

AUTUMN 2011

# CHARITY & SOCIAL ENTERPRISE LAW UPDATE



BATES WELLS & BRAITHWAITE LONDON LLP

## IN BRIEF

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View from the Lords. **Andrew Phillips** has long been championing the interests of the voluntary sector, including now in the Review of the 2006 Charities Act. Page 5

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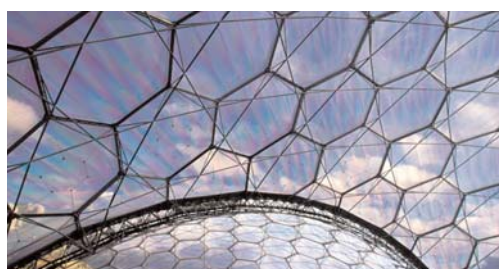
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### Front Cover: Eden Project

As advisers to the Eden Project, we have helped this charity with a range of commercial work, including restructuring and financing.

To learn more about the Eden Project please visit [www.edenproject.com](http://www.edenproject.com)

## COMMENTS

Please contact us with any comments or suggestions.

Previous updates are available at: [www.bwbllp.com/Updates](http://www.bwbllp.com/Updates)

Let us know if you would like to add a name to the distribution list for this or other departmental updates; if your contact details have changed; or if you would prefer to receive our update by post/email. Contact the Marketing Department at [marketingdepartment@bwbllp.com](mailto:marketingdepartment@bwbllp.com)

## VIEW FROM THE SENIOR PARTNER

The relationship between the State, business and the voluntary sector is shifting. Whatever one may think about the Big Society rhetoric, there is no doubt that throughout the developed world people are beginning to look to new solutions to social problems and to go beyond private or public sector monopolies. I was recently asked to attend the Tällberg Forum in Sweden to discuss the way in which new hybrid legal models could combine charitable or social purpose, state money and private sector energy. One of the senior Swedish Government officials whom I was working with said, *'We have realised that the State is very good at raising money but not so good at spending it. We want to find new ways of doing that.'*

BWB has always worked at the intersection of the public civil society and business. Our advocacy of the community interest company (CIC) is testimony to that. If new ways are to be found to finance social provision then charities, co-operatives and social enterprises need to be assisted to raise finance in new ways. Hence, our proposal to Government recommending the establishment of a special regime for social investment is vital – see Luke Fletcher's article on page 9. We have seconded Luke Fletcher to the Cabinet Office for the next six months for two days a week to work on social investment and related legal and regulatory reform issues. The Cabinet Office is also working on another BWB initiative, the Social Enterprise LLP, which aims to be precisely the type of hybrid vehicle combining social purpose and private sector expertise/money that was discussed in Sweden.

Public procurement is one of the key factors in the reconfiguration of the State and the Government's desire to see employee owned mutuals (EOMs) take

over the running of State activities. The State procures £75bn worth of services every year. But while EOMs are exposed to the full blast of public procurement rules they will get nowhere. Unfortunately the Open Public Services White Paper, which Julian Blake reviews (page 8), is a damp squib. More encouraging is the recent Government announcement that it is campaigning for simplification of the public procurement regime including allowing temporary exemptions for EOMs. While we wait to see if these proposals make it into law, there is much that can be done within existing legal structures and BWB is developing interesting ways to work with public procurement rules to help EOMs transition from State control to independence. BWB is working on this with the Mutualisation Taskforce – itself spawned by the Cabinet Office – and two Primary Care Trusts (PCTs).

Finally, we are delighted that we have been instructed to work on the establishment of what has been known as the Big Society Bank, the investment fund that will apply money from the Merlin banks and from unclaimed assets in England to invest in social enterprises and environmental projects. We believe that increasing the availability of social investment finance will be crucial to the Government's ambitions to develop more 'payment by results' contracts. These present charities, in particular, with huge challenges because of their lack of large cash balances to fund such contracts. The availability of appropriate finance for charities and social enterprises to win these contracts is therefore vital. The Peterborough Social Impact Bond, which BWB also worked on, has been given much publicity.

All in all we continue to be involved in innovative and vital legal work combining social purpose with commercial and financial sophistication.



*Stephen Lloyd.*

**Stephen Lloyd**  
Senior Partner

*'All in all we continue to be involved in innovative and vital legal work combining social purpose with commercial and financial sophistication.'*

## BWB NEWS AND EVENTS

BWB is one of the lead sponsors of Charity Finance's **Charity Property Conference on 17 October**. BWB's Property team, along with other experts from the charity and commercial sectors, will present their strategic outlook for the property market, providing property managers with the insight to make the most from their charity's property portfolio. For bookings and more information, please see [www.civilsociety.co.uk/events/conferences/content/9865/charity\\_property\\_conference](http://www.civilsociety.co.uk/events/conferences/content/9865/charity_property_conference)

We are delighted to be once again co-hosting the annual **NCVO Trustee Conference on 31 October**. Several speakers from BWB will be involved at this very popular conference, which is a must-attend event for anybody who sits on, or works with, trustee boards. To book online, please visit [www.ncvo-vol.org.uk/Trusteeconference2011](http://www.ncvo-vol.org.uk/Trusteeconference2011)

BWB's newly launched Faith-Based Group is running a series of breakfast seminars on issues of particular interest to faith-based organisations:

**Seminar 1: Tuesday 4 October – Equality Act 2010**

**Seminar 2: Thursday 3 November – Immigration and employment status**

**Seminar 3: Tuesday 6 December – Top issues for faith-based organisations (including governance, tax & property matters)**

Please see page 10 of this Update for more information on our Faith-Based Group.

BWB has a range of additional seminars scheduled in the coming weeks, including **Charity Text Fundraising – Using text and the mobile internet for fundraising with the Mobile Data Association on 29 September** and **Embedding Sound Governance During Challenging Times in association with MemberWise on 10 October**.

OnBoard, BWB's governance development service, is now in its fifth year of providing training and support to charity boards and trustees. The autumn programme is set to include informative and useful seminars such as a rerun of the **Specialist Governance and Leadership Session for Chairs and CEOs (17 November)** and **Governing and leading effectively; strategies, tools and techniques that work (24 November)**.

As part of our ongoing support of **Remember a Charity Week (12 to 18 September)**, we are hosting an event during this year's initiative. This event, a free training session on best legal practice in relation to charity legacies – principally aimed at solicitors – to encourage charitable legacy giving, will take place on Tuesday 13 September 12.30pm to 2.30pm at our offices. If you would like more information, please contact Laura Soley on [l.soley@bwbllp.com](mailto:l.soley@bwbllp.com)

For details on any of these events, please email [seminars@bwbllp.com](mailto:seminars@bwbllp.com) or visit [www.bwbllp.com/seminars](http://www.bwbllp.com/seminars)

## VIEW FROM THE LORDS

Since receiving a life peerage in 1998, BWB's founder Andrew Phillips – Lord Phillips of Sudbury – has been championing the interests of the voluntary sector in the House of Lords.

Andrew put forward well over 100 amendments to what became the Charities Act 2006 – the biggest overhaul of charity law in 400 years. He championed the requirement for the Act to be reviewed after five years – a process due to start in November 2011. It is very rare for legislation to be formally reviewed in this way. But Andrew was concerned that the new Act would create a mass of additional bureaucracy for charities, which would make their functioning more difficult, especially for those with no paid staff.

The Review must address excepted charities, public confidence in charities and, in line with Andrew's concerns, the level of donations and the willingness of individuals to volunteer. The Review will also cover the changes to the rules on public benefit made by the 2006 Act. This will coincide with judgment in the Charity Tribunal cases on public benefit initiated by the Independent Schools Council, which were heard in May.

BWB, in common with many in the sector, will be seeking reform of the scope of the

Charity Tribunal's jurisdiction to hear appeals from decisions of the Charity Commission. The Tribunal can only deal with decisions on matters specifically listed in the 2006 Act. The net effect of this limitation has been that in a significant number of Tribunal cases the appeal has been dismissed on technical grounds: because the Tribunal did not have jurisdiction to hear the case. This casts serious doubt on the Tribunal's ability to provide an effective avenue of appeal.

In the meantime, Andrew has secured confirmation that a related move – the appointment of the Secretary of State for Education as principal regulator for academies and other exempt charities – will be reviewed in 2014. As reported in our Education focus on page 12 of this Update, Andrew expressed concerns in the House of Lords that this move could threaten the independence of these charities.

Andrew has also been active in the consolidation of charity law in the Charities Bill 2011, which will bring together the 1993 and 2006 Charities Acts. In the House of Lords debate on the Bill, he obtained concessions on clarifying important parts of the Bill. The Bill is now at committee stage and is expected to become law before the end of this year.



**Andrew Phillips**  
Consultant  
BWB's founder is a senior statesman in charity law.

**BWB will be contributing to the Review of the Charities Act 2006 and we will be reporting on this in future Updates. If there are any particular areas that you would like to see covered, please contact your usual adviser at BWB or Christine Rigby on [c.rigby@bwblp.com](mailto:c.rigby@bwblp.com)**

# FOSTERING PHILANTHROPY

**We are now starting to see what the Government's commitment to encouraging philanthropy will mean in practice.**

## Simon Steeden examines the developments and finds room for improvement



**Simon Steeden**

Associate  
Simon Steeden is an associate in the Charity & Social Enterprise department. He provides general charity, corporate and commercial advice, with a particular focus on social finance, philanthropy and charity taxation.

**'We continue to have concerns about the unnecessary burden of compliance with the new rules'**

As part of the Big Society agenda, the Government is taking steps towards fostering a stronger culture of philanthropy; encouraging the giving of time and money to charity. This year's Budget, together with the Giving White Paper published in May, have provided the first indications of what this will mean in practice.

**The tainted donations rules**

The tainted charity donations rules were introduced by the Finance Act 2011, which was given Royal Assent on 19 July. The rules are designed to replace the much-criticised Substantial Donor Rules (SDRs) as a mechanism for HMRC to prevent charities from being used by donors to obtain tax advantages (although a transitional period means the SDRs will continue to have effect for two years from May 2011).

The replacement of the SDRs is welcome. Under the SDRs certain 'relevant transactions' with 'substantial donors' resulted in a tax charge to the recipient charity. The rules were unnecessary in light of existing charity tax rules, caught unintended transactions and burdened charities with unreasonable monitoring obligations.

The new rules are based on a purpose test intended to catch donations only where they are made to obtain a private financial gain. They look at whether a donation is linked to 'arrangements' that aim to provide a direct or indirect benefit to the donor or a connected person (beyond those acceptable under the Gift Aid

regime). Where there is a benefit of this type, the new rules ask whether the donation and arrangements would have been entered into independently of one another.

In many respects, the new rules are a significant improvement on the SDRs. In particular, the donor replaces the charity as HMRC's principal target for repayment of incorrectly claimed tax. The charity will be jointly and severally liable with the donor only if it was aware that the donor entered into the arrangement with the purpose of obtaining a financial advantage.

However, we continue to have concerns about the unnecessary burden of compliance with the new rules. We are yet to be convinced that any anti-avoidance legislation was necessary to replace the SDRs. Existing charity tax law, including the Gift Aid benefits rules, should be sufficient to deal with most of the mischief the new rules are intended to tackle.

**Gift Aid**

Administration of Gift Aid on small donations of £10 or less is to be relaxed (up to an overall limit for a charity of £5,000 per year), allowing the charity to claim Gift Aid without obtaining Gift Aid declarations or other paperwork from donors. This change is likely to be of particular benefit to charities carrying out street collections and other small fundraising initiatives.

The new scheme is expected from April 2013, but will only be open to charities

that have been registered with HMRC for Gift Aid for at least three years and have a good compliance history.

The Finance Act also increased the maximum benefits to donors that are permissible for Gift Aid qualification. The new limits apply to any gifts made on or after 6 April 2011. Aimed at encouraging major donations to charity, the maximum limit on benefits is increased from £500 to £2,500 or (if less) 5% of the gift.

In contrast to these beneficial new measures, the end of transitional relief on Gift Aid claims for donations after 5 April 2011 was unwelcome, though long anticipated. The value of Gift Aid claims by charities has now fallen to 25p in the pound from 28p. Charities will continue to be able to benefit from the transitional relief on donations received up to 5 April, provided the Gift Aid claim is made within two years.

#### **Reduction in inheritance tax for charity donations**

From April 2012, it is proposed that the rate of inheritance tax will be reduced from 40% to 36% for individuals leaving 10% or more of their estate to charity. Although it is questionable how much of an impact this will have on the majority of charities faced with the impact of a VAT increase, spending cuts and the end of transitional Gift Aid relief, the change could be a welcome boon to those charities reliant on legacy income and accords with the Government's professed intention to foster a culture of giving.

#### **Encouraging volunteering**

The Government has also announced a number of proposals aimed at increasing the giving of time by volunteers. The Social Action Fund will support new models, such as 'complementary currencies' that give people credit for volunteering, and the Government has asked Ministers and civil servants to lead by example – by increasing their own volunteering.

#### **Future proposals**

The Government has announced a number of consultations intended to result in future proposals to benefit UK philanthropy. In particular, a consultation on possible tax relief on gifts of pre-eminent works of art is currently open and HMRC has invited ideas from the sector as to how to encourage the take-up of payroll giving.

#### **FIND OUT MORE**

**For general advice on tax-efficient fundraising, please contact Simon Steeden on [s.steeden@bwbllp.com](mailto:s.steeden@bwbllp.com) or your usual BWB contact.**

**You can download the Giving White Paper at [www.cabinetoffice.gov.uk/resource-library/giving-white-paper](http://www.cabinetoffice.gov.uk/resource-library/giving-white-paper)**

**'The Government has announced a number of proposals aimed at increasing the giving of time by volunteers ... and ... has asked Ministers and civil servants to lead by example'**

# PUBLIC SERVICE REFORM – PLUS ÇA CHANGE?

The Open Public Services White Paper was published in July.

**Julian Blake asks whether it heralds a new regime – or does it leave too many familiar questions unanswered?**



**Julian Blake**

Partner and Joint Head of Charity & Social Enterprise department Julian has been a Partner at BWB since 1999 and is a leading practitioner in charity law. The latest edition of *Chambers UK* rated him as ‘extremely pragmatic and vibrant’ and ‘very influential in international charity work’.

**‘Our experience of the past 25 years of public service reform initiatives is that the idea of operating the current system “properly” is rarely given sufficient attention’**

**FIND OUT MORE**

You can read and respond to the Open Public Services White Paper on the Open Public Services website at [www.openpublicservices.cabinetoffice.gov.uk](http://www.openpublicservices.cabinetoffice.gov.uk)

The White Paper consolidates much familiar Government rhetoric and policy – some of it inherited from the previous regime, some linked to the Coalition motifs of localism and the Big Society, some describing reforms already underway.

The principles for public service reform are ‘choice, decentralisation, diversity, fairness and accountability’. This generally means:

- individuals managing their own service budgets, by purchasing in a market of diverse suppliers;
- community services delivered by community organisations; and
- services that cannot be devolved being commissioned by the public sector from a market of diverse suppliers, who are paid by results.

There is recognition that residual state intervention is required to promote equal access for the disadvantaged to public services. Overall this is described as bottom-up reform.

Although such a policy paper, ranging across all types of public service, could not describe detailed implementation policy, it prompts familiar questions. What are the implementation means and mechanisms? Where is the capital for new market suppliers, particularly in these austere times? What assurance is there that the detail of transition and reform can raise the standards of current bureaucratic processes?

From a practical perspective, past lessons in reform are rarely consolidated and systemised, so the new is always, yet again, de novo, and reform initiatives tend to focus on the grand view of the horizon, rather than the mundane miles of travel to

reach it. There is some ideology in the current vision (the centrality of choice and competition), but it is broadly a consensus view (diversity, fairness, accountability).

Observations on the causes of the need for reform are absent. Our experience of the past 25 years of public service reform initiatives is that the idea of operating the current system ‘properly’ is rarely given sufficient attention, as more striking effects are pursued in repeated policy change.

Also absent are references to the current imperative to cut public service spending, while delivering this vision of reform. Equally unremarked is the connection between stability in funding and contract duration and the target efficiencies.

Finally, the Paper does not seek to articulate the social values at the heart of public services and how they are to be protected and enhanced. There are few links to declarations elsewhere of Government support for social enterprises, co-operatives, charities and voluntary groups, or the mobilisation of the Big Society. Instead the Paper implies that public benefit in public services is to be protected essentially by the market principle. Competitive social benefit organisations may have the opportunity to set the standards that private organisations must also reach, but there is much work to be done for the animating spirit of the public benefit sector to drive this reform.

There is now a consultation period for specific questions asked in the Paper, which may allow for the expression of such general responses to this general policy.

# SOCIAL FINANCE – LEGAL REFORM

**BWB is leading the call for a new regime which we believe would encourage investment for social as well as financial benefit.**

BWB has published a new report, 'Investing in Civil Society', recommending the establishment of a special regime for 'social investment', or investment in civil society for social as well as financial returns. One of the key proposals in the report, which was funded by NESTA, is the establishment of a new Social Finance Regulator.

Our view is that there should be a special regulatory regime for social investment for the following reasons:

## Social benefit

Third sector organisations, such as charities and social enterprises, play a vital role in communities throughout the UK by:

- delivering socially beneficial goods and services;
- promoting collective action and community responsibility; and
- generating jobs and wealth in communities that really need it.

## Diversification of funding

There is an urgent need to help charities and social enterprises to become less reliant on state funding and to diversify their resource base, given recent public spending decisions. Investing in social enterprises is attractive to a growing number of investors.

## FSA authorisation a barrier

Under current financial services legislation, charities and social enterprises are unable to raise investment from the general public unless an investment offer is issued or approved by a person authorised by the Financial Services Authority.

FSA authorisation is prohibitively expensive for most modestly sized charities and social enterprises, which struggle to understand and conform to financial regulation.

As a result, the current system prevents ordinary members of the public from investing in civil society and this is choking the social investment market.

## Opportunity

There is a window of opportunity. Financial services law is currently being reformed and HM Treasury intends to introduce legislation on financial regulation reform to Parliament shortly. The passage of legislation is expected to take around a year and it is anticipated that the new regulatory framework will be in place by the end of 2012.

## Get involved

If you would like to join us in calling for a new legal regime for social finance, please:

- ask your MP to write to Mark Hoban MP, Financial Secretary to the Treasury; and
- write to the following members of the pre-legislative scrutiny committee: Nicholas Brown, David Laws, Peter Lilley, David Mowat, George Mudie, David Ruffley, Baroness Drake, Lord Newby, Lord Skidelsky, Lord McFall of Alcluith, Lord Maples and Baroness Wheatcroft.

You can use the template letter on the BWB website:  
[www.bwbllp.com/News/Detail.aspx?NewsID=187](http://www.bwbllp.com/News/Detail.aspx?NewsID=187)

## Luke Fletcher outlines the key recommendations in a new BWB report



### Luke Fletcher

Associate  
 Luke advises on a wide range of social finance transactions and is the author of the 'Investing in Civil Society' report commissioned by NESTA.

**'The current system prevents ordinary members of the public from investing in civil society'**

## FIND OUT MORE

'Investing in Civil Society – a framework for a bespoke regulatory regime' is available on NESTA's website at [www.nesta.org.uk](http://www.nesta.org.uk)

A longer article on the release of the report is on our website here: [www.bwbllp.com/News/Detail.aspx?NewsID=181](http://www.bwbllp.com/News/Detail.aspx?NewsID=181)

# CHALLENGES FOR FAITH-BASED ORGANISATIONS

While faith-based organisations differ in their beliefs, they share legal and governance concerns.

## Leona Roche introduces BWB's Faith-Based Group



### Leona Roche

Associate

Leona is a member of BWB's Charity & Social Enterprise department and a founder member of the Faith-Based Group.

BWB advises a wide range of charities and voluntary organisations established to advance a variety of faiths. These groups often face similar legal concerns, particularly issues around the Equality Act, governance and immigration. In response, BWB has established a cross-departmental Faith-Based Group, consisting of solicitors from our various departments who have a particular expertise in advising faith-based organisations. A series of seminars is planned for the autumn: please see page 4 of this Update for more information.

The Equality Act, for instance, continues to be an area that faith-based organisations are getting to grips with and seeking to understand, so that they can comply with its requirements whilst remaining true to their values and beliefs. The revised guidance on the Equality Act published by the Charity Commission at the end of August includes more practical examples than the previous guidance but for many faith-based organisations there remain unanswered questions.

In the meantime, the Act has been considered by the Charity Tribunal in the latest in a series of appeals from the charity Catholic Care (Diocese of Leeds). Catholic Care wishes to change its objects in a way that would permit it to restrict its adoption services to heterosexual prospective adoptive parents only. The Charity Commission has refused the amendment. In April 2011 the First-Tier Tribunal (Charity) refused Catholic Care's

appeal from that decision. Catholic Care argued that the restriction was permitted under the legislation 'as a proportionate means of achieving a legitimate aim', namely increasing the number of children placed with adoptive families. The Tribunal accepted that this was a legitimate aim for the purposes of the Act, but not, on the evidence before it, that the aim would be achieved by the charity's proposed approach.

Catholic Care now has permission to appeal to the Upper Tribunal.

To find out more, you can attend our seminar for faith-based organisations on the Equality Act on 4 October at BWB, further details on page 4 of this Update.

**For more information on the range of services we offer, please visit our website at [www.bwbllp.com/Departments/BWB-Faith-Based-Group.html](http://www.bwbllp.com/Departments/BWB-Faith-Based-Group.html)**

## FbRN's Jane Winter highlights some of the key findings on quality standards



FAITH BASED  
**FbRN**  
REGENERATION  
NETWORK uk

### FIND OUT MORE

The research findings are available on the FbRN website [www.fbrn.org.uk](http://www.fbrn.org.uk)  
If you would like to hear more, please contact Jane Winter at [jawinter@fbrn.org.uk](mailto:jawinter@fbrn.org.uk)

BWB recently took part in research by the Faith-based Regeneration Network (FbRN), into the use of quality standards by faith-based social action groups.

Faith Based Social Action (FBSA) is alive in every community, rooted in a faith commitment and carrying distinct values of respect, hospitality and holistic care. However, the necessary governance, management, policies and procedures required in our current culture can drain the resources of these projects. Research conducted by FbRN examined why FBSA projects find it hard to engage with these requirements.

The research used and piloted VISIBLE: a quality standard tool produced by

Community Matters for small community groups and endorsed by the Charity Commission.

The top three findings are:

- The value of dedicated support. Each project had a mentor and received regular practical support from FbRN.
- FBSA groups were willing to demonstrate professionalism and use a quality standard tool, but this was often hampered by a lack of resources.
- The tool enabled the groups to reassess their governance and operational arrangements against their faith values, resulting in stronger, more confident projects.

## IMMIGRATION

### Consultation on changes to the immigration rules

In June 2011, the Government published a consultation paper confirming its intention to introduce changes to the law that will break the link between employment and settlement in the UK for non-European Economic Area skilled workers who are sponsored by their employers to come to the UK to live and work.

Under the current system, skilled workers from outside the European Economic Area can be sponsored by their employer to come to the UK to live and work in an occupation designated by UKBA as 'shortage occupation' or a position which cannot be filled by a resident worker under Tier 2 (General) of the Points Based System (PBS) for five years. After that time, the worker has an automatic right to apply for settlement in the UK.

If the proposed changes are implemented, Tier 2 will be re-classified as a 'temporary' visa route, which means that Tier 2 workers will be required to leave the UK after five years. They will no longer be entitled to apply for settlement, unless they fall within the limited proposed concessions for occupations with a particular economic or social value to the UK, such as ministers of religion and sportspeople or those earning over £150,000 per year.

If implemented, these changes are likely to have significant consequences. It may become more difficult for employers to attract workers with a particularly desirable skill set to come to the UK if the prospective employee knows that he or she will not be able to settle here eventually. Employers may need to

reconsider their recruitment strategies if they know that staff they sponsor from outside the EEA will be required to leave the UK after five years, taking the knowledge and skills they develop elsewhere.

The consultation also proposes changes to Tier 5, the route for non-EEA workers to come to the UK temporarily for primarily non-economic purposes, including volunteering for charities. Currently, a Tier 5 volunteer can bring their dependents, including their spouse or unmarried or civil partner and children, with them to the UK, but the consultation proposes the removal of this right. Non-EEA volunteers may be deterred from taking up opportunities here if it will mean leaving their family behind, and ultimately charities in the UK will lose out.

The consultation has now closed and BWB submitted a response. We now await the Government's response to the consultation responses.

The proposed changes are the latest in a series of amendments to the immigration rules, including the introduction of the Annual Limit or 'cap' on Tier 2 (General) workers, which have made it more difficult for migrants to come to the UK and for employers to ensure they have the personnel they need. A consultation on family migration was published in July 2011: if the changes it proposes are implemented the options available to relatives of British citizens will be restricted further. The consultation closes on 6 October.

If you would like to discuss any of these changes and how they affect you, your family or your organisation, please contact Philip Trott on [p.trott@bwblp.com](mailto:p.trott@bwblp.com)



**Philip Trott**  
Partner & Head of Immigration department  
Philip's high-profile immigration casework has gained him recognition as a leader in this area, with *Chambers UK* commending him for 'his experience in handling "the more unusual immigration cases"'.  
*Chambers UK*



**Sarah Payne**  
Trainee Solicitor  
Sarah is a trainee solicitor in the Immigration department, where she assists with a range of casework.

### FIND OUT MORE

Current and past consultation papers are available on the UK Border Agency's website at [www.ukba.homeoffice.gov.uk/policyandlaw/consultations](http://www.ukba.homeoffice.gov.uk/policyandlaw/consultations)

To request a copy of BWB's employment-related settlement consultation response please contact Sarah Payne on [s.payne@bwblp.com](mailto:s.payne@bwblp.com)



### **Mary Groom**

Partner

Mary is a partner in the Charity & Social Enterprise department specialising in Education. She works with academies and free schools, local authorities, education charities and maintained schools.

## EDUCATION

Mary Groom explains the recent developments in the regulation of educational charities.

### **Exempt charity status for schools and academies**

From 1 August 2011 all academies – multi-academies and single, new and old – became exempt from registration with the Charity Commission. Going forward, academies will be regulated for charity law purposes by the Secretary of State for Education as ‘Principal Regulator’.

The regulations necessary to achieve this were passed by Parliament, despite some resistance voiced by BWB’s Lord Phillips in a House of Lords committee hearing. He argued that having a Minister as a charity regulator would inevitably involve conflicts of interest in the management and regulation of the charities, and that the Department for Education lacks sufficient knowledge of charity law to be an effective regulator. It remains to be seen if the Secretary of State, as principal funder and charity regulator, will indeed be in a position to manage the inevitable conflicts of interest appropriately and effectively. At the time of going to press, the proposed memorandum of understanding between the Charity Commission and the Secretary of State to ensure effective co-operation on charity law matters had not been published.

The Charity Commission has begun to remove the 170 academies currently on its register. Each academy concerned will be notified by the Charity Commission when that happens. In addition, exempt charity status has been re-conferred on the governing bodies of sixth-form colleges, foundation schools and foundation special schools, and voluntary-controlled and voluntary-aided schools.

Charitable status is not relevant for the per pupil grant funding distributed to such schools by the local authority, which remains classified as public funding. Recent guidance has been issued by the Charity Commission on regulation of academies at: [www.charity-commission.gov.uk/Charity\\_requirements\\_guidance/Specialist\\_guidance/Education/academy.aspx](http://www.charity-commission.gov.uk/Charity_requirements_guidance/Specialist_guidance/Education/academy.aspx)

Unlike registered charities, exempt charities are not required to comply with many of the provisions of the Charities Act 1993 and are subject to significantly less regulation and oversight by the Charity Commission. For example, the restrictions on the disposition and mortgaging of charity land and the requirements to disclose charity status on various documents under the Act do not apply to exempt charities. However, the Charity Commission does have powers to investigate exempt charities in consultation with the Principal Regulator.

### **FIND OUT MORE**

**More information on exempt status for academies is on our website here:** [www.bwbllp.com/Updates/Exempt-Charity-Status-for-Schools.html](http://www.bwbllp.com/Updates/Exempt-Charity-Status-for-Schools.html)

### **Welsh Universities register with the Charity Commission**

Unlike academies, Welsh universities, which were previously exempt charities, have now lost their exempt status. Prior to the implementation of the Charities Act 2006 Welsh universities were accountable to their funder, the Higher Education Funding Council for Wales, in relation to charity law issues. They now need to register with the Charity Commission.

So far eight Welsh universities have registered with the Commission, with the

most recent addition being Glyndŵr University. Once all Welsh universities are registered, income from registered charities in Wales is expected to exceed £2.2bn – more than double the current income.

Apart from a named few, universities in England remain exempt from registration and continue to be regulated by the Higher Education Funding Council for England.

**BWB Education Forum**

In May and July 2011 the BWB Education Forum held roundtable lunches on the Special Educational Needs (SEN) Green Paper and the draft revised School Admissions Code.

The SEN Green Paper roundtable was attended by experts in the field of special educational needs and disability, including Brian Lamb, the Chair of the Lamb Inquiry into parental confidence in SEN; Jane McConnell, Chief Executive of IPSEA; and Anna Tylor, Chair of Dyslexia Action.

Alan Parker, Schools Adjudicator, led the roundtable discussion on the draft revised School Admissions Code.

**FIND OUT MORE**

**The Summary Notes of the roundtable discussions are available on the BWB website at:**  
[www.bwbllp.com/Departments/Education-Forum.html](http://www.bwbllp.com/Departments/Education-Forum.html)  
**Both summary notes were submitted to the DfE consultations.**

**Free Schools Workshop**

In conjunction with the New Schools Network, the BWB Education team hosted a seminar in June 2011 explaining the constitutional requirements for free schools. The well-attended seminar provided free school proposers with an opportunity to gain a deeper understanding of the company limited by guarantee, the DfE model Articles of Association for free schools and some key governance issues for free school proprietors.

**FIND OUT MORE**

**Answers to all the questions raised during the seminar are now available as FAQs on the BWB website at:**  
[www.bwbllp.com/Files/Publications/FreeSchoolsFAQs.pdf](http://www.bwbllp.com/Files/Publications/FreeSchoolsFAQs.pdf)



**BWB Education**

Our Education team is a cross-department group that has, for many years, provided specialist services to the full range of organisations and individuals within the education sector.

For more information on the range of services we offer, please download our leaflet at [www.bwbllp.com/Publications/Education-leaflet.html](http://www.bwbllp.com/Publications/Education-leaflet.html)

**Considering conversion?**

Schools nationwide are considering conversion to academy status.

BWB's Education team has produced a short document 'Academy Conversion: issues to consider', which will be of interest to governors or staff at schools considering converting to academy status. The guide can be downloaded from [www.bwbllp.com/Publications/Academy-Conversion--issues-to-consider.html](http://www.bwbllp.com/Publications/Academy-Conversion--issues-to-consider.html)

For more information about the conversion process contact Mary Groom at [m.groom@bwbllp.com](mailto:m.groom@bwbllp.com)

### WHAT'S NEW AT THE CHARITY COMMISSION

[www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)



**Tom Ketteley**

Trainee Solicitor

Tom is a trainee solicitor in the Charity & Social Enterprise department.

#### Funding cuts at the Commission

As the substantial cuts to the Commission's budget begin to be felt, it is clear that the Commission will seek to manage the demand for one-to-one interaction through providing additional online guidance and by signposting charities to umbrella organisations.

David Locke, Executive Director for the Commission, speaking at a conference of Independent Examiners, highlighted how the Commission will look to increase charities' self-reliance. Going forward, it will be for trustees to make their own decisions, with less 'hand-holding' by the Commission as the regulator adopts a firmer approach to regulation.

Similarly, the Commission will change how it manages applications for charitable registration and how it deals with requests for the Commission to exercise its wide range of legal permissions. In the past, the approach has been to work with the charity to overcome any problems with the application but the Commission will now expect charities to get it right first time.

#### Commission Customer Service Annual Review

Complaints about the Commission's activities during the year 2010-11 rose, with the majority of complaints relating to decisions about whether the Commission should investigate a charity following a report of concern from a member of the public.

Overall, the number of formal complaints remains very low, with just 185 complaints

from service users during the year. The number of unsolicited compliments about service delivery rose to 4,325.

#### Consortia for the delivery of public services

A new report published by the Commission, entitled 'Consortia for the delivery of public services: the issues for small and medium-sized charities', has found that working in consortia helps charities increase their access to funding and allows for capacity to be built through peer support and resource sharing.

Nevertheless, the report notes that some charities were not fully considering and appreciating the risks involved with working as part of a consortium and that some were entering into consortia arrangements without the board of trustees having considered whether it was right for the charity.

The report includes a checklist that sets out key questions charity trustees should consider before deciding to join a consortium.

#### Be open about the realities of running an effective charity

Speaking at an Action Planning conference, Dame Suzi Leather, Chair of the Commission, called on trustees to be open with the public about the realities of running an effective charity in the 21st century.

In particular, Dame Suzi commented that, unless charity trustees are open about how overhead costs are part and parcel of being an effective charity, the public and funders will fail to understand why charities can't operate on 'thin air and love alone'.

Separately, the Commission has said it will consult on devising a 'good-enough index' of administration costs incurred by charities as part of a wider information strategy being developed by the Commission to improve public confidence in the management of charities.

#### Public benefit

At the time of going to press, we await the outcome of the Independent Schools Council case on public benefit in the Charity Tribunal. In the meantime, Sheffield Hallam University has conducted research into how trustees are reporting on their charity's public benefit in their annual reports, which has been a legal requirement since April 2008.

The research, based on a survey of just under 1,500 annual reports, and discussions with 30 charities, revealed that there is still significant room for improvement in the way the reports record public benefit, particularly among charities with low incomes.

94% of charities surveyed with incomes over £500k either partially or fully detailed their public benefit in their Annual Reports. However, many trustees, particularly in smaller charities, were not familiar with the Commission guidance relating to public benefit, despite it being a reporting requirement for trustees to state they have considered the guidance.

See [www.bwbllp.com/News/Detail.aspx?NewsID=191](http://www.bwbllp.com/News/Detail.aspx?NewsID=191) for BWB's comment on the report.

#### New Guidance

The Commission has published an updated version of its guidance *Charities and Insurance (CC49)*.

The Commission has also updated its online compliance toolkit for trustees, *Protecting Charities from Harm*, including a new chapter on holding, transferring and receiving funds safely, and updating the section on fraud and financial crime following the coming into force of the Bribery Act 2010. The Commission recommends that trustees should have a written policy, practice and procedure in place, in line with Ministry of Justice principles relating to anti-bribery policies, and that a culture of openness and transparency is fostered within the charity, led from the top.

New online resources targeted towards small charities have been published to assist with managing risk.

**Proposed changes to the accounting framework**

The Accounting Standards Board (ASB) is proposing to make changes to the accounting framework, which would affect small and medium-sized charities from 2013. If the proposals are adopted, the impact on most charities will be significant as the Statement of Recommended Practice (SORP) will be updated.

To prepare for the possible changes, the Commission is advising charities to:

- task a trustee or subcommittee with finding out about how planned changes could affect the charity; and
- ask the charity’s professional adviser for advice on the preparations that need to be made.

**TAX AND VAT**



**Bill Lewis**  
 Consultant  
 Bill has expertise in all aspects of taxation affecting charities.

There have been two recent VAT cases that are of interest to charities.

The first involves the well-known employment agency Reed International.

For many years staff agencies could supply staff but only charge VAT on their introduction/administration fees. This was because the contracts they had with customers were for introduction services, and not for the provision of people. Separate employment tax rules meant they still had to pay the staff under PAYE, but that had no bearing for VAT purposes.

HMRC long saw this as a ‘fiddle’, and indeed many years ago took Reed to court over it – and lost. HMRC sulked. They then sought to change the rules on the back of employment law changes so they could charge VAT on the cost of staff as well as the administration fee. There were cries of outrage at the additional cost that the financial and charitable sectors would have to bear. HMRC put off the changes – but then in 2009 implemented them. They were under pressure from the Government to get taxes in to pay the bills.

Reed challenged what HMRC had done saying it was unlawful, and was successful. It was noted in the Tribunal that if the staff were managed and controlled by the organisation they were working for, and not by the agency, then they were not supplied by the agency, and that the contractual arrangements had to back this up.

Given HMRC have got it wrong, then the law reverts to what it was in 2009, so in these cases VAT is only due on the agency administration fee. This means that charities and social enterprises that have used agencies operating in this way since 2009 can ask those agencies to repay the VAT they need not have charged since that time. Organisations should also ask agencies to charge VAT only on their administration/introduction fee in the future.

This is an important case and in these times of austerity could save a lot of money and result in a repayment windfall.

HMRC’s comment on the case is given in their Business Brief 34/2011 published on 24 August: “HMRC ...do not regard Reed as having any wider impact, particularly in relation to the VAT treatment that should apply to employment bureaux operating in the current market conditions and regulatory regime. HMRC’s view of the correct VAT treatment for employment bureaux remains that set out in VAT Information Note 03/09. In essence a bureau acting

as an agent only has to account for VAT on its commission whereas a bureau acting as a principal has to account for VAT on the full amount charged to clients including the temps’ wages and employers’ National Insurance contributions.”

This is a typical reaction from HMRC aimed at trying to put claimants off. If your agents operate in the same way as in the Reed case then you have grounds for a claim.

The second interesting case involves the Bridport & West Dorset Golf Club.

Membership fees of non-profit making sports clubs are not subject to VAT, but fees charged to non-members are subject to VAT.

However the VAT Tribunal ruled that HMRC had misinterpreted the European VAT law, and that the fees charged to non-members should not be subject to VAT.

Golf clubs (and indeed many other sporting clubs) could, in principle, be eligible to claim welcome VAT refunds. HMRC has sought permission to appeal the decision to the Upper Tax Tribunal. In a recent briefing it has indicated that claims for VAT relief and refunds based on the VAT Tribunal decision will be rejected. However, our view is that despite this announcement it may still be worth making claims: please contact me on [b.lewis@bwbllp.com](mailto:b.lewis@bwbllp.com) for advice.

