



# Charity Briefing

Keeping you up to date with events in your sector.

## Welcome

Welcome to the latest edition of our Charity Group Briefing.



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It is an interesting time for charities following both the April budget and the introduction of the Bribery Act in July. The budget brought about some notable changes in Gift Aid donations aimed primarily at encouraging people to donate more to charities. The changes brought about by the Bribery Act 2010 are far reaching and will affect all charitable organisations.

Our guest author Katherine Gifford of Wilsons Solicitors LLP has outlined the main offences under the act and also the six principles set out by the Ministry for Justice to guide charities and commercial organisations in implementing bribery prevention measures. We welcome our newest member of the Charity group, Bill Devitt, who looks at the question of the payment of trustees by charities and the potential pitfalls involved and, on the subject of trustees

Elliot Harris examines how best to resolve a dispute between trustees in the FAQs section. Helena Wilkinson reviews the first year of the Learned and Professional Societies Forum which was set up with the support of the firm last summer. Finally we draw your attention to an alert released by the Charity Commission warning charities of a number of frauds and attempted frauds involving bogus suppliers.

I do hope you find the articles of interest, and as always welcome your constructive feedback. If you have any questions arising from this briefing, or regarding our services, please contact me or another member of our charity team. We have just launched our autumn series of seminars, details of which can be found on our website, and I look forward to meeting you at one of these events.

## Budget 2011: update for charities

**On the 23 March 2011 the coalition Government delivered its second Budget, predominantly focusing on measures to balance the country's books. While the headline writers concentrated on the corporate tax announcements there were a few small crumbs of comfort for charities. Despite the repeal of the Millennium Gift Aid legislation (no great loss as it will not be relevant for over 988 years!!) a number of measures are being introduced aimed at simplifying the Gift Aid process and to attract legacies and bequests from estates.**

### Changes effective from 6 April 2011

Firstly, for Gift Aid donations in excess of £10,000 made on or after 6 April 2011, the maximum value of the benefits that an individual or corporate donor may receive as a result of making the donation is increased from £500 to £2,500. The new limit will be subject to the existing rule that the benefit must not exceed five per cent of the gift.

This measure is clearly designed to encourage people to give more to charity and will enable charities who wish to do so, to thank their larger donors in a more generous way without the donations being disqualified from Gift Aid.

Also effective from 6 April 2011 are changes to the controversial substantial donor rules aimed at restricting tax relief and exemptions a charity is entitled to if it enters into certain transactions with a substantial donor that provide



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value to the donor. A substantial donor is an individual or a business which donates £25,000 in one year or £150,000 over six years to that particular charity.

The new "tainted" charity donations rules will remove the thresholds, thus potentially catching much smaller donations, but will be more focused on the purpose of the donation and the financial advantages received. An exemption will be included so that donations from connected trading companies are not caught by the rules.

#### **Future changes**

From April 2013 charities that receive small donations of £10 or less will be able to apply for a Gift Aid style repayment without the need to obtain Gift Aid declarations for those donations. The amount of small donations on which the new repayment can be claimed will be capped at £5,000 per year, per charity. In order to qualify for this new repayment, charities will need to have been recognised by HMRC for Gift Aid purposes for at least three years, have been operating Gift Aid successfully throughout that time and have a good tax compliance record.

In 2012-13 HMRC will introduce a new online system for charities to register their details for Gift Aid and to make Gift Aid claims. As a first step towards this, four new "intelligent" forms for charities to use will be made available which contain automatic checks to improve the accuracy of information and reduce administrative burdens.

Legislation will be put in place to enable repayments of tax to charitable companies and certain charitable trusts that make a claim to repayment of tax outside a tax return ("in-year claims").

The Government is also considering introducing a tax reduction for taxpayers who give a work of art or historical object of national importance to the State. A consultation on the proposal will take place over the summer.

The SA Donate scheme is to be withdrawn for repayments of tax due on tax returns for 2011-12 and subsequent years, and for any repayments made in respect of earlier tax years on or after 6 April 2012. Self-assessment taxpayers who are due a repayment of tax from HMRC may currently direct that the repayment should be made instead to a charity of the taxpayer's choice. SA Donate was introduced in 2005 but has not been well used, is not cost-effective and is vulnerable to fraud without extensive upgrading.

The Government has announced that a reduced rate of inheritance tax (IHT) will apply where ten per cent or more of a deceased's net estate (after deducting IHT exemptions, reliefs and the nil rate band) is left to charity. In those cases the current 40 per cent rate will be reduced to 36 per cent. The new rate will apply where death occurs on or after 6 April 2012.

#### **Compliance update**

Finally, a reminder that iXBRL (Inline Extensible Business Reporting Language for those who may be interested) filing became compulsory for all corporation tax returns filed after 1 April 2011. Trading subsidiaries of charities will therefore be required to produce iXBRL compliant tax computations and financial statements from that date.

iXBRL may also impact on charities themselves that are required to file a corporation tax return. Transitional arrangements are in place to allow smaller charities with income less than £6.5 million to continue to file financial statements and tax computations in PDF format, but larger charities must be compliant from 1 April 2011.

HMRC have stated that difficulties with filing will be treated "sympathetically" for the first two years providing reasonable steps have been taken to comply.

Chantrey Vellacott DFK has a comprehensive range of iXBRL compliance packages available to assist in meeting filing obligations, from full preparation and filing through to conversion into the required format. Please contact your local office for more information.



## The Bribery Act 2010 – Is your charity ready?

The Bribery Act 2010 came into force on 1 July 2011. The Bribery Act sets out four criminal offences which could apply to charities:

1. offering, promising or giving a bribe;
2. requesting, agreeing to accept, or accepting a bribe;
3. bribing a foreign public official;
4. the failure of a commercial organisation to prevent bribery (“the commercial organisation offence”)

The Ministry of Justice issued guidance in March 2011 to accompany the Act. This guidance clarifies matters of interpretation relating to the Act as well as providing guidance on designing anti-bribery procedures and controls.

### Impact on charities

The offences are widely drawn; the first offence includes bribes paid anywhere, intended to induce any “improper performance” of a wide range of public or private functions, wherever they are expected to be performed in good faith or impartially. The standard is defined in terms of the expectations of a reasonable person in the UK; no allowance is made for local custom or practice, unless there is clearly defined ‘written law’ in the jurisdiction where the bribe took place.

Facilitation payments (small bribes paid to facilitate routine government action) could be seen as an offence under the first, third or fourth offence. There is no exemption under the Bribery Act for such payments. However, in their guidance, the Ministry of Justice recognise that the total eradication of facilitation payments is a “long term objective that will require economic and social progress”. Accordingly, the Bribery Act is flexible; if an act on the face of it breaches the Bribery Act, the prosecutors have a discretion whether or not to prosecute, depending on whether doing so is in the public interest.

The government also recognises that there are circumstances in which an individual has no alternative but to make a payment. The guidance states that in a situation where the individual's safety was threatened, the individual is likely to be able to rely on the defence of duress.

### The Commercial Organisation Offence

At first glance, charities might think that the commercial organisation offence does not apply to them. However, it does apply to some charities. A commercial organisation is defined in the Bribery Act as a body which “carries on a business”. This definition therefore includes charitable companies, trading subsidiaries of charities and could also include the charities themselves, if the charity is carrying on a business. The Ministry of Justice guidance states that the courts will be the final arbiter as to whether an organisation is carrying on a business, taking into account the particular facts in individual cases. The Government intends that a common sense approach is applied. It is worth noting that the Ministry of Justice has stated in the guidance that it is irrelevant whether the organisation pursues primarily



charitable or educational aims or purely public functions. The Act is designed to catch all organisations which carry on business, irrespective of the purpose for which profits are made. The Act also catches foreign organisations which carry on business in the UK.

There is no requirement that the charity in question was aware of the bribe. The offence will be committed by an organisation if any bribe is paid by a person associated with it. The definition of a person who is “associated” with a commercial organisation is someone who “performs services for or on behalf of” the commercial organisation and may be the commercial organisation's employee, agent or subsidiary.

### The defence – to establish and maintain “adequate procedures”

It is a defence to the commercial organisation offence for the organisation to show it had adequate procedures in place to prevent persons associated with it from committing bribery. The Ministry of Justice's guidance on the “adequate procedures” makes clear that small organisations with a low risk of bribery will not need to implement the same measures as a large organisation operating in a high risk sector.

The guidance sets out six principles to guide commercial organisations in implementing bribery prevention measures:

1. **Proportionality** – a charity's procedures should be proportionate to the bribery risks it faces and to the nature, scale and complexity of its activities. For example, where it is likely that the employees or agents of a charity might encounter situations involving facilitation payments, the charity should have clear, practical and accessible procedures advising employees how to act in these situations.



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2. **Top-level commitment** – the top-level management and the trustees of charities should be committed to preventing bribery.
3. **Risk assessment** – the charity should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.
4. **Due diligence** – the charity should apply due diligence procedures in respect of persons who perform or will perform services for or on behalf of the charity.
5. **Communication** – the charity should ensure that its bribery prevention policies and procedures are embedded and understood through internal and external communication. Training should be given if necessary to ensure that the procedures are understood and complied with by everyone associated with the charity.
6. **Monitoring and review** – the charity should monitor and review procedures designed to prevent bribery.

### The penalties

The penalty for breaching the Bribery Act is a maximum term of imprisonment of ten years and/or a fine (the fine is unlimited in respect of the commercial organisation offence).

### Take action

Charities need to take action now and put adequate procedures in place. The extent and nature of the procedures which are put in place will depend on the size of the charity, its operations and activities and the risk assessment on bribery by the charity. Implementing adequate procedures should hopefully prevent bribery, and for any isolated events that occur regardless of the procedures, the procedures should protect the organisation from the penalties that might otherwise be imposed. As well as the criminal offence, perhaps one of the biggest considerations for charities is the detrimental effect resulting from a bribe on trust, reputation and the charity brand.

## Charity VAT Update



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### Is it a grant?

One of the most common questions that any Charity VAT advisor gets asked is whether money received should be treated as a grant or payment for a service.

If it is a grant then it will generally be outside the scope of VAT meaning no tax is charged. It could also result in the activity it funds being treated as non business for VAT purposes with the consequence that VAT recovery is restricted. If alternatively it is regarded as a payment (or 'consideration' in technical terms) then it will be potentially subject to VAT.

When VAT was first introduced there was a clearer distinction between grants and payments. When a grant was made there were often few strings attached. In contrast, with a contract for services it was clear that a particular price was being charged for a particular service. Over the years this distinction has become more blurred.

It is difficult to distinguish between a grant which often now is given subject to a stringent set of conditions and a contract for service.

Deciding if income is outside the scope is not helped by HMRC's inconsistency when dealing with such questions. Their tendency is to adopt the position towards a particular case that maximises the revenue. In case of money received from local and central government this normally means seeing it as outside the scope and thereby restricting VAT recovery. But this is not always the case and sometimes they insist on VAT being charged.

The good news is that the government appears to have recognised that there is an inconsistency in treatment and work is being undertaken to bring out clearer guidance. It would also seem possible that the current orthodoxy will be reversed and HMRC will be more willing to regard money received from local authorities as being consideration for a supply made to that authority. This can only be good news for the VAT recovery of charities currently grant funded by local authorities.

If you have difficulty distinguishing between grants and payments for service and wish to discuss the matter then please contact Peter Ladanyi on 0207 509 9490.

### The Reed Case

There has been a lot of coverage recently concerning the Reed Employment case. Here the VAT tribunal considered whether Reed needed to charge VAT on the full price of temporary staff it provided as opposed to accounting for VAT on the commission. The conclusion reached was that VAT was only due on the commission. This would obviously be beneficial to the charity sector which has had to suffer VAT on the full price of any temporary agency workers since the staff hire concession was abolished in April 2009.

HMRC did not appeal the Reed tribunal but there is still uncertainty as to whether they will try and take another case on the issue with more up-to-date facts or just accept the decision. In the meantime it is open for employment agencies to make claims for over accounted VAT and then pay this over to their clients. There is little in this for the agency other than good client relations so we should not be surprised if the agencies wait until HMRC's position is more certain.

## Trustee expenses and payments – don't fall into the trap



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**There are over 900,000 charity trustees in England and Wales. The vast majority give their time freely, believing passionately in the aims of their charity. The sector has been built on the concept of unpaid trusteeship.**

We all know that trustees are entitled to have their expenses met by the charity, when fulfilling their trustee duties, although we regularly see trustees refusing to claim any expenses, such is their generosity and desire to support their charity.

So the question arises, can charities pay a trustee for:

- the supply of services; or
- serving as a trustee; or
- loss of earnings to enable them to attend meetings during working hours?

The answer to each of the above is “yes”, but only under certain circumstances. Failure to follow the guidance can ultimately lead to the Charity Commission ordering a trustee in receipt of payment to repay such monies. The guidance to follow is set out in CC11 “Trustee expenses and payments”, which is derived from charity law, case law and good practice. This guidance is equally applicable to charity trustees and persons or businesses connected with them.

Ensuring that the opportunity to be a trustee is open to all is one of the keys to achieving a strong board. Forms of payment can help attract good individuals who may otherwise be unable to serve.

Charities contemplating paying a trustee for **servicing as a trustee** must be satisfied this is clearly in the interests of the charity and provides a significant and clear advantage over all other options. Legislation does not provide a general power for this type of payment. Specific authority must come from its governing document, or be granted by the Charity Commission or the Courts.

Where a charity wishes to employ a trustee in another role (such as chief executive), or where a charity wants to compensate a trustee for **loss of earnings** to enable them to attend meetings during working hours, it must firstly ensure that it has the necessary authority. If it is not provided by the governing document, again the charity must approach the Charity Commission or the Courts.

The Charities Act 2006 introduced new powers enabling charities to pay trustees for the **supply of services**, under certain conditions. This power cannot be used where prohibited by the governing document.

In any situation where a trustee board determines it is appropriate to pay, the board must be open and transparent about its decision and be prepared to justify that decision if publicly challenged. Disclosing such payments is required by the Charity SORP and will help dispel any perception that payments were made in secret.

Where paying a trustee, conflicts of interest will arise. Charities should have procedures for identifying and managing such conflicts, ideally set out in the governing document.

Each trustee's performance should be reviewed on at least an annual basis, as a matter of good practice, especially where a trustee is being paid.

Where a charity is contemplating making a payment to a trustee, other than reimbursement of expenses, the trustees would be well advised to seek professional advice. In any event, the trustees must consider and address six points as follows:

- Who will receive the payment – is it a trustee or connected person or business?
- What will the payment cover?
- Is payment clearly in the best interest of the charity?
- Is there a legal authority for it?
- What conditions must be met if the payment is to be made?
- How will any conflict of interest be managed?

Where we have come across charities making payments to trustees, which is relatively unusual, due process has been followed in the majority of cases. However, we have occasionally seen charities unwittingly pay a trustee for the **supply of services** without having the appropriate power.

In one example, a consultant providing services to a charity was subsequently invited to join its board, because the trustees could clearly see the value he could add to the organisation. He duly became a trustee whilst continuing to provide his consultancy services to the charity. Unfortunately the board was unaware that the charity's Articles of Association prohibited payments of this nature to trustees.



In a similar situation, a charity purchased IT equipment and services from a company owned by one of its trustees. Again the governing document prevented such transactions with its trustees.

Easy mistakes to make and no doubt further examples will continue to arise. In both cases the trustees were aware of the payments and believed they were appropriate and in the best interests of their respective charity. However, what should trustees do if they discover (perhaps as a result of the annual audit) that an unauthorised payment has been made and what are the potential consequences? The first thing to do is establish the facts and ensure no further illegal payments are made. Professional advice may be appropriate. The trustees are obliged to notify the Charity Commission, who will want to establish whether the payment represented good value to the charity and the trustees were acting in good faith. Where the Commission concludes that these factors applied, it will seek to regularise the position if similar payments are to continue. Where it concludes these factors did not apply, the Commission may use its formal inquiry powers to protect the charity. This means the

Commission would consider seeking restitution of the amount paid from the trustee in question, or from the other trustees. Seeking restitution is not an empty threat; it has been applied in practice.

The Commission does not have the power to grant retrospective authority to the remuneration of trustees and cannot eliminate the legal liability to repay the money. However, where it is satisfied that it is likely the Courts would excuse the person from repaying all or part of the money received, it can decide, as an administrative matter, not to pursue the question of repayment. For practical purposes, its decision not to take any action would usually be the end of the matter.

Don't fall into the trap of making unauthorised payments. Trustees should not make payments where there is doubt over the legal basis.

If you would like to discuss your own situation, please contact your usual Chantrey Vellacott partner or Bill Devitt on 0121 454 4141.

## Update: Learned and Professional Societies Forum

**Last summer, through the efforts of Chantrey Vellacott DFK, a Learned and Professional Societies Forum (LPSF) was established. This is a group of like minded individuals who have come together in order to form a networking opportunity for learned and professional societies – the forum assists the sector to have an opportunity to discuss and share ideas, experiences and knowledge and strengthen the sector as a whole.**

This forum could not operate without the support, experience, knowledge and commitment of the members of LPSF, who include Helena Wilkinson, Charities Partner at Chantrey Vellacott DFK (Chair); Keith Lawrey, Barrister and Chartered Secretary, Societies' Liaison Officer at the Foundation for Science and Technology; Professor Paul Palmer, Associate Dean at CASS Business School; Sue Thorn, Consultant and the Executive Director from the Association of Learned and Professional Society Publishers. All members of the group have extensive and specific experience not only of the charity sector but specifically learned and professional societies.

We launched the LPSF with a free seminar programme in the spring on topics relevant to the sector. Our first three seminars covered key activity risk which dealt with membership, conferences and seminars and publishing activities; governance risk particularly reserves and investment policies and insurance; and finally membership databases. Each of these topics was a hefty subject and could easily have been a whole day's seminar. We are delighted by the support and interest shown by learned and professional societies in our seminar programme, with our events being well attended and well received by our guests. So far representatives of some 40 learned and professional societies have attended, the speaker notes summarising the events have been circulated to some 200 learned and professional societies and many have expressed an interest in our future planned programme.

We are delighted to confirm that our evening seminar programme will continue, with plans for seminars to start again in the autumn for the next round of events. Please do let us know if you would be interested in joining our forum, or about any desired topics or issues that you currently face and would like us to cover. We are continuing to build this forum into providing training, advice, coaching and support to you all. We look forward to welcoming you at a future event.



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## FAQ

**Q: How can we resolve a dispute between trustees?**

**A:** The last port of call is to involve the Charity Commission, when all else fails. The Commission make it clear that the trustees are expected to have exhausted all other means of resolving the dispute before approaching the Commission.

Disagreements happen in any organisation and, most of the time, are usually resolved by consensus. When they are not it is usually for two main reasons;

- a) the trustees are split straight down the middle with very divergent viewpoints or
- b) there is a very strong-minded individual or minority view where the minority either refuse to see reason or alternatively have in their own eyes, legitimate concerns that the rest of the trustees are not taking seriously enough.

In the latter case, these trustees need to be very sure of their grounds to take such a standpoint and it would be expected that they would have taken advice to arrive at their position. Assuming advice has been received, the remaining trustees should then at the very least re-examine their position and if in doubt take their own advice and compare the results. In most circumstances following such a review, a consensus should become apparent. However, if the issue relates to strategy or policy matters then that could still require the minority to be “prepared to abide by decisions that are taken fairly and within the rules of the organisation, even if this does not match their own personal preferences” (RS7 Membership Charities - a Charity Commission publication).

In the case of a split board, again both sides would be expected to seek guidance in an attempt to resolve the dispute. Often the charity’s auditors or lawyers as trusted advisors may be able to help in such situations and again, on matters of fact, the consensus may be achievable but often such disputes are as much to do with personalities as anything else.

Some charities have internal procedures stipulated within their constitution for resolving disputes of this nature, but equally many do not. This is certainly an area to consider when you are revising your constitution. Others may have the ability to approach their national body or a membership organisation that they belong to who may be able to assist or arbitrate. An external fresh pair of eyes is often of use.

There are also forms of Alternative Dispute Resolution that may be attempted. The most cost effective of these is mediation where a professional mediator has the skills to assist both parties to resolve their dispute. If this fails, then the remaining course of action may be the incurring of costs to apply to the Charity Tribunal or to Court for a resolution. This is a last resort which will often need the permission of the Charity Commission and who in turn will have expected these other avenues to have been attempted. Remember also that the Courts do not look kindly on charities who have “frittered away money subject to charitable trusts in pursuing litigation relating to internal disputes” (Conflicts in your Charity - a statement of approach by the Charity Commission).

The Charity Commission will not get involved where the dispute is either about policies pursued or actions taken within the law or the charity’s constitution where others are more qualified to interpret. Where they will get involved is where the dispute not only gets out of hand but threatens the well-being of the charity or a severe disruption of the charity’s work.

The lesson with all such disputes is not to let them get out of hand. Having some sort of dispute resolution procedure within your constitution is useful. In the sort of disputes involving policy and strategy, some form of trustees “away day” will often get matters sorted away from the day to day trustee business. Consider using the assistance of an experienced external facilitator who will help to keep the meeting on track.



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## Website Monitor

### Commission calls on charities to become more independent

**Sam Younger, chief executive of the Charity Commission, says changes at the regulator will mean that charities will need to become more independent and more self-reliant.**

He said that it would be less involved, in future, in providing one-to-one advice that merely provided reassurance that the charity had correctly applied the Commission’s guidance.

Sam Younger said that this, in turn, could help transform charities’ view of the Commission and its relationship with the public:

*“I hope that, over the course of the next few years, we’ll see charities viewing good governance not as a hurdle to clear, but as an opportunity to show the public they’re accountable, they’re trustworthy, they’re a wise investment. This is clearly what the public expects. Our consultation revealed that, while people have great trust in charities, they demand a lot in return: good governance, sound management and absolute probity. The Commission has taken that message on board, and my advice to charities would be: do the same. Think of your relationship with the public as a contract in good faith, not as a relationship of unconditional love”.*

## Charity Commission warns charities of bogus suppliers

**The Charity Commission has been notified by the Higher Education Funding Council for England (HEFCE) of a number of frauds and attempted frauds involving faked documentation purporting to change suppliers' bank account details. Higher education institutions across England have been targeted. A number of the frauds have involved construction companies, possibly as payments to such suppliers tend to be substantial. All cases have been investigated by the police.**

This alert has been issued as part of an initiative by the Charity Commission to inform trustees and members of the public of scams or fraudulent activity carried out within the charitable sector.

Many charities, particularly those using suppliers of significant services, could be vulnerable to this type of fraud. The Commission is advising such charities to be alert to this fraud risk and to:

- ensure they have appropriate controls over proposed changes to supplier details, such as independently verifying with the supplier the change to supplier details before it is actioned, e.g. by speaking to the supplier's credit control department (or equivalent) and/or writing to confirm the change of account details with the supplier;
- scrutinise the documentation which purports to make these changes; e.g. check if the contact details, and the customer or contract numbers are correct;
- ensure that making changes to supplier details cannot be carried out by one individual unchecked, particularly where large ongoing contracts are concerned; and that such changes are properly authorised by an individual at an appropriate and agreed level in the charity and the supplier;
- review their existing controls.



If a charity suspects or becomes aware of a fraud they should report this to Action Fraud, using their online fraud reporting tool, or by telephoning 0300 123 2040. Charities should also contact the Charity Commission via their website, or by telephoning 0845 300 0218.

Higher education institutions that are exempt charities should report suspected frauds to HEFCE as the principal regulator, not the Commission.

Sound financial controls and financial management are an essential defence for charities against fraud and financial crime. They should be a core part of a charity's culture, and practised to the same degree of excellence as a charity's activities.

## Who to Contact

**For further information or advice, please contact the author of the relevant article, your usual Chantrey Vellacott DFK partner or one of the following:**

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