

### The CIO – A win win solution

The Charitable Incorporated Organisation or CIO will be available later this Spring and should become the preferred choice for most new charities.

It has been a long time coming. It appeared on the horizon in 2001 and was developed in the 2002 review of Charity Law, 'Private Action, Public Benefit'. The statutory framework was included in the Charities Act 2006. However, the complexities of creating a specific organisation designed to meet the needs of the famously diverse charity sector proved difficult. The draft regulations produced in 2008 clearly needed a good deal of further work. With the changed economic circumstances and the growing pressure on public sector budgets, observers may be forgiven for having thought that the implementation of the CIO would be delayed further still.

On the contrary. Nick Hurd has assured the sector that the new legal form will come into existence from Spring 2011 and the Charity Commission is expecting it to go live from 1 April.

Under the CIO model, charities have the advantages of limited liability and corporate status without needing to register as companies. For charities this is a win win result as they achieve all the benefits previously enjoyed by charities formed as companies, without the

accompanying problems (and costs) of dual regulation by the Charity Commission and Companies House.

It is of course also a win win result for the Government. Dual regulation means dual costs for the Government too. Introducing the CIO quickly can therefore be seen as a cost cutting measure and at the same time as an important step towards a new breed of charitable organisation ready and willing to embrace the Big Society.

The CIO will have a strong appeal to charities as an entity tailor made for the sector with streamlined regulation. How far it delivers on its promise will depend heavily on the revised regulations which are still awaited. The 2008 draft regulations met strong criticism partly for their complexity and a tendency to fall back on corporate style regulation and partly because they approached promoting compliance by prescribing penalties for the charity's trustees. Hopefully the new regulations will take the criticisms on board and provide a governance structure which does not get in the way of, or distract from, the effective delivery of a charity's mission.

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### Testamentary capacity

The recent case of *In the Estate of George Douglas Key [2010] EWCH 408 (Ch)* appears to have extended the test of testamentary capacity to make a Will, which was established by the decision in *Banks v Goodfellow (1870) LR 5 QB 549*.

George Key was a farmer. He had been married for 65 years and had four children. In 2001 he made a Will which divided the bulk of his estate equally between his two sons. George's wife died in 2006 and, the week after her death, George proceeded to make a new Will which divided the majority of his estate equally between his two daughters (one of whom had made arrangements for him to prepare the new Will). George's sons sought to challenge the 2006 Will on the grounds that their father lacked the necessary testamentary capacity at the time of making it and/or failed to know and approve the contents of it.

George was seen by his GP shortly after the death of his wife, who described him as being "high risk because he was so dependant on his wife". However, the GP had not been asked to consider George's capacity to make decisions, at that time; this was an assessment he was asked to make some four months after the execution of the 2006 Will.

Evidence from family, friends and experts established that George was showing signs of diminished mental capacity at the time of making

on the ground of lack of capacity, stating that the testator had been "simply unable during the week following his wife's death to exercise the decision-making powers required of the testator". Mr Justice Briggs held "that such a conclusion involved a slight development of the Banks test, taking into account decision-making powers rather than just comprehension".

In conclusion, when considering if a person has the necessary capacity to make a Will, there is now a need to look not only at a person's understanding, but also at that person's ability to make decisions. It will be important for solicitors to continue to take detailed contemporaneous notes of a testator's instructions for a Will and to arrange for a medical practitioner to examine an elderly or infirm testator with a view to confirming whether he has capacity to make the Will. It will also now be important for solicitors carefully to consider whether a person who has recently been bereaved has capacity to make decisions as to how he wishes to deal with his estate and to consider involving a medical practitioner in this assessment.

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## Are volunteers protected?

As most charities will already be aware, the question of whether volunteers qualify for protection against unlawful discrimination has always been somewhat of a thorny issue. However, a recent decision of the Court of Appeal may help tip balance in the favour of the charity.

The Court of Appeal held last month, in the case of *X v Mid Sussex Citizens Advice Bureau*, that in certain circumstances, volunteers will not be protected under the disability discrimination legislation. The case concerned 'X', who volunteered for the Citizens Advice Bureau for 4 to 5 hours per week. She had signed a 'volunteer agreement' (although the document stated that it was "binding in honour only" and "not a contract of employment"). After some time volunteering on this basis, she was asked by the CAB to cease to attend as a volunteer and subsequently brought a disability discrimination claim.

The Court of Appeal's decision was that the volunteer in this case did not qualify for protection against disability discrimination (and it was noted that if she could establish that she was protected against disability discrimination, she would also be protected against unlawful discrimination on other grounds). Key factors in their decision making process were the fact that she was not remunerated for her volunteering work, she was under no legal obligation to attend work (and frequently did not attend on the days when she was expected),

and also that the CAB did not give volunteers preferential treatment in selecting who to appoint into paid posts (therefore preventing the volunteering arrangement from amounting to an 'arrangement' for the purposes of deciding to whom to offer employment, which would mean that anti-discrimination law applied). Although the decision was made in respect of a claim brought under the Disability Discrimination Act 1995, it would apply equally in respect of a claim under the Equality Act 2010.

The Court of Appeal did make it clear that volunteers come "in many shapes and sizes and it cannot be assumed that all will have the same status in law". As such, it seems that each case will still turn on its own particular facts. Therefore, although the decision is helpful, charities are still going to be uncertain about their potential liabilities to volunteers.

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Kylie has recently joined Henmans and advises both employers and employees on a wide range of employment issues, from providing day to day HR advice to corporate clients to advising senior executives on exiting a business.



## Public benefit – a sharper focus?

Charities will be familiar with the renewed emphasis on public benefit brought by the Charities Act 2006. They should now be in the routine of reporting on public benefit in their annual accounts. However, the area continues to be contentious and in the coming months will be looked at in some detail by the courts.

The area which has attracted the most interest in the press has been the position of independent schools, and by extension, fee-charging charities in general. The Independent Schools Council brought judicial review proceedings against the Charity Commission's guidance to fee-charging charities. This focused on whether trustees had a positive obligation to provide benefits to the whole of a beneficial class and whether the Charity Commission was right to disregard 'wider' benefits given by the charities. The judicial review proceedings have now been supplemented by a request by the Attorney General for the courts to consider a number of specific scenarios affecting fee-charging schools. The two sets of proceedings should come before the courts in May. They should bring into sharp focus both the general principles affecting public benefit where fees are charged and also how far a range of specific potential solutions (in particular means tested bursaries sharing facilities with state schools and community groups) can help in determining whether an independent school gives public benefit.

***“The key thing to bear in mind is their statutory obligation to keep a sharp eye on the Charity Commission’s general guidance on public benefit whenever they exercise a power or duty.”***

The Attorney General has also made a request for the courts to clarify the law in another area – benevolent funds. Some 1400 charities are affected, 90% of them with Masonic origins. The bulk of the remainder are charities set up by employers to relieve hardship among

current or past employees and their families. The general rule has long been that a body cannot be charitable where beneficiaries are linked by a 'private nexus'. However, trusts for the relief of poverty have always been treated as an exception to this rule, with the result that so

called 'poor relative' charities and charities for the relief of hardship among former employees of a particular employer have long been regarded as charitable notwithstanding the clear private nexus. The attorney general's request should clarify the anomalies in this area and also give a pointer to how far modern courts will go in re-examining some of the long standing principles of charity law.

These developments will affect a significant number of charities, but only a minority. For most, the key thing to bear in mind is their statutory obligation to keep a sharp eye on the Charity Commission's general guidance on public benefit whenever they exercise a power or duty.

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