

Issue 2 – June 2011

UK200Charities Group e-bulletin keeping you up to date with issues affecting the Charity Sector and written by UK200Charity Group members. In this our second edition we are covering CIOs and the forthcoming Bribery Act ...

CHARITABLE INCORPORATED ORGANISATIONS - further delays in implementation announced

As has previously been reported, there have been extensive delays in the rolling out of the Charitable Incorporated Organisation ("CIO").

As you will be aware, a CIO is an incorporated form of charity which is not a company, and therefore will not be required to register with Companies House. It will only come into existence when registered with the Charity Commission. It is intended that a CIO will have the benefits of incorporation, without having to take on some of the burdens. In particular filing with the Companies Registry will not be required.

The regulations which will complete the legal framework for CIOs have still not yet been debated by Parliament, so it is not known when it will be possible to register CIOs.

However, the Charity Commission has recently published guidance to allow people to look at what becoming a CIO will mean, and to decide if a CIO is the right structure for them to run their organisation.

The guidance does confirm that the implementation of the regulations, once they are approved, will be phased with new organisations being able to register first, and existing charitable companies being able to convert towards the end of the implementation period.

The main points highlighted in the guidance are:-

1. CIOs can enter into contracts in their own right and the trustees will normally have limited or no liability for the debts of the CIO.
2. As against unincorporated structures a CIO will have a legal personality of its own so it can carry on business in its own name rather than the names of the trustees.
3. It is considered by the Charity Commission that CIOs will be most suitable for small to medium sized organisations which employ staff and enter into contracts.
4. Although CIOs will not have to register with Companies House, they will have to register with the Charity Commission and will have to submit accounts and annual returns to the Commission and keep registers of members and trustees. This is irrespective of the income of the CIO.
5. All CIOs must have members and charity trustees. In the case of smaller CIOs these may be the same individuals, or there may be a wider membership made up of people who are not charity trustees.
6. It will not be possible for existing unincorporated associations to convert to CIOs. Those that wish to become CIOs will need to register a CIO, transfer the assets and undertakings to the CIO and settle the liabilities, and dissolve the unincorporated charity in accordance with its' governing document.
7. Unincorporated charities with permanent endowments may need to make vesting declarations to transfer the property to the CIO. Unincorporated charities with defined benefit pension schemes will also need to consider if the transfer to a CIO will be regarded as a cessation event by the pension regulator.
8. It will be possible for existing charitable companies to convert to CIOs under the Charities Act 2006. The process should be relatively straightforward, and will not affect the legal personality of the organisation.
9. A Community Interest Company will also be able to convert to a CIO under the Charities Act 2006. However, further regulations need to be made before it is clear exactly how this conversion process will operate.

10. Industrial and Provident Societies will only be able to convert to CIOs once their exempt status is removed. However, once again further regulations are needed before it is clear how this conversion process will operate.

Included with the guidance are two model constitutions; a foundation model for those wishing to register a CIO whose only voting members will be the charity trustees, and an association model for charities which will have a wider membership which includes voting members other than the trustees.

In practice, the foundation model will be similar to an unincorporated charitable trust; it will be run by a small group of people who will make the key decisions. The association model will be more appropriate for larger organisations with a wider voting membership.

The draft regulations specify that a CIO must have a constitution in the form prescribed by the Charity Commission, or as near to that as circumstances allow. Therefore, in order to register a CIO it is recommended that one of the model constitutions is used, as it will ensure that the requirements of the law are met and that good practice is observed.

The Charity Commission expects that any amendments to the draft regulations when they are debated in Parliament will be minor. Once the regulations have been approved, the Office of Civil Society will be responsible for publishing a timetable for their implementation. Having very recently heard the Office for Civil Society speak on the subject, I am hopeful that this implementation will commence before the end of the year.

BRIBERY ACT 2010 – note for charities

Guidance and implementation

The government has recently released its final guidance for commercial organisations on the Bribery Act 2010 ("the Act"). The Act will come into force on **1 July 2011**.

There is information on the new offence of failing to prevent bribery created by Section 7 of the Act, and guidance is given regarding when an organisation will be a 'relevant commercial organisation'. This will include charitable companies which, although they may have charitable aims, also carry out some commercial activities. Unincorporated charities and charitable trusts cannot be liable under this section of the Act as a 'relevant commercial organisation' is defined as either an incorporated body or a partnership which carries on a business.

Unfortunately, there is no definition of "business" in the Act or the guidance, so incorporated charities will need to take a cautious approach and proceed under the assumption that they could be caught by the provisions of the Act.

Guidance is also given on who will be classed as an 'Associated Person' for the purposes of the new Section 7 offence, and whether corporate hospitality or facilitation payments will be considered to be 'bribery' under the Act

It was acknowledged by all parties that the existing anti-corruption laws were wholly inadequate and needed replacing but there is still concern that the new legislation has not been subjected to sufficient scrutiny and that adopting an anti-bribery policy for many companies will turn into a bureaucratic nightmare.

Overriding message

The guidance published on 30 March 2011 has attempted to address these issues, along with the Joint Prosecution Guidance published by the SFO and the Director of Public Prosecutions. The overriding message appears to be that common sense will prevail. The main points are:-

1. Bona fide hospitality and promotion is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour;
2. As long as the expenditure serves a legitimate business interest and is not disproportionate, it will not fall foul of the Act. Only where a gift or expenditure is lavish or extraordinary in the circumstances will investigations be made.

3. Facilitation payments (typically small payments which seek to secure the provision of a service to which the payee is rightfully entitled in any event) are prohibited under the Act; however the problems that commercial organisations face in some parts of the world are recognised.

Provided that any payments are small or self reported to the SFO in the interests of preventing corruption, it is unlikely that the SFO will feel it is in the public interest to prosecute.

With regard to charities, it seems that in order to commit an offence (especially in relation to any hospitality offered); the organisation would probably have to be doing something it should not be doing for other reasons in any event. For example this could include offering extravagant hospitality to donors who may be considering making a gift to the organisation, or offering a benefit to a decision maker over and above what can legitimately be offered as part of a tender process.

Implementation

The Act will come into force on **1st July 2011** and by then commercial organisations need to have put in place suitable anti-bribery procedures in order to have a defence against the new offence of failing to prevent bribery.

The penalty for being convicted of a bribery offence is up to 10 years' imprisonment and/or an unlimited fine for an individual or an unlimited fine for a company. A charity found guilty of failing to prevent bribery could also be barred from applying for public contracts and funding streams.

What now?

You will need to ensure that you have put in place suitable anti-bribery procedures in order to protect your organisation and the officers of your organisation against the new offence of failing to prevent bribery.

There are six principles listed in the guidance which are designed to inform the procedures that organisations should now be putting in place to prevent bribery and corruption.

Organisations are encouraged to implement proportionate measures to combat bribery and show that they are committed to fostering an anti-corruption culture.

The guidance also contains a number of case studies to illustrate how the six principles can be applied. These are a useful tool in demonstrating how the government envisages the Act will be applied and what organisations can do to protect themselves.

As a minimum you should:

- Adopt an anti-bribery policy at board level, backed by a widely disseminated statement to staff and contractors outlining the board's endorsement of anti-bribery measures.
- The anti-bribery policy should contain, among other items:-
 - A prohibition on all offers or receipt of bribes by staff and/or contractors;
 - A prohibition on all "grease" or facilitation payments made to public or private officials. These are expressly prohibited by the new Act;
 - A prohibition on the giving or receipt of all hospitality which aims to secure improper economic or commercial advantage;
 - A requirement that all hospitality given or received (which is not expressly prohibited) is entered within a centrally held hospitality register;
 - A requirement that staff and contractors should report all actual or suspected bribery by the organisation and/or its contractors to the Bribery Compliance Officer as appropriate;
 - A statement that any breach of the terms of the policy and its provisions as updated from time to time will constitute a disciplinary offence by the employee concerned.
- Depending on the size of the organisation, the appointment of a nominated Bribery Compliance Officer(s) to implement and revise anti-bribery and corruption policy. The Bribery Compliance Officer(s) should be responsible for:-

- Conducting periodic risk assessments as to the organisations exposure to bribery and corruption risk;
- Providing training for staff on anti-bribery procedures and measures;
- Maintaining accurate records of all disclosures made to him/her in respect of identified bribery and corruption risk;
- Reviewing the entries on the hospitality and facilitation payment register;
- Considering the efficacy of appropriate disclosure to regulatory authorities;
- Incorporating the anti-bribery measures as effective internal controls within the organisation;
- Conducting heightened due diligence in respect of bribery risk, where a report is made to him/her or where risk assessments indicate that there is a heightened bribery risk;
- Updating the policy and procedures as further documentation and guidance becomes available.

Duress

Charities may operate in areas that are more at risk of bribery occurring. This is particularly likely to be true in some overseas areas, where bribery and facilitation payments may arise. Concern had been expressed that trustees and managers in the UK could be guilty of an offence if bribes were paid by staff working overseas. While the Act does make the charity responsible for bribes paid by their staff, the guidance does state that where payments are made because of duress it is unlikely that the charity will face prosecution. However, this is only likely to apply in extreme circumstances (such as where there is a risk of loss of life, limb or liberty).

Conclusion

The guidance should help to reassure charities although there is still some uncertainty on to the extent to which charities activities are covered which should be clarified further.

About the author:

Mark Lewis MA, Solicitor with Wright Hassall LLP, Solicitors, Leamington Spa. Mark is a member of the UK200Charities Committee. He heads up the Wright Hassall Charities Unit and has experience of a wide range of charities and not-for-profit organisations. He is also co-author of the Charities Handbook 2010 produced by the UK200Group.



UK200Group is an association of separate and independently owned and managed chartered accountancy firms and lawyer firms. UK200Group does not provide client services and it does not accept responsibility or liability for the acts or omissions of its members. Likewise, the members of UK200Group are separate and independent legal entities, and as such each has no responsibility or liability for the acts or omissions of other members.