

LEGAL BRIEF

CHARITIES AND NOT-FOR-PROFITS

A MODERN LEGAL FRAMEWORK - OVERHAUL OF EXISTING CHARITY LAW

THE GOVERNMENT RESPONSE TO 'PRIVATE ACTION, PUBLIC BENEFIT'

In July 2001, the Government commissioned a review of current charity law that was undertaken by the Strategy Unit. The Strategy Unit's Review 'Private Action, Public Benefit' was published in September 2002. A consultation period in relation to the Review ran from 25 September 2002 to 31 December 2002.

The Government has now published its response to the Review and the subsequent consultation. The Government has responded to each of the Review's recommendations and has indicated which of the recommendations are due to be included in the proposed Charity Bill.

SUMMARY - REVIEW RECOMMENDATIONS / GOVERNMENT INTENTIONS

This summary provides a list of the main recommendations and Government intentions only. A comprehensive list and the full Government report is available at: www.homeoffice.gov.uk. A copy of the full Strategy Unit Review is available at www.number-10.gov.uk/su/voluntary/report/index.htm.

RECOMMENDATIONS FOR MODERNISING CHARITY LAW AND CHARITABLE STATUS:

1. Definition of Charity

That charity be redefined in law, based on the principle of public benefit and falling under one of ten new purposes of charity.

The Government supports the above recommendation. Furthermore, there will be a statutory list of charitable purposes but none of the existing charitable purposes will be excluded.

It is proposed that to qualify as 'charitable', an institution must satisfy a two-stage test;

- its purposes as set out in its constitution must fall within one or more of the purposes on the new statutory list; and
- it must be established for the public benefit.

The Government wishes to abolish the presumption of 'public benefit' in favour of charities established for the relief of poverty, advancement of education and the advancement of religion. As a result, organisations established for purposes set out in the list that do not benefit a significantly wide section of the public, will not qualify as 'charitable'. Organisations that have in the past benefited from the presumption will have to actively demonstrate that 'public benefit' is at the heart of their purpose (see below).

2. Checks on the 'Public Character' of charities

The Charity Commission should undertake on-going checks on the public character of charities.

The Government supports the above recommendation. It intends that in circumstances where doubts are raised about the public character of a charity, that charity should be subject to an examination by the Charity Commission to confirm or refute the doubts. If the charity is found not to satisfy the 'public benefit' test it will have to 'develop its performance' to do so. If a charity continues to fail to provide adequate 'public benefit', section 13 of the Charities Act 1993 will be invoked, and the assets of charities whose purposes have ceased to be charitable will be devoted to other charities, whose purposes are closest to those of the defunct charity.

3. Trading by Charities

To amend charity law to allow charities to undertake all trading within the charity.

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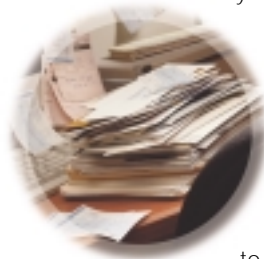


without the need for a separate trading company. The power to undertake trade would be subject to a specific statutory duty of care.

The Government rejects the above recommendation. Under existing law, trading companies owned by charities are in the same position in relation to taxation as any other company. The Government believes that if trading activities were conducted within the tax-exempt structure of charities, this would 'offend the principle of a level playing field with private sector businesses'. The Government wishes to maintain the current arrangement whereby profits are passed to shareholders (that are charities) within the Gift Aid arrangements.

4. Mergers and administration

That the Charity Commission should provide specific advice to facilitate mergers, possibly by creating a dedicated internal unit and that a package of legal measures should be introduced that will facilitate mergers and, more generally, the administrative running of the charity.



The Government supports the above recommendations. The Government has recommended that the Charity Commission should consider ways of providing advice and guidance to charities and to consider creating a dedicated mergers unit. The proposed Charities Bill is to introduce measures recommended by the Review to make merger, evolution and administration easier for charities.

5. Permanent endowment

Criteria for allowing trustees to spend capital should be revised.

The Government accepts the above recommendation and intends to include it in the proposed Charities Bill. It states that charity trustees will be permitted to expend permanent endowment where to do so will enable the charity to more effectively fulfil its purposes. Safeguards will be put in place whereby larger sums may be expended with Charity Commission approval if the expenditure is in line with the 'spirit' of the original gift.

RECOMMENDATIONS FOR IMPROVING THE RANGE OF LEGAL FORMS

1. Community Interest Company

That a Community Interest Company (CIC) be established, with certain characteristics.

The Government has passed this recommendation on to the Department of Trade and Industry (DTI) because it relates to Company Law. The DTI, the Home Office and the Treasury launched a further consultation on the CIC proposal in March 2003 and consultation closed in June 2003. The report, based on an analysis of the responses to the consultation, is awaited and will be published later this year.

2. Industrial and Provident Societies

A number of recommendations were made in relation to updating the law in relation to Industrial and Provident Societies (IPS) and bringing it more in line with relevant aspects of companies legislation.

The Government supports the Review's recommendations in relation to changing the name of IPS to Co-operatives and Community Benefit Societies, easing member share capital limits and updating IPS legislation in line with company law. However, it wishes to undertake more work before deciding how to bring the recommendations into effect. It does not agree with the Review's proposal that co-operatives should be given a statutory definition in law in line with International Co-operative Alliance Principles. This is because it believes such a move would inhibit the future development of co-operative IPS in the future.

3. Charitable Incorporated Organisation

That a new legal form designed specifically for charities, the Charitable Incorporated Organisation (CIO), be introduced, which will only be available to charitable organisations.

The Government accepts this recommendation and intends to include the new CIO in the proposed Charities Bill. It intends that the basic framework for the CIO should be set out in primary legislation, while the 'technical provisions', which might need amendment should be contained in secondary legislation. It is intended that a feature of the CIO will be that it will be easy for organisations to convert to it.

RECOMMENDATIONS FOR ENSURING ACCOUNTABILITY AND TRANSPARENCY

1. Standard Information Return

As part of their Report and Accounts, the largest charities should complete an annual Standard Information Return (SIR). This should highlight key qualitative information about the charity, focussing on how it sets objectives and measures its outcomes against these.

The Government accepts the above recommendation. However, it believes that further work must take place to develop the format and content of the SIS so that information can be compiled without placing undue administrative burdens on charities and to find means to ensure that the information collected is accurate (whether by external scrutiny or self-certification by charities). The Government is to take this forward with the Charity Commission in consultation with charities and is to explore the possibility of collecting the SIR information as part of the annual return that charities must already submit.



2. Auditor protection

Auditors of all charities should have the same statutory protection from the risk of action for breach of confidence or defamation, as do the auditors of charities which are not companies.

The Government accepts the above recommendation and intends to use the proposed Charities Bill to implement it. The Government is also going to ensure that independent examiners are adequately protected.

3. Reporting on procedures for recruitment of trustees

The Statement of Recommended Practice should provide for annual reports to include a statement of procedures for recruitment, induction and training of new trustees.

The Government supports the above recommendation and believes that charities should have and disclose effective policies for recruiting trustees and equipping trustees to govern their organisation effectively. The Government wants to encourage charities to bring 'greater diversity' to trustee boards and emphasises that trustees should be identified for their skills and experience.

4. Payment of trustees

A trustee body should have a statutory power to pay an individual trustee to provide a service to a charity (outside their duties as a trustee) if they reasonably believe it to be in the charity's interests to do so.

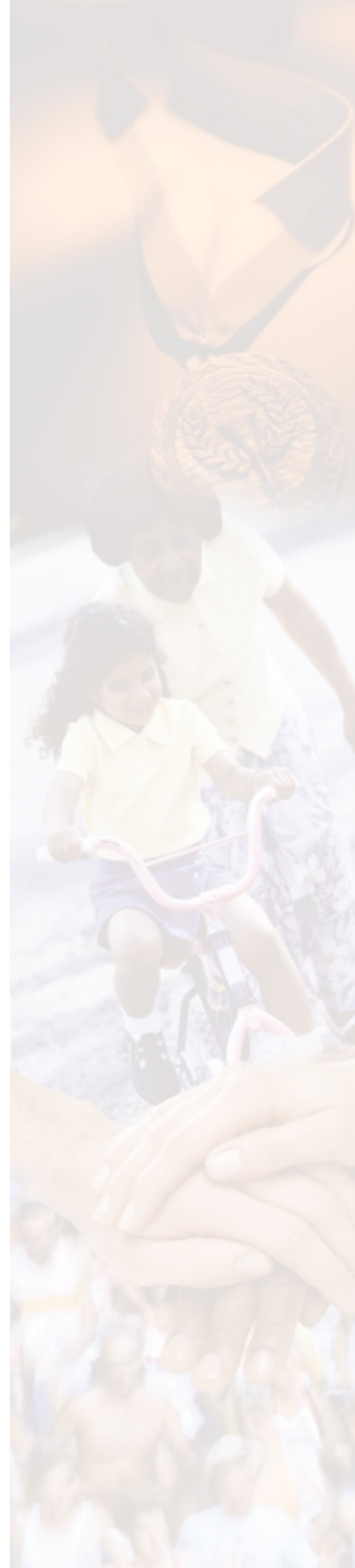
The Government supports the above recommendation and intends to include it in the proposed Charities Bill. It intends to include safeguards to prevent abuse of this power. Safeguards may include limitations on the number of trustees who may receive payment or a limit on the amounts that individual trustees can receive by way of payment.



5. Personal liability of trustees

Charity trustees should be able to apply to the Charity Commission as well as to the court for relief from personal liability for breach of trust where they have acted honestly and reasonably.

The Government accepts the above recommendation and intends to include it in the proposed Charities Bill. It believes that it will help some trustees to absolve their fears in relation to personal liability.





RECOMMENDATIONS FOR ENSURING INDEPENDENT, FAIR AND PROPORTIONATE REGULATION

1. Reforms to the Charity Commission

A number of recommendations were made in relation to the reform of the Charity Commission to make it more open and accountable (ie by opening its Board meetings to the public), it was also recommended that the Charity Commission carries out performance reviews of charities.

The Government partially accepts the above recommendations. The Government believes that the Charity Commission's Board meetings should be open to the general public unless there are valid reasons not to do so.

The Government also accepts the recommendation that the Charity Commission should carry out 'performance reviews' of charities and that it has the power to do so under existing legislation.

2. Registration

The threshold for compulsory registration should be raised to £10,000.

The Government accepts that the threshold for compulsory registration should be raised, but that it should be raised to £5,000 and not £10,000. Voluntary registration is to be allowed for charities below the new threshold. This is to be included in the proposed Charities Bill.

3. Exempt Charities

Exempt charities with incomes above the new proposed registration should be required to register.

The Government believes that there is no longer justification for keeping the classes of charity that are currently exempted outside registration with the Commission. The Government proposes to include provision for ending exceptions in the proposed Charities Bill. It states that further work must be done to make arrangements for

the registration of different groups of exempted charities to avoid adding undue bureaucratic burdens. The Government intends to set the initial registration threshold for formerly exempted charities at £100,000 annual income.

4. Exempt Charities

A number of recommendations were made in relation to increasing the accountability and compliance with charity law by exempt charities whilst minimising extra bureaucracy.

The Government accepts the above recommendations. The Government aims to identify (with exempt charities either individually or in groups) acceptable main regulators for each charity or group. Where this cannot be achieved, the charity or group will be required (if above a £100,000 annual income threshold) to register with the Charity Commission. This is to be included in the proposed Charities Bill.



SUMMARY

This is a far reaching reform of charity law should all these recommendations be carried through. The Government has not published a definite time-scale for the publication of the draft Charities Bill. However, the Home Secretary, David Blunkett has stated that the Government is anxious to proceed with a draft Charities Bill as soon as possible to carry through the reforms and modernise existing charity law. The Charity Group at Rollits is awaiting the publication of the draft Charities Bill and will keep you informed of all progress.

FURTHER INFORMATION

If you have any queries relating to this document, or indeed any questions relating to charity law please contact Ros Harwood on 01904 625790 or email your queries to ros.harwood@rollits.com

Alternatively visit our website at www.rollits.com.

The information contained in this paper is intended as a general guide only. Action should not be taken without first obtaining specific advice.

August 2003

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