

Equality Act 2010 – an Introduction

Much of the old discrimination legislation exempted charities when discrimination was inherent in their constitution. Charities are therefore particularly affected by the Equality Act 2010. It covers three main areas: provision of services or exercise of a public function, disposing of or managing premises, and employment. Therefore working out how to comply with the Act should involve a review of HR procedures, provision of services, membership criteria and operations. For a few charities it may also lead to a fundamental reappraisal of whether the charity can still help its beneficiaries in the way the trustees think best or whether the charity can still carry on its core mission at all.

Very many charities define their activities by reference to what the Equality Act terms the "protected characteristics" of age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race (which includes nationality and ethnic origin), religion or belief, sex and sexual orientation. That focus tends to exclude others and since the defining characteristic of beneficiaries is a protected characteristic, so too is the exclusion. Any exclusion is likely to involve discrimination particularly given the word's extended meaning in the Act.

Charities can discriminate to prevent or compensate for a disadvantage linked to a protected characteristic or where the discrimination is inherent in their governing document but only if the provision of

services to the restricted group is a "proportionate means of achieving a legitimate aim". "Legitimate" aims should have a reasonable social policy objective, be consistent with the charity's stated purpose and not in themselves discriminatory. A "proportionate" means will be used where there is a strong justification which shows that the restriction is appropriate and necessary. So, for example, it is legitimate under the "compensation for disadvantage" test to restrict services to visually impaired people if the services address disadvantages linked their disability. The "legitimate aim" test is less easy to grasp. A single sex care home will need to show it has legitimate aims and to show that providing single sex accommodation is a fair, balanced and reasonable way of achieving it.

There is a raft of more specific exceptions. These include restrictions limiting membership to those of a particular religion, single sex fundraising events, single sex schools, faith schools, associations limiting benefits to members, faith organisations discriminating on the grounds of sexual orientation and sports organisations segregating by gender. However, many of these have detailed requirements and limitations which need to be checked on a case by case basis.

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Counting the Cost of Governance

Many of the recent examples of problems with governance have highlighted how everyday activities can give rise to serious issues. For example, the Tate Gallery found itself in difficulty for failing to identify (still less manage) conflicts of interest in buying works of art from its own trustees. Similarly the Royal Institution got into difficulties in part for failing to identify conflicts of interest and in part for failing to have systems in place to control decisions affecting restricted as opposed to unrestricted funds and as a result misapplied £3.2million on a redevelopment project.

The Charity Commission's recent regulatory report on the well publicised difficulties of the MS Society highlights problems at a 'macro' level. The difficulty stemmed from a common enough situation where an organisation has branches. Specifically there was a lack of clarity on whether MSS Scotland was a constituent part of the MS Society or a legally separate organisation and lack of clarity in the governing documents both for the MS Society and MSS Scotland about the role of the governing body of the MS Society in

relation to MSS Scotland. In setting out the lessons of the report for charities generally the Charity Commission highlights the need for an organisation when it is setting up branches to establish clearly the terms of delegation then to observe and monitor them.

The reputational and internal costs of poor governance are difficult to quantify. The Charity Commission has shown itself reassuringly supportive of charities which find themselves in difficulties. Sometimes the action needed is relatively straightforward, such as reviewing governance arrangements to establish clearer boundaries and responsibilities. Sometimes they are profound. The MS Society, for example, is reconstituting its unincorporated association structure into a single company limited by guarantee. The clear lesson, however, is that the Charity Commission expects charities to review their governance arrangements regularly and systematically and that pre-emptive action to deal with difficulties is always better than waiting until a Charity Commission investigation is underway.

Will the new bribery laws apply to charities?

The Bribery Act 2010 ("the Act") is due to come into force in April 2011. The Act creates new offences relating to giving and receiving bribes. In addition, it creates an offence for a commercial organisation. The organisation can be guilty of "failing to prevent bribery" if an associated person gives a bribe unless the commercial organisation has adequate procedures in place designed to prevent bribery. The Ministry of Justice has consulted on the nature of procedures that organisations should put in place in order to avoid liability. The responses have raised questions about whether the Act applies to charities.

The general view of charity lawyers is that there has to be more clarity in both the Act and the accompanying guidance notes and that the legislation has to recognise that many charities, as a matter of reality have little choice but to offer bribes in order to ensure the safe passage of aid and the smooth running of their work.

Some parties argue that a charity is not a commercial organisation and so that the Act does not apply. It is hard to see why the Act should not apply to charities. Some doubt over whether the Act catches charities arises because the Act is couched in terms of business or commercial advantage. Just because a charity is not driven by the profit motive, it does not follow that a charity is not a commercial organisation and can never abuse process or seek to exert improper influence to achieve a particular end. Add to that the fact that

charities can and often do deliver the same sort of services (whether they be micro-loans to individuals in the developing world or children's services in the UK) as profit making enterprises in exactly the same way and it is hard to see why a charity should be excused from addressing the issue.

Unless there is a change to the Act to either clarify that a charity is not a "commercial organisation" (or to clarify the extent to which it is a commercial organisation) or to carve out exceptions which charities and possibly commercial organisations can rely on in extreme situations the only comfort that can be offered is that the authorities are unlikely to spend time prosecuting charities. At this stage, the guidelines for prosecuting offences under the Act are not available. Our suspicion is that those guidelines will clarify what is and is not "prosecutable" and so will offer comfort. Our sense is that in many cases the Charities Commission or the CPS will conclude that there would be no public interest in taking action – for example, where a bribe is paid under duress in order to ensure safe passage of aid.

The government has taken the view that bribery is a wrong that needs to be addressed. The debate around the Act will continue. The Ministry has not yet responded to the consultation exercise and more guidelines will be published in the next months. But for now, it is hard to see why charities should expect to be treated as a special case that deserves an automatic exemption.

"But we had a deal!" ... What happens to contracts and claims post-death?

If you are the executor (or a beneficiary) of a will with an outstanding pre-death contract or an unresolved claim, it is important to know what steps must be taken to ascertain the nature of the potential asset or liability and, in turn, what action to take to maximise any benefit to the estate.

Contracts

Where an individual has a contract outstanding on death:-

- The nature of the deceased's liabilities under the contract should be considered - they may have been joint, several, or even joint and several.
- The contract should be reviewed to see whether it contains a clause specifying what should happen if one of the parties dies.
- The other party may be willing to revise the contract terms in view of the circumstances.
- The Will should be checked for any express powers given to the personal representatives (PRs) in respect of any business. An express power would be required to permit the PRs to continue the business.



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Claims

Generally, causes of action pass to the PRs of the deceased by virtue of Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

Exceptions to this rule:-

- If the deceased had a joint action with another party, the deceased's rights pass by survivorship to the joint party rather than to the PRs.
- Certain claims end on an individual's death, for example claims by or against the deceased in defamation.
- There are some limitations to what the PRs can claim in a cause of action - PRs cannot claim exemplary damages.

If an action is already in progress, copies of the relevant papers should be obtained and examined at the earliest opportunity, as there may be pending court deadlines.

PRs should always ensure that they publish a notice under section 27 Trustee Act 1925 to protect themselves against any unknown claims against the estate.