

End of the line

Gerry Morrison puts the Charities Act review under the spotlight

Before he was appointed to conduct the review of the Charities Act 2006, the Conservative peer Lord Hodgson had, it was reported, indicated his views on some aspects of charity law including that he thought the payment of charity trustees was inevitable – which was in response to concerns about the Charity Commission's intention to cut back on its advisory role. Since starting the review earlier this year, however, Lord Hodgson has indicated that he is keeping an open mind on these issues and that he wants charities and the public to inform the review – hence the calls for evidence which followed his appointment. The evidence gathering finished at the end of April and the aim is to complete the review and produce a report to be laid before Parliament before the summer recess (expected to be mid-July). We now await his final report and its recommendations.

The Charity Commission has voiced concern about the lack of practical sanctions in the Charities Act 2006 which it can apply against charities that fail to submit their annual reports and accounts on time. It perceives these requirements as being an essential part of promoting public confidence in charities. Currently, it can prosecute defaulting charities' trustees, which is only practical in the worst cases of prolonged and wilful default. It wants power to suspend charities that fail to submit on time from the Register and to withdraw their ability to claim Gift Aid. This sounds like a practical solution until you consider the potential legal complexities. What would the legal status of an organisation suspended from the Register be, and should the withdrawal of its ability to claim Gift Aid also affect its ability to claim other charity tax reliefs?

Budget cuts mean that the Charity Commission has restructured its internal operation to focus upon its core regulatory role and has inevitably had to cut back on its advisory role. Despite this, the Charity Commission does not appear to be in favour of introducing legislation to enable it to charge charities for its services.

Falling flat

It will be interesting to see what, if anything, the review makes of the charitable incorporated organisation (CIO) which was introduced via the Act to widespread support, but has fallen somewhat flat because of the prolonged delays in its introduction. Issues identified with the draft supporting legislation have led the Charity Commission to suggest that

the CIO might not be a suitable structure for larger charities which raise finance by securing borrowing over their assets because there is currently no provision for a Register of Charges. The latest indication is that the CIO will be available from October 2012. This would follow the review and it will be interesting to see if any changes to the legislation are proposed.

The Charity Tribunal was also introduced by the Act and was hailed as being a convenient and less expensive way to appeal against decisions of the Charity Commission. However, the remit of the Charity Tribunal is very specific and the Charity Law Association has proposed that the Charity Tribunal should instead have "general supervisory authority to review decisions made by the Charity Commission". This would make it simpler to bring cases to the Charity Tribunal by removing the very specific parameters and lists of the types of decisions which can be reviewed. Inevitably the Charity Commission is concerned about widening the Charity Tribunal's remit to the extent that it becomes the automatic next stop for anyone who disagrees with its regulatory decisions.

The removal of the presumption of public benefit by the Act in favour of charities for the advancement



The Charities Act 2006: five-year review

The Charities Act 2006 was hailed as the biggest shake-up of charity law in 13 years when it was enacted and contains a clause which requires a review of the Act five years on, which must address its effect on:

- excepted charities;
- public confidence in charities;
- the level of charitable donations;
- the willingness of individuals to volunteer; and
- the status of the Charity Commission as a government department.

However, it is intended that the review will cover other aspects of the Act which are perhaps more relevant to charities in terms of their day-to-day concerns including (among other things):

- the regulation of fundraising;
- the Charity Tribunal;
- the charity accounting and reporting regime;
- whether charities should be able to pay their trustees;
- whether there should be a statutory definition of public benefit; and
- if charities should pay an annual charge to cover the costs of running the Charity Commission.

of education, religion and relief of poverty was widely publicised. It led to months of media speculation about its impact upon charities that charge fees for their services (particularly charitable independent schools) and to a judicial review of the legality of the Charity Commission's public benefit guidance in terms how the public benefit requirement applies to fee-charging charities. It also led to the Charity Tribunal being referred the issue of benevolent funds and whether charities of this type meet the public benefit requirement of the Act. Although having a definition of "public benefit" in the Act might remove the ambiguity which prompted these cases, introducing a definition would be highly contentious (in terms of how such definition is framed) and would remove flexibility.

Potential target?

The Register of Mergers (also introduced by the Act) is another potential target for the review. It was intended to ensure legacies to charities which had merged and dissolved would go to the merged charities. However, the wording of the legislation is not sufficient to catch all types of legacies and some legacies (if worded in a certain way) may still fail. Many smaller or medium-sized charities which merge or incorporate mistakenly believe this is only

an issue for larger high-profile charities which actively fundraise from the public. However, the unexpected can sometimes happen and legacy income can sometimes come to light when the charity never knew it was coming. Therefore in a lot of cases, it may still be advisable to retain the old charity as a "shell charity" to receive any post-merger or incorporation legacy income which is not as tidy from an administrative point of view.

One of the largest issues the review will tackle is fundraising regulation because the provisions in the Act giving the Charity Commission power to regulate public charitable collections have never been implemented and this responsibility currently remains with the local authority. The Charity Commission is not necessarily in the best position to take this on at the moment with its reduced budget. There are also arguments for and against self-regulation of fundraising and whether this is effective. The Fundraising Standards Board was brought in to encourage the sector to self-regulate fundraising and operates a system of self-regulation for its members. However, membership of the Fundraising Standards Board is not compulsory and take-up of membership has not been as widespread as expected.

The evidence gathering process of the review and undertaking the consultations is the easy part. While it is easy to suggest changes to legislation, there are always knock-on consequences and the sector is so diverse that the legislation has to cover organisations with a wide variety of legal structures, purposes and attitudes. Lord Hodgson has a monumental task and it will be interesting to see whether the review will rise to the challenge.

Gerry Morrison, Associate, Charities, for Rollits LLP. Website: www.rollits.com. E-mail: gerry.morrison@rollits.com