Charity Commission consultation or would like help with drafting a submission please do not hesitate to contact either Thea Longley or Augustus Della-Porta.

Thea Longley is chairing the Charity Law Association Working Party that will respond to the consultation.

Community Amateur Sports Clubs

Those involved with sports clubs registered with HMRC as Community Amateur Sports Clubs (CASCs) should also note the proposed changes to the Gift Aid regime (see page 22). An amateur sports club with open membership policies can, as an alternative to registering as a charity, register as a CASC with HMRC and receive many of the valuable tax reliefs that charities receive. This includes 80% mandatory and 20% discretionary rate relief, inheritance tax relief for donors leaving gifts in their Will and Gift Aid relief on donations (25p extra from HMRC for every £1 given).

FIND OUT MORE

Thea Longley and Augustus Della-Porta would be happy to advise on the possibility of clubs registering as either a CASC or a charity; more information is available at www.cascinfo.co.uk

BWB Sports team

We have a long history of working with sports organisations, and our clients include the Football Foundation, ECB and RFU. BWB's former senior partner, Andrew Phillips was also closely involved in the lobbying that led to the introduction of the Community Amateur Sports Club status.

Mike Townley, Head of our Sports department, is ranked by both Legal 500 and Chambers UK, which says that he is 'noted for his long and distinguished track record in UK sports law. He is commended by clients for "his undeniable passion for sport," who note that "we save considerable time because he is already up-to-speed with the complexities and challenges we face".'

If you would like any more information or advice about this area of our work please contact Thea Longley t.longley@bwbllp.com

WHAT'S NEW AT THE CHARITY COMMISSION



Tom Ketteley

Trainee Solicitor

Tom is a trainee solicitor in the Charity & Social Enterprise Department.

New Strategy for 2011-15 due out in the summer

BWB, along with charities, trustees and representatives of charities, has been keenly analysing the public statements from the Commission to gain a sense of how it will cope with the budget cut of a third imposed during the Government's Comprehensive Spending Review. The Commission strategic review consultation generated lots of responses, and the Commission is considering its priorities, structure and activities. BWB's Julian Blake chaired the Charity Law Association's working group on the Review.

The Commission has indicated that a focus will be placed on delivering five key regulatory activities, namely:

- Registering charities;
- Providing guidance to charity trustees to enable them to manage charities effectively;
- Ensuring that charities are accountable to the public by requiring and publishing information;
- Granting such permissions as are required by law; and
- Investigating individual charities where there is mismanagement or abuse (but focusing on intervening only when there is a serious and systematic risk).

Indications are that the new strategy, covering the period 2011-15, will be

published in the summer. It is expected that there will be a reduction in bureaucracy where charities have to seek the Commission's consent. Also there will be a move to require charities to make 'right first time' applications for registration, which will either be accepted or rejected.

Public benefit – Emerging findings report – art, recreation and leisure charities

Following the publication of its assessment of recreation and leisure charities (see page 19) the Commission has published a report of its latest conclusions and recommendations on public benefit.

The Commission reports that, beyond just providing subsidised access, there are a variety of ways in which charities can meet the public benefit requirement.

The Commission also highlights the need for membership charities to remain sufficiently open – especially in cases where membership fees are high, there is selection by ability, or where an existing member must nominate a new member.

Additionally, the Commission voiced concern over the way some arts charities expressed their aims in their objects and recommended that they should be accurate in doing so. This is because only benefits in relation to a charity's aims can be used as a way of demonstrating that the aims are for the public benefit.

Charitable Incorporated Organisations

As was reported in our Spring Update, the new Charitable Incorporated Organisation ('CIO') legal format is expected to be introduced, despite the planned reductions in the Commission's funding. The CIO is not yet available, but at the

end of March the Commission published the first part of its guidance for anyone setting up a CIO. Two model constitutions were also made available – a foundation model and an association model. See http://www.charitycommission.gov.uk/Start_up_a_charity/Do_I_need_to_register/CIOs/default.aspx. However, the regulations implementing the new regime have not yet become law, so the guidance may well be changed.

GUIDANCE

Online compliance toolkit for trustees expanded

The Commission has updated its online compliance toolkit for trustees. Two new chapters in *Protecting Charities from Harm* have been made available covering:

- issues surrounding due diligence as well as the monitoring and verification of end use of funds for charities; and
- guidance on fraud and financial crime in relation to charities.

Updated guidance for Excepted and Exempt Charities

Additional guidance on accounts and land transactions for charities losing their exempt status as part of the move towards the single registration requirement for all English and Welsh charities has been published. This adds to the existing guidance relating to the changes to the regulation of excepted and exempt charities.

New overview guidance on Managing Charity Assets and Resources (CC25)

New guidance has been published covering the management of charities' assets and resources, such as property belonging to a charity including

investments, cash, land and buildings as well as staff, volunteers, goodwill and reputation.

REGULATORY CASE REPORT

London Philharmonic Orchestra

Following allegations in the media of substantial fraud, a Regulatory Compliance Case was opened by the Commission. After the resignation of the Finance Director in August 2009, it came to light that he had been committing large-scale fraud involving the charity's funds. A forensic investigation revealed that a reasonably complex fraud had been perpetrated using a number of different methods. The total loss to the charity was in the region of £2.1m although £1.2m has since been recovered. A significant proportion of the loss was as a consequence of the former Finance Director forging the second signature on cheques – effectively bypassing the internal financial controls in place at the charity.

The former Finance Director pleaded guilty to fraud by abuse of position and acquiring and using stolen property and received a four-year prison sentence.

Having detected the fraud, the Commission was satisfied that the trustees fulfilled their duties in responding to it although it would have been good practice to inform the Commission of the fraud as soon as it was discovered by making a serious incident report.

Key observations include that trustees should report crimes or suspected crimes to the police in order to discharge their duties to act in the best interests of the charity and that trustees have a duty to recover, whenever possible and cost effective, funds that have been misappropriated.

INQUIRY REPORT

Alzheimer's UK Research Education and Care

The Commission received a complaint relating to the remuneration of the acting Chief Executive Officer and opened a statutory inquiry into the charity in October 2008. The inquiry established that in the two financial years ending 31 March 2007 and 31 March 2008, over 92% of the charity's expenditure was accounted for by the costs associated with fundraising mailshots and the acting CEO's salary. Of particular concern was the engagement of two private companies, at significant cost, to raise funds for the charity. Both these private companies were previously known to the acting CEO.

The inquiry concluded none of the charity's funds had been spent on charitable activities since its registration in July 2006.

The inquiry found the trustees did not manage the charity effectively. They met infrequently and had little input into the running of the charity. Moreover, the trustees relied heavily on the acting CEO and gave her freedom to manage and administer the charity. There was no strategic plan for the charity which, the Commission concluded, had become no more than a fundraising vehicle.

Lessons for the sector, as identified by the Commission, include that an effective trustee body is required to have control over the administration of the charity so that the funds of the charity are applied for the benefit of the public. Also, when delegating activities such as fundraising, clear terms of reference must be established and trustees should receive regular reports on performance targets in order to maintain proper oversight of all aspects of the charity.

CHARITY TRIBUNAL



Christine Rigby

Solicitor

Christine is a former Partner, whilst continuing with her client work she focuses on updating clients on new legal developments, delivering training and writing books.

The next few months will see a busy period for the Tribunal with:

- the hearing in May of the judicial review brought by the Independent Schools Council and the linked Reference by the Attorney General (see page 25 of our Spring Update <http://www.bwbllp.com/Updates/Charity-Social-Enterprise-Update-Spring-2011.html?Location=2&ID=1>); and
- the progression of the second Reference made by the Attorney General on benevolent funds (see page 8).

As we go to press, it has just been announced that the appeal by Catholic Care against the second decision of the Commission to refuse to allow it to amend its objects was unsuccessful. More details will follow in our next Update.

NORTHERN IRELAND



Mairead O'Reilly

Solicitor

Mairead advises charities, social enterprises and other not-for-profit organisations on company & charity law.

The Charity Commission for Northern Ireland (CCNI) has now been granted its regulatory powers. These include investigatory and enforcement powers but are currently restricted to the approximately 7,000 Northern Ireland charities which are registered with HMRC for tax purposes.

The establishment of a full charity register has been delayed by the need to pass new legislation to clarify how the public benefit test is defined under the Charities Act (Northern Ireland) 2008. In addition to technical queries about the definition of the test, the Northern Ireland Executive has requested that the legislation be redrafted to reintroduce a presumption of public benefit for religious and other organisations.

It remains to be seen how this new charity regime will affect English and other non-local charities with a presence in Northern Ireland. It is expected that such charities will be required to register on a separate 'parallel register', which will allow them to be recognised as being charitable in Northern Ireland without needing to be established for charitable purposes under Northern Irish law.

TAX AND VAT



Bill Lewis

Consultant

Bill has expertise in all aspects of taxation affecting charities. He specialises in reviewing VAT structures to maximise VAT efficiency.

Increase in Gift Aid donor benefit limits

From April 2011 the maximum value of the benefits that a donor can receive without prejudicing a Gift Aid claim is increased from £500 to £2,500. The new limit is subject to the pre-existing rule that the benefit must not exceed five per cent of the gift.

Gift Aid: records for small donations.

From April 2013 charities (and community amateur sports clubs) that receive small donations of £10 or less will be able to apply for a Gift Aid repayment without the need to obtain Gift Aid declarations for those donations. The amount of small donations on which the new repayment can be claimed will be capped at £5,000 per year, per charity. In order to qualify for this new repayment, charities will need to have been recognised by HMRC for Gift Aid purposes for at least three years, have been operating Gift Aid successfully throughout that time and have a good tax compliance record. The Government will be consulting with charity representatives on the details of the new scheme during the summer.

Gift Aid: online filing

In 2012-13 HMRC will introduce a new online system for charities to register their details for Gift Aid and to make Gift Aid claims. As a first step towards this, HMRC will publish four new 'intelligent' forms for charities to use.

The forms contain automatic checks to improve the accuracy of information and reduce administrative burdens. HMRC will work with the sector to develop the new online system. HMRC will also work with the sector to develop a supporting electronic Gift Aid database for Gift Aid declarations.

Gifts of art

The Government is considering introducing a tax deduction for donors who give a work of art or historical object of national importance to the State. A consultation on the proposal will take place over the summer.

Donating through the self assessment system

The SA Donate scheme is to be withdrawn for repayments of tax due on tax returns for 2011-12 and subsequent years, and for any repayments made in respect of earlier tax years on or after 6 April 2012. Self-assessment taxpayers who are due a repayment of tax from HMRC may currently direct that the repayment should be made instead to a charity of the taxpayer's choice. SA Donate was introduced in 2005 but has not been well used. The resources saved from the withdrawal of SA Donate will be redirected to support the introduction of an online claims system for Gift Aid.

Gift Aid guidance

Revised Detailed Guidance Notes on Gift Aid have been promised by HMRC 'to clarify a number of issues and misunderstandings' that have become apparent following discussions with the sector.

VAT cost-sharing exemption

As reported in our Spring Update, consultation continues on the options for implementing the VAT cost sharing exemption into UK legislation. The exemption could be used by organisations such as charities, universities and housing associations wanting to make efficiency savings by working together to achieve economies of scale. Under current UK legislation a VAT cost can arise, creating a barrier to the sharing of costs and services in this way. The exemption, if implemented in the UK, would in certain circumstances remove this VAT barrier.

Tainted Donation Rules

As reported in our Spring Update, legislation will be introduced this year to replace the existing substantial donors to charities legislation ('the SD rules') with tainted donations legislation ('the TD rules'). HMRC accept that the SD rules are too restrictive: the TD rules will tax donors who receive financial advantages following making a donation to charity. The SD rules caught many innocent transactions and charged tax to the charities, so with the tax charge moving to the donor the TD rules are an improvement.

However, we believe the rules are unnecessary – long standing rules concerning charity investments, Gift Aid and donor benefits, and the requirement for a charity to spend its money charitably all adequately deal with every example of mischief that HMRC have produced in justification of the new rules.

Enquiries

For enquiries about any points covered in this update, please contact:

Eva Abeles	e.abeles@bwblp.com	020 7551 7649
Tesse Akpeki	tesse.akpeki@on-board.org	020 7551 7835
Julian Blake	j.blake@bwblp.com	020 7551 7750
Melanie Carter	m.carter@bwblp.com	020 7551 7615
Victoria Cook	v.cook@bwblp.com	020 7551 7856
Alex de Jongh	a.dejongh@bwblp.com	020 7551 7832
Chinonso Denwigwe	c.denwigwe@bwblp.com	020 7551 7769
Rupert Earle	r.earle@bwblp.com	020 7551 7615
Mary Groom	m.groom@bwblp.com	020 7551 7760
Sean Egan	s.egan@bwblp.com	020 7551 7796
Tom Kettleley	t.kettleley@bwblp.com	020 7551 7638
Bill Lewis	b.lewis@bwblp.com	020 7551 7775
Stephen Lloyd	s.lloyd@bwblp.com	020 7551 7711
Thea Longley	t.longley@bwblp.com	020 7551 7831
Stuart Marchant	s.marchant@bwblp.com	020 7551 7652
Robert Oakley	r.oakley@bwblp.com	020 7551 7808
Mairead O'Reilly	m.oreilly@bwblp.com	020 7551 7613
Lisa Marie Roca	lm.roca@bwblp.com	020 7551 7608
Christine Rigby	c.rigby@bwblp.com	020 7551 7712
Laura Soley	l.soley@bwblp.com	020 7551 7768

Advice

Advertising & Marketing Law	Rupert Earle	r.earle@bwblp.com
Competition Law	Julian Blake	j.blake@bwblp.com
Corporate / Commercial	Mark Tasker	m.tasker@bwblp.com
Dispute Resolution	Malcolm Robson	m.robson@bwblp.com
Education Law	Julian Blake	j.blake@bwblp.com
Employment Law	William Garnett	w.garnett@bwblp.com
Environment	Stephen Lloyd	s.lloyd@bwblp.com
Film & Television	Sean Egan	s.egan@bwblp.com
Finance	Stephen Lloyd	s.lloyd@bwblp.com
Health & Social Care	Stuart Marchant	s.marchant@bwblp.com
Immigration	Philip Trott	p.trott@bwblp.com
Insolvency	Malcolm Robson	m.robson@bwblp.com
IP / IT & Information Law	Sean Egan	s.egan@bwblp.com
Legacies and Probate Disputes	Robert Oakley	r.oakley@bwblp.com
Litigation	Malcolm Robson	m.robson@bwblp.com
Media Disputes	Rupert Earle	r.earle@bwblp.com
Membership & Trade Associations	Dinah Tuck	d.tuck@bwblp.com
Property	Anthony Cartmell	a.cartmell@bwblp.com
Property Dispute Resolution	Lesley Robinson	l.robinson@bwblp.com
Public & Regulatory Law	John Trotter	j.trotter@bwblp.com
Public Service Reform Unit	Stephen Lloyd	s.lloyd@bwblp.com
Sports	Mike Townley	m.townley@bwblp.com
Theatre & Arts	Sean Egan	s.egan@bwblp.com
Trade Marks	Lawrence Simanowitz	l.simanowitz@bwblp.com

Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact Mona Rahman at m.rahman@bwblp.com

The information contained in this bulletin is necessarily of a general nature. Specific advice should be sought for specific situations.



Printed onto 150gsm Cyclus 100% post consumer recycled stock

Bates Wells & Braithwaite London LLP
2-6 Cannon Street, London EC4M 6YH

Tel: +44 (0) 20 7551 7777 Fax: +44 (0) 20 7551 7800

www.bwblp.com mail@bwblp.com



Bates Wells & Braithwaite

SOLICITORS

Bates Wells & Braithwaite London LLP is a Limited Liability Partnership. Registered in London OC325522.

Regulated by the Solicitors Regulation Authority and authorised by the Financial Services Authority.