

J. & H. Mitchell W.S.
Charity Newsletter 2011

A substantial amount of legislation has come into force during the last few months, much of which is significant for charities and other community organisations. We wish to highlight the main features briefly. If you would like more detailed information on these or any other matters, please do not hesitate to contact Colin Liddell, who is head of our Charities Team.

Bribery Act 2010

This Act came into force on the 1st July 2011. It covers the whole of the UK and also extends to acts committed abroad provided that there is a close connection to the UK.

The Act has created four broad offences:

1. giving a bribe, inducement or advantage to any person or organisation
2. receiving a bribe, inducement or advantage from any person or organisation
3. bribing a foreign public official
4. failing as an organisation to prevent bribery of one of its employees, consultants or agents.

An act of bribery is broadly defined as “giving someone a financial advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so”.

"Agents" could include subsidiaries, contractors, suppliers, fund-raisers and professional advisors.

It is obviously important to be wary of the first three offences noted above, but of particular importance to your charity will be the fourth offence. This means that your charity may be guilty of an offence if an employee, consultant or agent engaged by the charity bribes another person, or accepts a bribe from another person, for the charity's benefit, **unless** the charity can prove it has “adequate procedures” in place designed to prevent this occurring.

The 2010 Act does not give clear guidance as to what would constitute “adequate procedures”; however, guidance provided by the Government sets out six principles which organisations should use when creating anti-bribery policy and procedures:

1. Proportionate procedures – the anti-bribery procedures should be proportionate to the risk that the charity faces. Your charity should therefore assess its risk and then devise an appropriate procedure to reduce or eliminate the perceived risk.
2. Top-level commitment – the charity's Trustees should be involved and take responsibility not only for establishing bribery prevention procedures but also for creating and communicating an Anti-Bribery Policy (we can assist in connection with drawing a Policy appropriate to your charity).
3. Risk Assessment – if your charity does not have its own Risk Assessment, it should now do so, not only in respect of financial and operating risks, but also to include deterring bribery. As a charity evolves so does the bribery and other risks it faces, and therefore the assessment should be reviewed on an annual basis (we can assist in helping with any Risk Assessment your charity wishes to undertake).

4. Due diligence – this is good governance practice, in making appropriate enquiries in relation to any new initiative or project, or in involving new personnel, agents or partners.
5. Communication (including training) – this is intended to deter bribery by educating or enhancing awareness throughout the charity of its procedures and its Anti-Bribery Policy.
6. Monitoring and review – as mentioned above, the bribery risks which your charity may face will change over time and therefore the procedures should be monitored and reviewed as regularly as possible to ensure that they are and remain effective.

Please bear in mind that the Act will apply also to any trading subsidiary which the charity may have.

The Act should not affect 'corporate hospitality' as long as it is reasonable and proportionate. Many organisations already have a Policy to cover the giving and receiving of small gifts, hospitality etc., and a number will already have a Register where all such matters have to be recorded. If your charity does not, it should consider introducing these.

Pensions Act 2008

This Act is to come into force progressively from 1st October 2012, starting with the largest employers. The Act imposes a duty upon employers to enrol all eligible employees into a qualifying pension scheme, and to make contributions into that scheme for such employees. Employers can use an existing or a new scheme or can use the new National Employers Savings Trust (NEST), which also will be available from 1st October 2012.

Equality Act 2010

This Act came into force on 1st October 2010 to co-ordinate, update and strengthen existing discrimination laws. It protects people who have one or more of the following "protected characteristics":

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

The Act makes it unlawful to discriminate against an individual on the basis of a "protected characteristic" for example in relation to employment, or the provision of goods and services. There is no limit to the amount of compensation which can be awarded.

Where a charity's Charitable Purposes are restricted to beneficiaries with only one of these "protected characteristics" (which could on the face of it leave the charity open to an accusation that it discriminates against those with other "protected characteristics"), it will not be in breach of the Act provided that it can show:

either that the restriction helps to tackle disadvantages that particularly affect someone with a "protected characteristic" (known as the 'Tackling Disadvantage Test')

or that the restriction is, for some other reason, a fair, balanced and reasonable way of achieving a legitimate aim (known as the 'Legitimate Aim Test').

If your charity is one which restricts its benefits to certain beneficiaries, it would be sensible to check its constitution and consider whether the restriction can be justified in terms of either or both of these Tests.

Charities should also check their job application forms, to ensure not only that these no longer ask for an applicant's age (or date of birth) but also do not make specific pre-employment health enquiries, except where a health question is necessary to ensure that an applicant is able to "carry out a function that is intrinsic to the work concerned" (for example, where heavy lifting is part of the job specification). For the same reason, no enquiry should be made about an applicant's sickness absence record.

Website

The **Charities References in Documents (Scotland) Regulations 2007** require a charity to state on all its documents - from business cards to invoices, from e-mails to brochures - that it is a Scottish charity, and preferably to quote its Scottish Charity Number.

Those Regulations have effectively been enlarged by **The Public Services Reform (Scotland) Act 2010** so that the requirement to state that the charity is a Scottish Charity and to quote its Scottish Charity Number is extended to include its website - certainly its Home Page, but logically its 'About Us' section too. Indeed, this information could, as in the case of the charity's stationery, be included as a strap-line at the bottom of every web page.

Please remember that the third item in the Scottish Charity Number is in fact a digit '0', not a letter 'O' (thus, for example correctly SC051515, not SCO51515).

Another aspect involving charity websites is that they may inadvertently be breaking another law if they are not accessible to blind and partially-sighted people, which would create an offence under the **Equality Act 2010** (qv). A simple remedy is to ensure that website text should be resizeable and that images should be labelled.

Contracts for staff

It is obligatory to provide all employees with a Contract of Employment within two months of the start of the employment. Charities need to ensure that they do so, providing the employee with a signed copy and retaining a signed copy for the charity too.

This is equally important in the case of temporary or ad hoc employees, so that everyone knows precisely what the relationship is, and the terms on which anyone is working for the charity. In the event of any dispute, the existence of a signed Contract should make it less likely that an employee, or former employee, would be heading off to an Employment Tribunal.

The **Agency Worker Regulations 2010**, which come into force on 1st October 2011 aim to ensure that agency workers and temps will receive the same basic working and employment conditions as permanent employees. These basic conditions relate to: pay; rest breaks; maximum working time (and length of night time work); and annual leave entitlement.

The position of volunteers is an important one to clarify also. At present, the Court of Appeal in England has stated that a disabled woman who was asked by a charity to stop working for them was not covered by anti-discrimination law. The decision turned on the fact that the woman did not have a Contract of Employment and was not paid. These two factors are therefore important for volunteers and those who are not employees (in contrast therefore to the position of, and our advice above about, employees).

Minimum Wage

The new basic minimum wage from 1st October 2011 for employees aged 21 and over will increase from £5.93 to £6.08 per hour.

Charitable Giving

If your charity gives grants to others, what follow-up does it undertake to monitor and ascertain that its grant has been spent in a way which falls within its own Charitable Purposes? This is as relevant whether the grant is to an individual or non-charitable organisation or to a registered charity.

Both OSCR and HM Revenue & Customs will expect a sufficient level of due diligence by the grant-giving charity to ensure that the grant has been spent as intended. "As intended" means in effect that there should be a formal Grant Contract between the grant-giving charity and the recipient.

The grant-giving charity needs to ensure that the recipient is genuine and has capacity to fulfil all obligations of the Grant Contract.

The grant-giving charity also needs to have sufficient systems in place to ensure regular monitoring and feed-back in relation to the grant whilst it is spent and, depending on the nature of the project, in the longer-term also.

The SCIO

Last, but not least, the new Scottish Charitable Incorporated Organisation (SCIO) - introduced within the **Charities and Trustee Investment (Scotland) Act 2005** - has now arrived, available for new charities (or for changes from unincorporated associations) from 1st April 2011, and for mergers (or for changes from Guarantee Companies) from January 2012.

The SCIO has a number of attractions, in providing limited liability to a charity without its having to be a limited company in terms of the Companies Act 2006, and in being able (in most cases) to have to provide only Income & Expenditure Accounts (rather than full Accruals Accounts required of Guarantee Companies). However, the SCIO has some drawbacks too, so it is not a case of 'one size fits all'.

We have encouraged and been involved with some charities which wish to become a SCIO, but we have been careful to explain the pros and cons and to ensure that those who choose to become a SCIO are making the correct decision to do so.

In practical day-to-day matters, there will, with only a few exceptions, be little difference between running a SCIO and running a Guarantee Company.

As ever, we will be delighted to help prospective and existing charities alike to assess and ascertain the most appropriate legal form for their activities. Our Factsheet 'What is a SCIO?' is available on our website (see below).

Are You "Too Laissez-Faire"?

Dame Suzi Leather, chair of the Charity Commission of England and Wales, has been quoted recently as saying that charity trustees are "too laissez-faire". Her comments apply south of the border, but do they perhaps apply to your charity also?

Each charity trustee needs to have what we call a 'culture of enquiry' in dealing with the charity's affairs.

In the event of any new project, initiative or idea, these need to be tested by the charity's trustees against:

1. the charity's own Charitable Purposes
2. the charity's strategy
3. the current Budget
4. available resources, skills and capacity to deliver
5. ability to achieve outcomes, and to monitor and measure them.

More Advice Needed?

There are a number of Factsheets on the Home Page of our website at www.hmitchell.co.uk. These are regularly updated and we hope you find them useful.

Please do not hesitate to e-mail us for any assistance you or your charity may need, to acml@hmitchell.co.uk. We would be pleased to hear from you.

Colin Liddell is always happy to provide training or seminars in your area or for your charity. He provides general seminars from time to time; to date these have been given at the likes of Glenrothes, Inverness, Benbecula, Perth, Edinburgh, Glasgow and, of course, Pitlochry.

July 2011