

Charities and Non-Profit Update



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There have been recent legislative changes that will affect charities and Non-Profit organisations which are summarised below.

The Bribery Act

The Bribery Act 2010 is due to become effective on 1 July 2011. The Act introduces four offences to UK law:

- Bribing another person
- Being bribed
- Bribing a foreign public official
- Failure by a commercial organisation to prevent bribery.

Charitable organisations should be particularly aware that the last offence 'failure by a commercial organisation to prevent bribery' applies to them.

A commercial organisation may be guilty of this offence if an associated person commits an offence of bribing another person or a foreign public official in the conduct of its business for the commercial organisation. An associated person is anyone acting for the organisation (i.e. employee, agent, supplier, consultant, distributor, subsidiary company etc). Concerns have been expressed by the charity sector about the risk of prosecution to UK Charities, particularly where bribes may have to be paid by staff working abroad. It may be difficult to say no with a gun pointed at your head in a war zone!

Defence

The only defence for such an offence would be for the organisation to demonstrate that they have "adequate procedures" in place to prevent bribery.

The Ministry of Justice have published guidelines which outline six principles that

should be considered when setting "adequate procedures": The emphasis of the guidance is on procedures being proportionate to the risks faced by the organisation.

The Six Principles

Proportionate procedures to prevent bribery by persons associated with it are proportionate to the bribery risk it faces and to the nature, scale and complexity of the commercial organisation's activities. They must be clear, practical, accessible, effectively implemented and enforced.

Top level Commitment - The top-level management (be it a board of directors, the owners or any other equivalent body or person) must be committed to preventing bribery by persons associated with it. They should foster a culture within the organisation in which bribery is never acceptable.

Risk Assessment - assess the nature and extent of exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment must be periodic, informed and documented.

Due Diligence - The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Communication (including training) - The commercial organisation seeks to ensure that its bribery prevention policies are embedded and understood throughout the organisation through internal and external

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communication, including training, that is proportionate to the risks it faces.

Monitoring and review - The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary

Trustees

Trustees should be:

- Identifying which areas of their business could be most exposed to bribery
- Developing procedures and policies to mitigate the risk in these areas (i.e. giving & receiving gifts, political donations, facilitation payments, relationships with associated persons).
- Implementing procedures
- Providing training across the organisation

The Equality Act

The Equalities Act 2010 came into force on 1 October 2010 and consolidates existing discrimination law. In particular, it prevents discrimination on age, gender, disability, race, religion, sexual orientation etc. These are collectively known as 'protected characteristics'.

The introduction of the Equality Act has raised some concerns within the charity sector, in particular how it applies to charities that restrict their benefit to a group with a shared protected characteristic. The Charity Commission has published guidance on how the Equality Act can be applied to Charities.

The Public Benefit Requirement states that all charities must have charitable purposes or aims that are for the public benefit. It allows the aim of the charity to benefit the public generally, or to benefit a particular group of people as long as it is a sufficient section of the public.

The Charities Exemption

The Equalities Act has a provision which allows a charity to restrict its benefit to a group with a protected characteristic ("The Charities Exemption"). However to qualify for the exemption, the restriction must be allowed by the governing document of the charity and the restriction must be justifiable.

Tests

The charity must use one of the following two tests to demonstrate that the restriction is justifiable:

- It helps to tackle disadvantages that particularly affect someone with that protected characteristic; or
- It is for some other reason a fair, balanced and reasonable way of achieving a legitimate aim.

Tackling disadvantage

A charity can restrict its benefit to a group with a shared protected characteristic if the disadvantage is more common to that group of people than the general population. For example, the aim of a charity is to tackle unemployment among people of a particular ethnic group. This restriction would be lawful, and justifiable, if unemployment in that ethnic group is particularly high.

Achievement of a legitimate aim

General law defines a legitimate aim as one that has a "reasonable social policy objective" (i.e. health improvement or protection of children). The charity must have a strong justification that demonstrates that the restriction is appropriate and essential to the aims of the charity.

Specific advice should be obtained before taking action, or refraining from taking action, on any of the subjects covered

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