

INDEPENDENT SCHOOLS EDITION PUBLIC BENEFIT CHECKS

PREPARATIONS THAT SHOULD BE UNDERTAKEN BY INDEPENDENT SCHOOLS

The draft Charities Bill proposes to remove the presumption of public benefit in favour of charities established for the advancement of education, including independent schools. There has been a lot of debate about whether or not the draft Charities Bill threatens the charitable status of independent schools. This is because it proposes to remove the presumption of "public benefit" in favour of charities established for the advancement of education.

The Government wants to place "public benefit" at the heart of the interpretation of what is recognised as charitable at law. At present, there is no legal definition of "public benefit" but the accepted interpretation is that a charity must benefit a sufficiently wide section of the public; for example, it must not exclude the disadvantaged by charging high fees for its services.

The Charity Commission recently published guidance detailing how it intends to carry out "public benefit checks" on charities when the Charities Bill becomes law. It has stated that it will concentrate on

fee-charging charities, such as independent schools and private hospitals, first, because these types of charities have attracted the most public debate.

It intends to carry out research exercises into fee-charging charities, including gathering information

on their fee-charging policies and practices. It also intends to look at how fee-charging charities such as independent schools can widen access to their services and facilities by people who might find taking up their services difficult because of the fees charged.

You must be aware that your school could be subject to scrutiny by the Charity Commission if the Charities Bill becomes law. At present, it is not clear what will happen to schools that fail to satisfy the Charity Commission that they provide adequate "public benefit" despite being given time to change. If an organisation's purposes cease to be charitable, the Charity Commission has the power to make its assets available to another charity with similar purposes. As a result, you might not only have to face the tax consequences of your school ceasing to be charitable. You should plan ahead and ensure your school will satisfy the Charity Commission's proposed "public benefit checks".

Some independent schools with good facilities already open up their facilities to the public and this is one way of actively demonstrating that the school provides "public benefit". However, some independent schools are discouraged from doing this because it is perceived as uneconomic and might adversely affect their ability to let their facilities to private bodies and make extra income. You might consider entering into partnerships with neighbouring state schools and organisations in the local community. The Government is keen for independent schools to do this and it would certainly help to satisfy the Charity Commission.

At present, there is no rigid "public benefit" test and as the debate still rages, it is not entirely clear how rigorously the Charity Commission will carry out its proposed "public benefit checks". Much depends on exactly how the Charities Bill will change the law; however, governors must be prepared to meet "public benefit checks". The Joint Committee of both Houses of Parliament published its report making recommendations on the Draft Charities Bill on 30 September 2004. The draft Charities Bill will either be amended or put to parliament in its present form at the next session.

You can access Rollits website at www.rollits.com to track the progress of the draft Charities Bill and view Rollits' publications on the Charities Bill and other matters related to charities.

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GOVERNORS' LIABILITIES

Independent schools can be set up in many different ways but overall will be either incorporated bodies (i.e. charitable companies) or unincorporated bodies (i.e. charitable trusts). Despite the current debate about the charitable status of independent schools if the draft Charities Bill becomes law, independent schools are currently still recognised as charities at law. The governors are still charity trustees and are still responsible for the general control and administration of the charity. The governors must be aware of their legal duties and responsibilities as charity trustees, otherwise there is a risk they could be held personally liable for their actions or omissions.

One of the ways in which to minimise the risk of incurring personal liability is to incorporate the school as a charitable company. A charitable company has a separate "legal personality". It can hold property and enter into contracts in its own name and it can also sue/be sued in its own name. The governors' personal liability can also be limited. The governors of unincorporated schools are more greatly exposed to the risk of personal liability because they can be sued in their personal names and they have unlimited personal liability.

Rollits would be happy to give an hour's free advice on the benefits of incorporation or a training session for charity trustees. If you would like to discuss the merits of incorporation please contact Ros Harwood at Rollits, Rowntree Wharf, Navigation Road, York YO1 9WE or email her at ros.harwood@rollits.com.

CHARITY EXPERTISE

Partner, Ros Harwood, heads the Charity Group at Rollits and is one of the country's leading charity lawyers. Ros joined Rollits from a top London firm where she was a partner and head of their charity group. Ros is also recognised as a leading individual and legal expert in legal directories such as



Ros Harwood

"Chambers and Partners", "The Legal 500" and "Legal Experts".



Gerry Salmon

More recently the group expanded due to the recruitment of a new solicitor, Gerry Salmon, who will be assisting Ros Harwood.

TRADING SUBSIDIARIES

At present, charities are only able to undertake trading activities that directly further their charitable purposes. The Joint Committee of both Houses of Parliament has recommended that the Draft Bill should be amended to allow charities to trade more extensively within the charity subject to specific limitations. However, the Government has not yet agreed that charities, such as independent schools, should be able to undertake permanent trading activities which do not directly further their primary purposes. A one-off fundraising event, for example, a concert does not fall within the trading prohibition but the letting out of facilities (i.e. sports halls) to commercial organisations to raise extra funds, does. This is because permanent trading activities, such as the letting out of facilities to commercial organisations, are not deemed to directly further the advancement of education and schools are unable to carry out this type of activity.



Therefore, because currently the draft Charities Bill does not propose to change the law in relation to charities and trading; some independent schools have established separate trading companies to carry out permanent commercial activities to raise funds. Any profits made by the trading company can be tax efficiently "gifted back" to the school.

If the governors of an independent school are interested in establishing a trading company to carry out commercial activities to raise funds for the school, they should seek advice because there are many important legal considerations to take into account. However, if the governors wish to exploit the school's facilities to raise extra funds it can prove an efficient and tax effective way of doing so.

INFORMATION

If you have any queries on any aspect of Charity and Education Law please contact: Ros Harwood on 01904 625790

This leaflet is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this leaflet useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 1 October 2004
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