

Charities & Social Enterprise Newsletter

Verdict in Independent Schools Council public benefit case announced

The long-awaited verdict in the judicial review proceedings brought by the Independent Schools Council with regard to the Charity Commission's public benefit guidance has been published.



The Independent Schools Council challenged the legality of the Charity Commission's public benefit guidance in terms of how it applies to charitable independent schools. The Charities Act 2006 introduced a new legal definition of "charity" and removed a legal presumption that certain types of charitable purposes are for public benefit (including education).

This now requires all types of charities to actively demonstrate that their purposes are for the public benefit. The Charities Act 2006 also requires the Charity Commission to publish public benefit guidance and charity trustees are required to have regard to such guidance (statements of compliance are required in the trustees' annual reports to the Charity Commission).

The public benefit guidance set out the Charity Commission's interpretation of the public benefit requirements including with regard to fee charging charities. Charities can charge fees for their services, but the extent to which charities that charge higher fees for their services (including charitable independent schools) meet the

public benefit requirements has been debated. Much of the reporting in the press has been inaccurate in terms of the legal position.

The Charity Commission's public benefit guidance on fee charging charities included a statement that "...the opportunity to benefit must not be unreasonably restricted... by ability to pay any fees charged". It also stated that "...people in poverty must not be excluded from the opportunity to benefit...". The Charity Commission's public benefit guidance also suggested that in order to meet the public benefit requirements fee charging charities, particularly those which charge higher fees for their services, should provide a certain level of subsidised or free places.

The Charity Commission's interpretation of the requirements and public benefit guidance impacted not only upon charitable independent schools but all type of charities which charge fees for their services. The Independent Schools Council disagreed with the Charity Commission's interpretation of the law in its public benefit guidance and in

particular the emphasis placed on subsidised places or bursaries.

It was hoped that the verdict would provide much needed clarity in terms of how the public benefit requirements apply, particularly in the context of charitable independent schools.

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In reviewing the legal position the Tribunal looked at whether a charitable purpose is intrinsically beneficial to the community and whether it is made available to a sufficient section of the community. Therefore it is a case of whether those with the ability to pay represent a "sufficient section of the community" for the purpose of meeting the public benefit requirements.

The verdict stated that trustees of charitable independent schools should make "more than de minimis or token provision" for those who cannot afford the fees. However, it also went on to state that it is for the trustees to decide what is appropriate according to the individual facts of their charity's circumstances. Therefore the Tribunal did not provide any rigid guidance or rules in terms of what provision is, or is not adequate and leaves it to the trustees' discretion to decide what is appropriate for their charity in the circumstances. Whilst this flexibility is welcome, it still leaves an element of uncertainty.

However, the Tribunal did say that charitable independent schools at what it called "the luxury end of education" would be under even greater responsibility to demonstrate "a real level of public benefit".

The Tribunal also concluded that providing subsidised places or bursaries may not necessarily be the best or the only means in which a charitable independent school can meet the public benefit requirements. Therefore indirect benefits will also be relevant such as collaborating with local state schools, sharing teachers and resources, etc. This may also include sponsoring or contributing to academies and allowing the wider community to benefit from education provided by the school.

The Tribunal made it very clear that opening recreational facilities such as sports halls, swimming pools or playing fields to the community at large (e.g. allowing the local rugby club to use the playing fields) will not be taken into account in assessing the public benefit provided. This is because the public benefit has to directly flow from the overriding charitable purpose which is education.

The Charity Commission has now confirmed that it is going to amend its public benefit guidance in the light of the Tribunal's verdict. For many charities it will remain a balancing exercise and it is for trustees to determine what is appropriate for their charity bearing in mind the specific circumstances.

The Localism Bill becomes an Act of Parliament

The Localism Bill became an Act of Parliament on 15 November 2011 and is now law.

The Act devolves greater powers to councils and neighbourhoods and gives local communities more control over housing and planning decisions.

Amongst other things it introduces:

- The community right to bid which is intended to make it easier for local people to take over local assets such as taking over shops, pubs and recreational grounds; and
- The community right to challenge which gives local groups the right to express an interest in taking over the running of local authority services.

It will be interesting to see how the new law is used in practice by charities and voluntary groups. We will be running a seminar on this and other charity issues in early spring next year.



For further information, please contact Gerry Morrison on (01904) 625790 or email gerry.morrison@rollits.com

Benevolent societies and public benefit

This month, the Charity Tribunal is considering another public benefit case and this time it is benevolent charities that are under examination in terms of meeting the public benefit requirements.

Benevolent associations are organisations where the people who benefit are defined by their link to an individual person, company or association. The Tribunal will be looking at whether restricting access to who can benefit by reference to a private relationship represents a "sufficient section of the community" for the purpose of fulfilling the public benefit requirements.

We will report on the decision when it has been made.



Trustee training



A recent report by the Charity Commission indicated that nearly half of all organisations applying for registered charitable status between April and September this year do not train their trustees. This is according to a Charity Commission survey. The Chief Executive of the Charity Commission has said "...we would like to see new charities recruiting more widely and offering new trustees more training and support...".

We can offer free trustee training for new organisations wishing to train their trustees or existing organisations wanting to provide their trustees with an update. Please contact Gerry Morrison on (01904) 625790 or email gerry.morrison@rollits.com for further information.

Review of the Charities Act 2006

Lord Hodgson has been appointed to lead the review of the Charities Act 2006 in 2012. The Charities Act 2006 contained a provision requiring its effectiveness to be reviewed, and if necessary further amendments introduced to ensure that the charity law framework is up-to-date, workable in practice and effective.

The review will look at (amongst other things) the public benefit requirements, the operation of the Charity Tribunal, the charity merger provisions, the provisions for the disposal of interests in charity land and whether there should be a UK-wide definition of the word "charity". At the moment there are differences which can cause complications for cross-border charities.

The review will also look at the area of fundraising regulation. A proposed new licensing regime for public charitable collections included in the Charities Act 2006 has never been enacted. Furthermore, the review will probably look at the Fundraising Standards Board

which was launched in 2007 with the intention of the sector self-regulating its fundraising activities. The Charities Act 2006 gave powers to the government to introduce a legal framework to regulate fundraising if self-regulation via the Fundraising Standards Board regime is deemed to have failed.

It is intended that Lord Hodgson will carry out the review and submit a final report to Nick Hurd, the Minister for Civil Society, by mid-July 2012. Thereafter the Law Commission will examine Lord Hodgson's conclusions at the end of 2012 and produce its own report in 2013. Therefore it is unlikely that there will be any progress in terms of amending legislation for some



time, but there will probably be an opportunity for interested parties to make representations and therefore we will report on any further progress as it happens.

The Community Infrastructure Levy pitfalls for unwary charities

The Community Infrastructure Levy ("CIL") is a new planning charge. Local Planning Authorities will be able to charge developers the CIL on most types of development. The money which they raise will be spent on infrastructure for the area. There are provisions for a charity landowner to receive a mandatory exemption from the CIL where they are using the development wholly or mainly for its charitable purposes. There are also provisions for discretionary relief from the CIL where the CIL liable development is to be held by a charity landowner as an investment from which profits are applied to its charitable purposes. If you are contemplating development, we would recommend that you take legal advice as to the applicability of the CIL and the availability of any exemptions/reliefs.

As with charities relief for Stamp Duty Land Tax, there are also clawback provisions for any relief (or exemption) from the CIL. If the development ceases to qualify for the relief granted within 7 years of commencement of the chargeable development, then any relief will have to be repaid. For

example, if the property ceased being used for charitable purposes; if the property were sold to someone not eligible for charity relief or if a charity held the property under a lease which they terminated within the 7 year period and their landlord was not eligible for charitable relief.

There is a duty to notify the collecting authority within 14 days of the date upon which the disqualifying event occurred. If you fail to notify, then the charging authority may levy a surcharge equal to the lesser of 20% of the chargeable amount and £2,500. Therefore, if a charity is contemplating development, they also need to assess the likelihood of them ceasing to use the property for charitable purposes within this 7 year period as, if they do, they face having to repay any relief they received on the amount of CIL due. The charity also needs to ensure that it has procedures in place which would enable it to notify the collecting authority within the 14 day period if a disqualifying event were to occur to avoid the risk of having to pay the surcharge.

It is important that charities owning or occupying property are aware of the CIL because there are pitfalls for unwary charities. We can provide specific advice if required.



Public Services (Social Value) Bill and social clauses

A private member's bill is currently working its way through Parliament which would oblige all public sector contracts to contain a "social clause". The Bill was previously named the Public Services (Social Enterprise and Social Value) Bill. The Bill aims to strengthen the social enterprise business sector and make the concept of 'social value' more relevant and important in the placement and provision of public services.



It is now at the Report stage and had its second reading debate on 19 November 2011.

The key points in the Bill identified on Parliament's website www.parliament.uk include:

- Placing a duty on the Secretary of State to publish a 'national social enterprise strategy' to encourage engagement in social enterprise;
- Amending section 4 of the Local Government Act 2000 so that local authorities are required to include in their sustainable community strategy proposals for promoting engagement with social enterprise in their area. They must also include a statement of the measures suggested to enable social enterprise to participate in implementing these proposals; and
- Requiring local authorities, when entering into public procurement contracts, to give greater consideration to economic, social or environmental wellbeing during the pre-procurement stage.

Charitable Incorporated Organisation update

It is becoming a long-running joke but the government recently reaffirmed its apparent commitment to introducing the Charitable Incorporated Organisation by spring 2012. We are waiting for the supporting legal framework to introduce the Charitable Incorporated Organisation which will be an incorporated structure designed specifically for charities. The Scottish Charitable Incorporated Organisation has been available since earlier this year. The Charity Commission has already published model constitutions for Charitable Incorporated Organisations on its website.

Existing incorporated charities will not be forced to convert to this Charitable Incorporated Organisation when it becomes available although the framework is there if, in the future they wish to do so. There are doubts over whether it will be a suitable structure for medium to large charities particularly those which charge their assets as security for borrowing. Therefore it will be appropriate for some charities but not all.

We will continue to monitor the situation and report when there are any developments.



Information

If you have any queries on any articles in this newsletter, or any charity matters in general please contact: Gerry Morrison on (01904) 625790 or email gerry.morrison@rollits.com

This newsletter is for the use of clients and will be supplied to others on request. It 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 newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

The law is stated as at 21 November 2011.

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