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28 November 2017

Charity and social enterprise update - November 2017

A summary of legal and sector developments since 10 September 2017.

Welcome to our Charity Lawyers' Update – an update on all the issues affecting the charity and social enterprise sector.

You already receive a general charity legal update from us – click here to see the latest version – and we received some feedback that a more detailed, technical update would be welcome. Well, we listened and here you are!

We've put together an update that keeps you in the loop with the news from the sector, with legislate news, cases, information from the Charity Commission, charity fundraising, philanthropy and social investment. We know how busy you are so to help you navigate the sections more easily, we have included a handy contents page that shows you at a glance where all the pertinent information is.

Hopefully you will find this update a useful resource but as always, we want to know what you think – is there anything missing or indeed too much information? Let us know your feedback on by contacting me or Tori using our details below.

Neil Burton for Mills & Reeve LLP
Partner
+44(0)1223 222455
Neil.burton@mills-reeve.com

Tori Spratt for Mills & Reeve LLP
Professional Support Lawyer
+44(0)1223 222323
tori.spratt@mills-reeve.com

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1 Legislative news

1.1 Conversion from CIC or charitable company to Charitable Incorporated Organisation – phased implementation from 1 January 2018

On 13 September, the Government published the response to its consultation on the statutory instruments required to allow conversion from CIC or charitable company to a CIO structure, along with an updated phased implementation plan and guidance on the process.

The Draft Charitable Incorporated Organisations (Consequential Provisions) Order has been published, and is intended to allow Community Interest Companies to appeal any decision by the Charity Commission not to allow its application for conversion to a CIO and registration as a charity. It is drafted to come into force on 1 January 2018.

The Charitable Incorporated Organisations (Conversion) Regulations 2017, and the Index of Company Names (Listed Bodies) Order 2017, will also be laid before Parliament, with the intention that they should also come into force on 1 January 2018.

1.2 Law Commission publishes its final report on technical issues in charity law, together with draft legislation. For more information on the proposed changes and the contents of the draft legislation, see our previous article.

1.3 News from Westminster:

- The Government has announced its intention to develop a Civil Society Strategy:
This will not involve any more funding for charities, but aims to create "a joined up approach to charities, across Whitehall". The next step will be a listening exercise in the new year, to discover key issues facing the sector, and consider how the strategy can address them. The implementation will be led by Tracey Crouch, minister for Civil Society. She has already overseen a similar process for sport.
- Autumn Budget 2017:
This year's Budget contained the word "charities" four times in total. However, the lack of use of the word should not be taken to mean that the Budget contained little of interest for the sector this year.

Policies mentioned in the Budget directly relevant to some charities include:

- A further £36 million in LIBOR fines to armed forces and emergency service charities over the next three years. Then the LIBOR Charity Funding Scheme will come to an end.
- A commitment to continue working with employers on how the Apprenticeship Levy can be spent.
- The simplification of the Gift Aid donor benefit rules by reducing the number of monetary thresholds from three to two. The change will impact on the value of benefit that can be provided in relation to donations of more than £100, in relation to which the limit of £25 will no longer apply. Instead, charities will be able to provide benefits to the value of 25 per cent of the first £100, and then 5 per cent of the rest, up to a maximum of £2,500. No donor should be "worse off" as a result of this change. In addition, all extra-statutory concessions (such as those relating to the admission to property and the provision of literature) will be legislated. Changes will come into effect from April 2019.
- A grant to help rescue charities meet the cost of irrecoverable VAT.

In addition, the Government has announced the creation of a Regulators' Pioneer Fund, to help regulators innovate and develop new products based on emerging technologies. Could this be an additional source of funding for the Charity Commission?

More on the Budget and its broader contents can be found in this blog post.

2 Cases

2.1 Cambridge Islamic College v The Charity Commission for England and Wales (1) and Cambridge Muslim College (2) (CA/2016/0008)

The decision by the Charity Commission that Cambridge Islamic College should change its name, on the basis that it was too like that of Cambridge Muslim College and was likely to give the impression that the two charities were connected when they were not, has been quashed by the First Tier Tribunal (Charity) ("FTT").

This was a very interesting decision by the FTT, as it is the first time that the FTT has considered the exercise of this particular power of the Commission. The power found in section 42 Charities Act 2011 involves the a two stage test, on the application by the Commission of which the FTT commented as follows:

- The "too like" test only requires a simple visual or oral assessment as to whether the names were similar "at a glance".
- In relation to the "connected" test, the Commission could use its knowledge of the register and the sector to decide whether a name was likely to give an incorrect impression of a connection with another charity but "evidence of generalised confusion would not be sufficient".

The FTT decided that the "too like" test was not satisfied in this case, as the words "Muslim" and "Islamic" are obviously different words. It was also "at a loss" as to how Cambridge Islamic College could reasonably have been thought to have given the impression that it was connected with Cambridge Muslim College.

The Commission has since, however, sought and been granted leave to appeal the decision. The sitting judge noted that there is no authority on the interpretation of section 42 Charities Act 2011, and so it would be helpful for the Upper Tribunal to determine the correct approach.

2.2 Eynsham Cricket Club v HMRC ([2017] UKFTT 0611 (TC)):A CASC can be a CASC and a charity for tax purposes

This decision of the First Tier Tribunal (Tax Chamber) in relation to VAT considered the varying definitions of a "charity" to be found in the Charities Act 2011 and the Finance Act 2010. It concluded that while a CASC could not be a CASC and a charity for the purposes of the Charities Act 2011, being a CASC would not prevent an organisation from being a charity for the purposes of the Finance Act 2010.

2.3 Densham v The Charity Commission for England and Wales (CA/2017/0002): allotments continue to be held on charitable trusts

This case involved an appeal against a scheme made by the Charity Commission for the allotments in question, on the grounds that the terms of the awards under the Inclosure Act 1845 in relation to the allotments had not created charitable trusts, and that the Commission therefore had no power to make the scheme. However, the tribunal held that the awards made under the Inclosure Act 1845 had created charitable trusts, and so the Commission did have the appropriate power. The facts of this case are very specific, but may be relevant to other allotments.

2.4 Routier and anor v HMRC ([2017] EWCA Civ 1584):

After the previous decision in relation to this case confirmed that the Coulter Trust, a trust established under and subject to Jersey law, did not qualify for charitable exemption from Inheritance Tax under section 23 of the Inheritance Tax Act 1984 because it was not governed by UK law but by Jersey law, this latest decision has now confirmed that the restriction of the Inheritance Tax exemption to charitable trusts governed by UK is not in contravention of EU freedom of movement of capital.

3 Charity Commission for England & Wales

3.1 Consultations

3.1.1 Consultation on annual return question areas ends on 24 November
As at 21 November, over 192 responses have been received by the Commission, and seventy charities have been involved in targeted user testing of the new system, as a way of testing the practical impact of the new questions.

3.2 Guidance

3.2.1 Guidance on new CIO phased implementation published
This contains the new phased implementation timetable, and details as to how all CIOs will be included in the Registrars' Business Names Index (maintained by Companies House) from 1 January 2018.

3.2.2 Updated guidance on Reporting Serious Incidents published
The published guidance has been amended from the draft guidance to take into account the responses received from the sector during the consultation. It gives useful examples and checklists to help charities decide when a problem should be reported, and also:

- makes clear that losing significant funding or contracts that the charity can't replace should be reported to the regulator; and
- confirms that charities need not report a failure to have a safeguarding policy in place as a serious incident, as this information is now considered a risk issue and reported in the Annual Return.

It also clarifies the reporting obligation for trustees. While there is a statutory obligation for trustees to report a serious incident in the charity's Annual Return to the Charity Commission, it is best practice to report a serious incident promptly.

This should hopefully enable the Commission to provide effective support, with early advice and guidance. The Commission has stated that if trustees don't report promptly and subsequently fail to manage risks properly, and, in failing to do so, breach their legal duties, this failure to report promptly may be regarded as mismanagement of the charity.

3.2.3 Protect your charity from fraud guidance updated, and now includes links to e-learning videos

3.3 Decisions

3.3.1 Decisions showing risks of abuse of charities for terrorist purposes published
The Commission also reminded charities that it "does not consider aid convoys an effective means of delivering humanitarian aid" and warned charities involved in them they will be "subject to additional regulatory scrutiny to ensure trustees comply with their legal duties and responsibilities".

3.4 Other Commission news of interest

3.4.1 Online giving summit
An update issued by the Charity Commission gives information about the outcomes of the joint online giving summit held with the Fundraising Regulator, and attended by fourteen representatives of different online giving platforms, at the end of last month.

Amongst other things, it states that the Fundraising Regulator is reviewing the Code of Fundraising Practice with a view to updating and expanding the standards for online fundraising. Online fundraising platforms have been asked to contribute to the review of the Code.

In addition, the online fundraising platforms are reported to have agreed both to provide information to the Fundraising Regulator about their complaints processes, and to work with the regulators and the Government to explore how their transparency on fees and charges can be improved.

3.4.2 Long waits for charity registration
On 9 October, the Commission confirmed that as a result of high demand for its registration services, it may take up to twelve weeks to receive a response from the registration team in relation to an application for registration as a charity.

3.4.3 Regulatory alert for military charities issued regarding safeguarding vulnerable beneficiaries
The alert also highlighted the importance of trustees complying with their legal duties when carrying out and/or overseeing fundraising.

3.4.4 Regulatory alert issued to all charities regarding phishing scams
The alert sets out the steps that charity trustees should take to protect their charity from phishing attempts, including:

- Make sure the charity's software has up-to-date virus protection
- Install software updates as soon as they become available
- Consider installing software offering an anti-spyware function
- Don't open attachments or click on links in unsolicited emails
- Make regular back-ups of your important files to an external hard drive or similar.

It also signposts some other sources of information to help protect charities from online threats, including a link to the NCSC's guidance "10 Steps to Cyber Security".

3.4.5 Research published by Commission shows need to improve board diversity and access to advice and support by charities

4 Charity Fundraising

4.1 Fundraising Regulator (FR) news:

4.1.1 FR issues warning to charities about scam FPS emails

4.1.2 Registration with the FR now open to third party fundraisers
Previously, only charities were able to register with the Fundraising Regulator. However, from 20 September, third party fundraisers have also been able to register, with those that do being

invoiced for registration "according to their annual turnover using the same bandings that are applied to the fundraising levy".

4.1.3 Online giving summit
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Amongst other things, it states that the Fundraising Regulator is reviewing the Code of Fundraising Practice with a view to updating and expanding the standards for online fundraising. Online fundraising platforms have been asked to contribute to the review of the Code.

In addition, the online fundraising platforms are reported to have agreed both to provide information to the Fundraising Regulator about their complaints processes, and to work with the regulators and the Government to explore how their transparency on fees and charges can be improved.

4.1.4 Memorandum of Understanding signed by FR and Charity Commission for Northern Ireland
The Memorandum sets out the framework within which both bodies' staff will co-operate with each other. It aims to promote a common understanding of responsibilities, working procedures, legal powers and constraints. The two bodies intend to work together on relevant investigations and policy issues

4.1.5 FR launches a Code Consultation on Data Protection
This consultation seeks to make sure that its guidance and terminology is "consistent with forthcoming GDPR legislation", and to address issues identified in the fixed penalty notices levied by the ICO during 2016 and 2017 against a number of charities for breaches of the Data Protection Act. Three new sections for the Code are proposed, covering Legitimate Interest, Processing and Consent. The consultation will run until Friday 8 December 2017, and it is intended that the new Code will be finalised next Spring.

4.1.6 FR publishes complaints report
The report is said by the FR to demonstrate a willingness and commitment by organisations to work with the regulator, with almost 900 organisations providing information. The number of complaints reported by those organisations numbered 42,782. Fundraising using direct marketing and face-to-face fundraising caused the most complaints.

4.2 Institute of Fundraising (IoF) launches a new Certification Programme for public fundraisers

4.3 Daily Telegraph article "Charities dodge begging ban"
The article (£) accused charities of using unaddressed mailings to "dodge" the Fundraising Preference Service, and prompted a swift clarification from the FR, as well as a response from IoF arguing that the headline was misleading.

5 Philanthropy

5.1 Charities received record amount from £1 million plus donors last year
Research by Coutts and the University of Kent discovered that 310 UK individuals or organisations made gifts of more than £1 million last year. Of the £1.83bn donated in the UK last year, £1bn was given by

foundations, £511m by companies and £313m by individuals. The researchers found that publicity around the giving pledge had encouraged both individuals and companies to increase their charitable giving.

5.2 £840 million Cordant becomes UK's biggest social enterprise
This is fascinating stuff. The Cordant Group is a recruitment and facility services business. The decision to become a social enterprise was taken unilaterally by its executive chairman, Phillip Ullman. The Group is owned by three branches of the Ullman family. It has already changed its articles of association to include a series of social commitments, capped annual shareholder dividends and capped all executive salaries at £400,000 (20 times that of the lowest paid workers). In addition, it has also developed plans which reflect its social mission.

6 Social Investment

6.1 UK social impact investment needs more support
The independent review "Growing a culture of social impact investment in the UK" published this month has suggested that the UK is now failing to keep pace with the rest of the world in enabling individuals to make social impact investments.

It seeks to find answers to the question: How can the providers of savings, pensions and investments engage with individuals to enable them to support more easily the things they care about through their savings and investment choices? It finds no "magic bullet", but some practical steps that could be taken to improve the situation.

6.2 Catalysing more and better venture philanthropy in the UK
A project carried out by Big Society Capital and the EVPA has revealed some 60-70 organisations were investing using two or more elements of the VP approach, including tailored financial support, non-financial support, and impact management/measurement. However, very few organisations were calling the approach VP.

With most respondents saying that they would need to connect with other practitioners and share best practice to expand their offering to charities and social enterprises, the next step taken has been the formation of a steering group "to develop the capacity of charities and social enterprises to improve their sustainability through the delivery of more and better venture philanthropy in the UK".

6.3 How many factors does it take to launch a social impact bond?
Researchers have examined the reasons why 25 areas did (or did not) set up a social impact bond (SIB), and summarised the four factors that were essential for a SIB to be launched. The factors are intended to provide a useful framework for future stakeholders to assess whether their intended SIB is likely to be feasible, and to indicate where further work may be required.