



Charity Newsletter 2016

Introduction

We are delighted to issue our annual Charity Newsletter. If you would like more detailed information on its content or any other matters, please do not hesitate to contact Colin Liddell, who is an accredited specialist in Charity Law and head of our Charities and Communities Team (colin.liddell@hmitchell.co.uk), or Sarah Rennie (sarah.rennie@hmitchell.co.uk).

Essential Charity Handbook now available

'*A Practical Guide to Charity Law in Scotland*' has now been published by W. Green (ISBN 978-0-414-03256-9). The Guide covers all aspects of a charity's life in Scotland (whether a Scottish charity or a charity from another jurisdiction, such as England & Wales, which is registered in Scotland). Colin Liddell has contributed two of the 13 chapters, one entitled '*Variation, Reorganisation and Amalgamation*' and the other entitled '*Dissolution and Winding-Up*'.

Registered charities should receive a 20% discount from the list price of £69 by contacting alan.bett@thomsonreuters.com.

Land Reform (Scotland) Act 2016

The Land Reform (Scotland) Act 2016, which can be viewed at (<http://www.legislation.gov.uk/asp/2016/18/contents/enacted>) received Royal Assent on 22nd April 2016. It is said to be one of the most controversial pieces of legislation passed by the Scottish Parliament. The Act deals with a range of matters aimed at reforming the way land is managed and owned in Scotland.

The Act introduces an additional Right to Buy for Community Bodies who will be able to enable the sale of land to the community where it is in the interests of sustainable development to do so.

As in the 2003 Act, '*sustainable development*' is not specifically defined in the new Act, but the conditions are set out as follows:

- the transfer would further the achievement of sustainable development and be in the public interest;
- the transfer is likely to result in significant benefit to the community and is the only practicable or
- most practicable way of achieving significant benefit; and
- the refusal of consent is likely to result in harm to the community.

This means that Community Bodies now have rights to buy under the following:

1. Right to buy under the Land Reform (Scotland) Act 2003
2. Abandoned and neglected right to buy under the Community Empowerment (Scotland) Act 2015
3. Sustainable development right to buy under the Land Reform (Scotland) Act 2016.

For more information on Community Right to Buy visit the Factsheet on our website.

New Statutory PSC Register for Charitable Companies

From 6th April 2016, all companies incorporated under the Companies Act 2006 (limited by shares or guarantee, or unlimited) and Limited Liability Partnerships are required to maintain a PSC or 'Persons with Significant Control' Register. Failure to do so (even if the Register has no entries) could result in criminal penalties for the company, its officers and the PSCs or Relevant Legal Entities concerned.

Please see our Fact Sheet which is on the Legal Services page of our website under the heading 'Companies & Partnerships'.

This is an important piece of legislation, designed to assist with transparency of UK companies and LLPs, and therefore help to combat tax evasion, money-laundering and terrorist financing by providing a fuller picture of both the legal, controlling and beneficial ownership of businesses.

If you have questions or require any assistance about whether the PSC Register is relevant to you, or how to set up and maintain the PSC Register, please contact us.

OSCR update

New style Annual Return Form

As part of OSCR's move to targeted regulation some of you may already be aware that from 1st April 2016 OSCR's Annual Return Form has changed. Charities with an income of £25,000 or more are now required to provide information on when they last reviewed their constitution and provide information about internal control procedures.

Duty to report 'Notifiable Events'

From 1st April 2016, OSCR are requesting that charities report on events which may threaten or have a significant impact on a charity or its assets. The new requirement is part of OSCR's aim to promote public confidence in charities and their work.

This means that risk management is now more important than ever.

OSCR's guidance on Notifiable Events can be found here:

<http://www.oscr.org.uk/charities/managing-your-charity/notifiable-events>

The Trustees should report any Notifiable Events to OSCR although it is worth mentioning here that auditors and independent financial examiners are under a duty to report on the activities or affairs of a charity where they encounter any matter which is likely to be of 'material significance' to OSCR in carrying out its functions.

OSCR publish charity accounts online

From 1st April 2016 OSCR will publish on their website a redacted version of the accounts and Trustees' report for all SCIOs and for all other charities which have an annual income over £25,000, as a move to improve transparency within the third sector.

New Good Governance section

OSCR have now helpfully introduced a 'Good Governance' section on their website which contains guidance and resources to support Charity Trustees. Areas covered include 'Conflicts of Interest', 'Financial Control', 'Meetings' and 'Trustees Duties'.

Changes to incorporation for unincorporated bodies

Those charities which are currently constituted as a unincorporated legal structure, such as a Deed of Trust or a Unincorporated Association (meaning that the Trustees have unlimited personal liability), should be aware that OSCR's legal process for incorporation to a limited liability structure (commonly into a Guarantee Company or a SCIO) has changed. From November 2016 the only route available is now for an unincorporated charity to:

- (a) form a completely new incorporated charity, with a new name and new charity number,
- (b) transfer the assets, liabilities and undertaking of the unincorporated charity to the new incorporated charity, and
- (c) wind-up the existing unincorporated charity.

This process (which is explained fully in the '*Practical Guide*' referred to on page 1), means that the new entity will require to register with HMRC. Trustees will need to consider the administrative steps it will need to take to ensure a smooth transition.

New Banking Guidance for Charities and Trustees

In response to the problems and confusion which charities can sometimes face when trying to open bank accounts, OSCR have published new guidance:

<http://www.oscr.org.uk/hot-topics/new-banking-guidance-for-charities>

Advance warning - Data Protection Law changes in 2018

Charities should be aware that the current law governing Data Protection is set to change as of 25th May 2018 with the introduction of the General Data Protection Regulation (GDPR). The GDPR will have direct effect throughout the EU from 2018 and we will be publishing a Factsheet closer to the time outlining the main changes.

Currently personal, financial and sensitive data is protected by the Data Protection Act 1998. Charities should be aware of their current duty under this Act in respect of data they hold which relates to a living individual who can be identified by that information, including employees, customers and clients. A Data Protection Policy together with training for staff, volunteers and trustees with access to personal data, and robust IT security, are a must for any charity. We can advise further on an individual basis if required.

New Gift Aid Declaration

From 6th April 2016, charities are now required to use a new style Gift Aid Declaration which has a new mandatory statement confirming that where the donor has paid insufficient tax it will be their responsibility to pay the shortfall, not the charities.

A basic principle underlying Gift Aid is that the gift should be freely given with nothing substantial provided in return. However, a charity can give donors modest tokens of appreciation but there are limits on their value. The way in which the benefit value for individual donors is calculated can be complex, so please do seek advice if you would like our help with this.

New HMRC reporting requirement for Charities under Common Reporting Standard

New HMRC reporting rules designed to prevent tax evasion were introduced on the 1st January 2016, although the first reports must be filed by 31st May 2017 using the HMRC online system.

Charities which receive more than 50% of their income from investing in financial assets which are managed by a third party (most investment portfolios) are likely to be affected if certain conditions are met.

Amongst other requirements, qualifying charities will require individuals and entities who receive any grant funding from them to complete a self-certification form to confirm their tax residence.

HMRC have produced detailed guidance specific to charities:

<https://www.charitytaxgroup.org.uk/tax-update/hmrc-published-specific-guidance-charities-common-reporting-standard/>

The rules are complex and we will be on hand to assist any charities who require further advice and guidance.

Conflicts of Interest

Do all of your charity's trustees understand when conflicts of interest might arise in your charity, either when a new trustee is being appointed or during your charity's ordinary course of business?

And if so are you all familiar with what your charity's constitution says on the subject? It may in fact say nothing (although all the constitutions we prepare and provide have referred to conflicts of interest for many years, and all SCIO Constitutions are required by law to do so).

Do you all also know the current best practice for recognising and managing conflicts of interest as and when they arise?

We are often asked to give advice on issues of conflict of interest as and when they arise. If not handled correctly, they can give rise to serious internal problems with external ramifications. We are happy to continue providing advice as and when required, but we also hope that charities will seek to create a policy and framework of their own, which we can help them to identify and put in place.

Trading Subsidiaries

A number of charities have their own wholly-owned trading subsidiary (which is usually a limited company, all the shares of which belong to the charity). This enables the charity to ensure that non-charitable work can be carried out by its trading subsidiary, and then ensure that the surplus taxable profit arising therefrom can be donated to the parent charity annually, with tax relief on the donation. For example, a charity may run a museum, which advances heritage and culture; all these activities are therefore charitable; however, its cafe and shop do not provide a heritage or cultural benefit directly, and so all of those activities have to be operated and managed by its trading subsidiary.

As HMRC say *"When a trading company donates its profits to its parent charity's main purpose, there is no Corporation Tax due on these payments. The trading company makes the donation without deducting tax. Your charity won't pay tax on the amounts it receives as long as it uses the money for its charitable purposes. The directors of a trading company can decide when to donate to their parent charity. The payment must be made within 9 months of*

the end of the accounting period in which the profits were made. They must show the payments in their tax return for the accounting period in which the payment was made."

In the past, trading subsidiaries have made such annual donations to the parent charity even if the amount donated exceeds the amount of profits available for distribution in terms of the Companies Act 2006. This can happen where the element of depreciation which can be added back into the accounting profit in arriving at the taxable profit exceeds the capital allowances which can be claimed, or where expenditure has been incurred which is not allowable for tax purposes.

This past practice has been accepted, even endorsed, but recent guidance issued by the Institute of Chartered Accountants in England & Wales explains that donations from a trading subsidiary to the parent charity are technically 'distributions' in terms of the Companies Act 2006 and that, therefore, the annual donation should not be more than the profit available for distribution. If the donation exceeds the profit available, it would be unlawful and would have to be returned by the charity to its trading subsidiary.

HMRC issued guidance in April 2016 which makes it clear that it is unlawful for a charity's trading subsidiary to make distributions in excess of distributable profits. This means that a trading subsidiary may have a tax liability when its taxable profits are greater than its distributable profits.

More Advice Needed?

There are a number of Factsheets on our website at www.jandhmitchell.com. These are regularly updated and we hope you find them useful.

Please do not hesitate to e-mail Colin Liddell or Sarah Rennie for any assistance which you or your charity may need to colin.liddell@hmittchell.co.uk or sarah.rennie@hmittchell.co.uk. We would be pleased to hear from you.

Colin Liddell and Sarah Rennie are always happy to provide specific training for your charity, or training seminars in your area for your charity (whether on its own or in combination with other charities). J. & H. Mitchell also provides open seminars from time to time.

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If you no longer wish to receive our Newsletter in future please let us know and we would remove you from our mailing list. If, in doing so, you are aware of someone else from the same charity or community organisation who would like to receive our Newsletter in future, please check with them and, if appropriate, provide us at the same time with their e-mail address.

If you wish to add any one or any charities with which you are involved to our mailing list, please let us know.

Thank you.