

## CHARITIES UPDATE

# Guidance on public benefit

**The Charity Commission has been busy fulfilling its statutory duty to publish guidance on the hot-topic of public benefit. The requirement for all charities to prove the public benefit they provide came into effect in April. Any new organisation applying for registration must now satisfy the Commission that it will be providing sufficient public benefit. Existing charities now have to address the issue in their annual reports, the level of detail being dictated by the charity's size.**

The Commission's general guidance on the issue defines two key principles:

- **There must be an identifiable benefit:** although they need not be quantifiable, benefits must be clear and must relate to the charity's aims. For example, if a charity's object is to advance education among young people, renting out its facilities for adult education will not count for the purposes of the test. Also, the benefit must not be outweighed by any harm, for example, a medical research charity produces positive benefits for public health but could have a harmful effect on animal welfare.
- **Any benefit must be to the public, or a section of the public:** who constitutes "*the public*" is linked to a charity's objects, for example, a charity which works with sufferers of a rare disease will legitimately have a small number of potential beneficiaries. Any restriction on the opportunity to benefit must be, "*legitimate, proportionate, rational and justifiable*" given a charity's purposes. For example, working to prevent ill-health amongst people with black hair in Exeter is unlikely to meet the test. Similarly, any private benefit a charity delivers to people other than beneficiaries must be reasonable.

What is clear, and controversial, is the Commission's guidance that where fee levels imposed by a fee-charging charity restrict benefits to those who can afford the fees, the charity must demonstrate that it is providing benefits in other ways to those who cannot afford to pay. All charities must ensure that "*people in poverty*" are not excluded from the opportunity to benefit.

Some charities have been getting hot under the collar about the new requirements and the Commission is in the process of consulting with many of these on its draft guidance for specific groups including fee-charging charities and those advancing religion. The Independent Schools Council has been vocal in its criticism of the Commission's guidance; its chief executive has described it as "*incredibly confusing*" and called on schools to voice their concerns direct to the Commission. The Evangelical Alliance has also expressed concern, for example, that the bar on "*seeking changes in the law based on quotes from religious texts*" would inhibit religious charities from campaigning effectively.

There's no doubt that the public benefit requirement will prove more of a challenge for some than others but the Commission's message is that no charity should rest on its laurels. Our advice is to face this new challenge head-on and use it as an opportunity to shout about the benefits your charity provides.

# Avoiding governance pitfalls

**Governance is like public transport: when it's good you take it for granted but when it breaks down the fall-out is far-reaching. Unfortunately, Charity Commission inquiry reports suggest that poor governance is an issue in the sector. Common pitfalls are:**

- A poor understanding of trustees' duties. For example, trustees of the Durham Mining Convalescent Homes Fund had, according to the Commission, failed to grasp the concept of conflicts of interest. Three trustees resigned and were immediately employed by the charity.
- The "dinosaur" trustee who's been around a long time but who's ceased to be useful.
- An over-dominant trustee. In its report on the charity, Al Jamia Al Islamia, the Commission noted that the chairman had been allowed to exercise too much authority without involvement from other trustees.
- Inadequate expertise. Being responsible for a charity requires a grasp of some complex issues. Trustees need to come on board with relevant experience or they need an enthusiastic willingness to learn. The Commission has recently replaced all the trustees of a Welsh charity following an inquiry which established that they did not have the right skills for the job.
- An inappropriate balance between trustees and staff. The potential for tension is obvious. The Commission's report on one charity, CATCH, found that the trustees had failed to take control, "so that they were neither administering nor managing the charity, leaving this to the employees." In other situations, trustees overstep their remit and constantly peer over the shoulder of employees.

**If these are examples of poor practice, what makes for good governance? The Governance Hub, which promotes good governance in the voluntary and community sector in England, has a Code of Governance which lists seven key principles:**

- **Leadership:** trustees must take ultimate responsibility for directing the affairs of their charity, concentrating on strategy and delivery of outcomes rather than day-to-day operational decisions. Training on their duties can help trustees to concentrate their efforts in the right areas. Equally, establishing a thorough induction process for new trustees is vital.
- **Control:** trustees are collectively responsible for ensuring the charity performs well, is solvent and complies with all its obligations. The trustees carry significant responsibilities so they need good support from staff, for example, board papers should be well prepared and sent out in good time.
- **High-performance:** trustees should bring a range of relevant skills and should receive proper induction and training. Charities must be willing to invest money in their trustee body to ensure they are fit for the task. Equally, however good your trustees it will, at times, be appropriate for them to take specialist advice; in our experience, getting good advice at the outset of an issue can save a lot of money in the long-run.
- **Review and renewal:** trustees should review their own and the charity's effectiveness from time to time and make changes as necessary. We are often asked to help a charity review its process for appointing trustees. Increasingly charities are operating an open recruitment procedure, advertising and interviewing prospective candidates. Similarly, imposing a shorter term of office on its trustees and, in some cases, a limitation on the total length of time a trustee can serve, can avoid the "dinosaur" trustee predicament.
- **Delegation:** there needs to be clear roles defined for trustees, committees and staff. Trustees should monitor their performance. Key to this is having a document (commonly called a "Scheme of Delegations") setting out who is responsible for doing what. We can help you put together such a document.
- **Integrity:** trustees should act according to the highest ethical standards and ensure that conflicts of interest are properly dealt with. It's not enough to have a conflicts of interest policy; trustees must be strict in complying with it. Some organisations include conflicts as a standard item on the agenda of every board meeting. Similarly, a board should have, and comply with, a code of conduct, requiring its trustees to operate according to certain standards.
- **Openness:** trustees should be open, responsive and accountable to the charity's beneficiaries, members (if any), stakeholders and others with an interest in its work. This can be seen as an opportunity rather than a burden. A good example of active accountability in our experience is that of a learning disabilities charity which not only requires at least one of its trustees to be an individual with a learning disability but also employs a staff member to provide the support this trustee requires to fulfil the role.

Foot Anstey's charities team provides training and guidance on issues highlighted in this article including trustees' duties, trustee induction procedures, codes of conduct and conflicts of interest. Please do contact us to discuss your needs.

# You're hired

**Why not impress your colleagues at the next board meeting by cutting through the mass of recent legislation and guidance? Here are seven new opportunities for trustees and managers to make positive changes to their charities. Many of these opportunities will be elaborated on at the seminars which the Foot Anstey Charities Team are running in June – why not come along to meet us and find out more! (see page 4)**

## 'Become a Charitable Incorporated Organisation'

The new Charitable Incorporated Organisation does away with the requirement for double registration and regulation (by Companies House as well as the Charity Commission) and allows charities to enjoy incorporation benefits without some of the existing burdens.

This structure is likely to be available at around the turn of the year 2008/9. Why not see what the board or committee thinks?

## 'Release historic capital for present projects'

Have you got valuable spending power that you could unlock, whether in terms of land or capital? Recent legal changes mean that assets previously held for a particular use or for investment only ('permanent endowment') can be released for driving the organisation's present schemes forward.

If you are a small charity (for these purposes with less than £1,000 income OR the particular endowment is £10,000 or less) then you can spend the capital if the purposes for which it was given can be better achieved by spending the money. The trustees need to pass a resolution (decision at a properly convened meeting) to this effect. It's a good idea to send a copy of the resolution to the Charity Commission.

A large charity (for these purposes with an income of over £1,000 AND the particular endowment is over £10,000) must also pass a resolution but the Charity Commission must approve it before it takes effect.

## 'Join forces with another organisation'

Merging is now simpler and the new register of mergers operates to ensure that:

- The new organisation receives any grants, gifts and donations intended for the old organisations.
- The public and funding agencies are reassured by a legitimate and recognised merger process.

A lot of red tape is removed by a simplified asset transfer procedure (a 'vesting declaration').

## 'Streamline your governing document'

Our last update highlighted changes which have made it a good time to review your governing document to ensure that it's working for you. Your objects, powers or procedures may need a 'spring clean' to make sure that you are operating legally and effectively.

## 'Let the board know that you now need to deal with public benefit in your annual report'

All charities must now demonstrate the public benefit they provide. The Charity Commission will assess this at a number of points: on registration, as part of a rolling review of charities and on receipt of the annual report.

## 'Get paid for work over and above your trustee duties'

You are not going to be paid simply for being a trustee – that is your good service to the community! However, if you have specialist skills, and the charity needs those skills for a particular piece of work, then you could be paid at the market rate. Due to your understanding of the operation of the organisation, the charity could make a saving and get a better service by paying you.

The trustees must go through the following steps to ensure that the payment is legal:

- Check there is no prohibition in the governing document. If there is, it will first need to be amended.
- Agree that it is in the best interests of the charity for that trustee to do the work and at that rate. The trustee concerned must not be involved in the decision-making process.
- Draft a contract setting out the work and remuneration.
- Make sure the majority of trustees are not subject to similar arrangements.
- Follow any Charity Commission guidance and exercise particular care.

## 'Know that you can challenge a decision of the Charity Commission'

The Charity Tribunal is up and running (although it is yet to hear its first case). The tribunal is independent of the Commission and is a low cost way of getting a fair adjudication on a dispute. If you have been subject to an unfavourable legal decision and have gone through the Commission's final decision review process, then this is an option you should consider.

# Avoid risks of prosecution

**The Corporate Manslaughter and Corporate Homicide Act 2006 came into force on 6 April 2008. The Act makes it easier for charitable companies to be held responsible for deaths arising from their mismanagement of health and safety issues.**

Under previous legislation a single individual, identifiable as the "directing mind" of a company, had to be found personally guilty of gross negligence or manslaughter before an organisation could be found guilty of corporate manslaughter.

However, companies can now be found guilty of the new offence if someone is killed as a result of a gross failure by the company's senior management. The courts will look collectively at the actions of the company, and its culture, rather than look for a single culprit. According to government estimates, this new legislation could increase prosecutions tenfold.

The Act allows the courts to impose substantial fines and publicity orders to "name and shame" offending companies. Conviction could, therefore, be very damaging for a charity.

What should charities be doing in the light of the new Act?

- Ensure that they understand all the health and safety requirements relevant to their activities.
- Ensure that all risk assessments are up to date and reviewed when circumstances change.
- Review the charity's "safety culture" – regardless of policies – what happens on the ground?
- Implement a consistent enforcement regime for health and safety issues, eg. what actually happens to employees when they fail to comply with health and safety rules?

Check that the charity's insurance provides cover for criminal costs.

Charities which are on top of their health and safety requirements have nothing to fear but all charities should be reviewing their procedures in the light of the new Act.

## In brief

### Strengthening our client service

The team at Foot Anstey has been strengthened by the recruitment of a third charities law specialist, William Hopkin.

William has been a trustee of a national disability charity for a number of years, is a director and company secretary of a social enterprise promoting development in Ethiopia and on a non-executive level, is also in a long-term advocacy partnership with a man with a learning disability. Prior to joining Foot Anstey, William practised as a barrister at 1 Gray's Inn Square in London and has substantial regulatory experience.

### Tax Team

Foot Anstey's charities team has just got bigger with the addition of three specialist tax lawyers. John Pindard, Malcolm Emery and Sarah Anderson make up our new tax team and can advise on all aspects of taxation relating to charities. That could involve summarising the tax advantages of charitable status, looking at the VAT aspects of construction projects, or advising on the tax issues that arise when setting up a trading subsidiary. If you think our tax team can help you, please call John Pindard on 01752 675571 or email John at john.pindard@foot-ansteys.co.uk.

## Seminars

If you haven't received an invitation to our seminars in Exeter on 11 June and Plymouth on 26 June, please go to our website [www.foot-ansteys.co.uk/events](http://www.foot-ansteys.co.uk/events) to book a place. The seminars will look at the opportunities open to charities as a result of recent legislation and will provide an interactive forum to discuss issues of concern to trustees, senior managers and involved professionals.

### More information

If you would like to follow up any of the issues in this update please contact any member of the charities team:

**James Evans on 01392 685243 or email [james.evans@foot-ansteys.co.uk](mailto:james.evans@foot-ansteys.co.uk)**

**Anna Roderick on 01392 685367 or email [anna.roderick@foot-ansteys.co.uk](mailto:anna.roderick@foot-ansteys.co.uk)**

**William Hopkin on 01392 685290 or email [william.hopkin@foot-ansteys.co.uk](mailto:william.hopkin@foot-ansteys.co.uk)**



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Senate Court  
Southernhay Gardens  
Exeter  
EX1 1NT

t: +44 (0) 1392 411221  
f: +44 (0) 1392 685220  
DX: 8308 EXETER

21 Derry's Cross  
Plymouth  
Devon  
PL1 2SW

t: +44 (0) 1752 675000  
f: +44 (0) 1752 675500  
DX: 118102 PLYMOUTH 2

First Floor  
Wellington House  
Queen Street  
Taunton  
TA1 3UF

t: +44 (0) 1823 337151  
f: +44 (0) 1823 362777  
DX: 32103 TAUNTON

The Quad  
Blackbrook Park Avenue  
Blackbrook Business Park  
Taunton  
TA1 2PX

t: +44 (0) 1823 337151  
f: +44 (0) 1823 362777  
DX: 97177 TAUNTON (Blackbrook)

Princes House  
Princes Street  
Truro  
Cornwall  
TR1 2EY

t: +44 (0) 1872 243300  
f: +44 (0) 1872 242458  
DX: 81200 TRURO