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Charity Law

Update

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Trust update

Register of beneficial owners

Since the 26 June 2017, trustees are required to maintain a register of beneficial owners in relation to trusts resident both in the UK and outside of the UK (but which are still liable to UK tax).



Trustees must be able to provide information on beneficial ownership to law enforcement agencies as set out in the Money Laundering Regulations 2017 (the regulations). In addition to this, trustees will be required to provide specific information to HMRC in relation to the register as set out in the regulations.

Only non-UK trusts which are not subject to UK tax liabilities will fall outside the scope for reporting.

The regulations regard the following persons as beneficial owners in relation to trusts:

- the Settlor (person creating the trust);
- the Trustees;
- any named Beneficiaries;
- any individual who has control over the trust (i.e. someone who has the power to widen or restrict the class of beneficiaries and to appoint and remove trustees); and
- Any other potential beneficiaries named in supplemental documents.

Trustees will be under an obligation to maintain the beneficial owner's full name and date of birth, National Insurance/UTR number and to record the nature of the individual's relationship to the trust.

Failure to maintain an accurate and up to date register of the beneficial owners can lead to a criminal offence and be punishable by imprisonment, the lesser penalty being a fine.

Currently, HMRC will maintain the register but this will not be available to the public; it will only be available to UK law enforcement agencies.

The impact of these new regulations is wide reaching and will catch charitable trusts.

Trustees will need to collate the necessary information to comply with such regulations within the tax deadlines (31 January 2018 or 31 January after the tax year in which any trust's tax liability arises).

Sarah Adams



Insolvency Service pursues ban on former Kids Company directors

Trustees are reminded of the importance of understanding the financial position of their charity and of providing strategic oversight and challenge following the decision of the Insolvency Service to pursue bans on the founder and former trustees of collapsed children's charity Kids Company. If proceedings are successful then the founder of Kids Company, Camila Batmanghelidjh and its former trustees could receive bans from running or controlling companies for two and a half to six years.

It has been alleged that the former trustees of Kids Company ignored reiterated warnings concerning the charity's financial position. The former trustees have said that they would "robustly defend" the proceedings and that they were not running an unsustainable business model.

If upheld it would mean a ban from being a charity trustee or a director of a company for a prescribed period whether the interests of the company are commercial or charitable. Therefore, the consequences of being banned are serious for the individuals concerned and particularly if someone is a director of a number of companies.

It is important to note that trustees and former trustees of charities can be faced with such proceedings being brought

against them, despite their role in the charity having been a voluntary position.

Ultimately, we await the outcome of the proceedings. Irrespective of the outcome of the proceedings for the former trustees of Kids Company it reminds all trustees to be vigilant in the management of the charity by ensuring its proper running and financial health. Charity trustees must ensure that they understand the financial position of their charity, ask questions and provide oversight and challenge where necessary and continue to act in the best interests of the charity and its beneficiaries for the long term.

Harriet Wheeldon

Law Commission Charity law reform project

The Law Commission published a report on 14 September 2017 entitled "Technical Issues in Charity Law". The Law Commission's project is not a full review of charity law and its terms of reference relate to selected technical issues. The Report states that those issues did not include a number of controversial high profile matters such as the law of public benefit, the charitable status of independent schools or fundraising practices.

The Report makes 43 recommendations and includes a draft Bill that would give effect to the Law Commission's recommendations for charity law reform. The Law Commission has also published a useful summary of its Report providing an overview of the main issues raised. The Law Commission's project began with a review of social investment by charities in 2014, and its principal recommendations on that topic have now been implemented in the Charities (Protection and Social Investment) Act 2016.

The Report includes a draft Bill that would give effect to the Law Commission's recommendations for legislative reform.

The Law Commission's recommendations include:

- Recommending a new statutory power for unincorporated charities to make any changes to their governing documents by resolution of the trustees (and, if applicable, the members) with certain amendments being subject to Charity Commission consent;

- In situations where too much, or too little, money is raised by a charity in response to a fundraising appeal the Law Commission has examined the situation. Where too much is raised, the Charity Commission can direct that the surplus is applied cy-pres. But when too little is raised, the funds cannot usually be applied cy-pres and the trustees must instead attempt to contact the donors to offer them a refund. The Law Commission does not think that donors would expect (and might even disapprove of) trustees incurring expense in seeking to contact them to offer a refund of a small donation. It therefore recommends that small donations (of up to £120 in a year) be applicable cy-pres without the trustees having to take steps to contact the donors, unless the donor provides otherwise when the donation is made. When the proceeds of a fundraising appeal are applicable cy-pres, the trustees can ask the Charity Commission to make a scheme authorising those funds to be used for other similar purposes. The Law Commission recommends that, where a fund that is applicable cy-pres does

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Law Commission: Charity law reform project (continued)

not exceed £1,000, the trustees should be able to resolve that the proceeds be applied for the new purposes without Charity Commission consent;

- The Report also recommends giving charity trustees flexibility to obtain advice that is tailored to the particular transaction when they sell land, and removing unnecessary administrative burdens;
- The Report recommends that a power to enable charities to borrow from their permanent endowment would be a useful alternative to the existing power to release permanent endowment restrictions altogether. It recommends that charity trustees be given a power to spend a portion of the charity's permanent endowment, subject to a requirement that they recoup that expenditure within 20 years;
- The Charities Act 2011 permits a reasonable sum of remuneration to a trustee who provides services to a charity other than in his or her capacity as a trustee (e.g. a trustee who is an accountant and provides accountancy services to the charity). There is, however, no equivalent power to authorise remuneration for the supply of goods. The Law Commission points out in its Report that payments of the supply of office stationery at cost price, for example, is not permitted even though it is of benefit to the charity. The Law Commission therefore recommends that such a power be introduced;
- The Law Commission also recommends that charity trustees be given a power to make ex-gratia payments that are small relative to the income of the charity without having to obtain authorisation from the Charity Commission. Ex-gratia payments are payments that the trustees of a charity feel morally obliged to make, but which they have no legal power to make. Such cases can typically

arise in the administration of Wills when a charity's legal entitlement to certain property may not reflect the true intentions of the testator;

- The Law Commission also recommends reforms that would resolve concerns about the effectiveness of the provisions in the Charities Act 2011 that enable charity mergers to be registered with the Charity Commission so that gifts by Will to the transferring charity are deemed to take effect as gifts to the new charity.

The Law Commission also recommends new powers for the Charity Commission:

- To increase powers to issue directions in respect of charities' working names as well as formal names; and
- To ratify invalid or uncertain trustee appointments or elections to confirm the appointments or election of a trustee where there is uncertainty as to whether a particular person was properly appointed or elected;

The Government's interim response to the Law Commission's Report is expected within the next 6 months, and a full response within the next 12 months.

The real question is whether the Government has the resources and/or desire to take forward any of the Law Commission's recommended reforms particularly in the light of Brexit and the legislative changes that will be required to implement it. It would be a great shame if all of this work went to waste and we await the Government response with interest.





Final guidance on grant funding non-charitable organisations published

The Charity Commission published the final version of its guidance on grant making charities funding an organisation that is not a charity on 11 August 2017.

The final guidance is amended from the original draft guidance so that the limits on funding non-charities are presented in a less restrictive manner and a prohibition on charities funding the overheads or core-costs of a non-charity removed.

Charitable Incorporated Organisations (CIOs)

Draft legislation has been laid before Parliament that will enable existing charitable companies and community interest companies to convert to CIOs (anticipated in 2018).

Charitable companies that have been waiting to convert to CIOs will welcome this news and will wish to keep up to date with developments so that they can apply to the Charity Commission to convert as soon as this becomes possible.

Charity Commission issues first public official warning

On 3 July 2017, the Charity Commission published an official warning to the National Hereditary Breast Cancer helpline with an accompanying report on its regulatory intervention into the charity.

This is the first time that the Charity Commission has published an official warning using its new power in Section 75A of the Charities Act 2011.

The official warning identifies the breaches of trust or duty and the action that the charity trustees are expected to take to rectify it and the grounds for issuing the official warning.

Further information can be found on the Charity Commission's website and it also shows the Charity Commission's active use of the new power.

Members of charitable companies must act in the company's best interests

The High Court recently ruled that the members of a charitable company limited by guarantee had fiduciary duties to act in the charitable company's best interests and not to act under a conflict of interest in considering whether they approve a payment to a director for loss of office.

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Law Commission: Charity law reform project (continued)

The decision of the High Court establishes unequivocally for the first time that the members of a charitable company are not free to exercise their powers in their own interests.

This will be of interest to all charitable companies with wider voting memberships and whose members are not all the same people as their trustees.

The Catalyst Trust – removal of dominant charity trustee

The Charity Commission has published a report on its enquiry into the Catalyst Trust. The Charity Commission determined that the Catalyst Trust was being operated by a single dominant charity trustee and that the other charity trustees took very little active role in overseeing the management and administration of the charity in breach of their legal duties to do so.

The Charity Commission concluded that the dominant charity trustee had applied the charity's funds to embark

upon a software project that could not fulfil the charity's aims. It also concluded that the charity trustees had failed to identify or properly manage conflicts of interest or submit adequate financial returns for the charity.

The Charity Commission issued an order removing the dominant charity trustee as a trustee of the charity using its powers pursuant to the Charities Act 2011. As a result the dominant trustee is now permanently disqualified from acting as a charity trustee. The charity has also since been wound up and removed from the register of charities.

This case also highlights how charity trustees are collectively responsible for overseeing the general control and management of the administration of the charity and to provide independent challenge and oversight and not allow a single trustee to dominate by failing to take an active role.

Gerry Morrison

Information

If you have any queries on any issues raised in this newsletter, or any charity matters in general please contact:

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The law is stated as at 21 November 2017.

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