



GILLESPIE MACANDREW
LAW · PROPERTY · FINANCE

Charity Insight

Legal, risk and business issues
facing charities and their trustees

Winter 2010



Big Society needs big answers

A recent survey of charity trustees found that nearly two-thirds viewed their main priorities as increasing fundraising activity and protecting and growing investment income as the UK economy continues to experience difficult trading conditions and consumers rein in their spending (and donations). The study also highlighted that many charities were actively considering linking up with other charities to improve service delivery and reduce back office administration costs, and more than 40% of trustees reported that they are looking into relocating programmes and resources as a way of saving money.

As the prospects for the Scottish economic situation continue to be uncertain in light of the £1.3bn public spending cuts and one year only spending programme announced by Finance Minister, John Swinney, the full scale of the reduction in spend and the inevitable reduction in public services is likely to hit

hard in 2011–12. The cuts are also likely to result in further increases in public demand for advice and support from charities, many of whom are



Public sector cuts are likely to result in an increase in demand for the services of charities

already feeling the strain from a reduction in income. Our First Minister announced on 20 November that the challenging financial situation is likely to last for the next 12–15 years and he went on to infer that what we are all experiencing at present is likely to become the new normal. A daunting prospect.

Prime Minister David Cameron's much heralded Big Society – pre-election – like many political ideologies has up until now lacked any significant detail, but in essence the pre-election mantra signalled that he expected communities and

charities to 'fill the void' between what the state provides and what community groups and local charities currently provide. In light of

the continued reduction in charity income and public sector 'grants' and contracts values also being cut, we do need to hear more from both the UK and Scottish Governments as to how this void will be filled and how the additional money which will be required to support this change, at least initially, will be made available. We will be discussing this and other significant legal and business developments impacting charities in 2011 at our forthcoming charity seminar on 1st December and we do hope you will be able to join us.

And cognisant of the current pressures around charity income, Charles Fortheringham from our Investment practice and John McArthur, Head of Tax, provide their thoughts on investing in uncertain times and John provides a timely aide memoir on the changes to Gift Aid, which if you don't get the dates right could result in a further reduction in income.

I do hope you enjoy the new look edition and look forward to seeing you on the 1st.

Tom Murray
Head of Charity Law



e: tom.murray@gillespiemacandrew.co.uk
t: 0131 260 7501



Economic outlook and investing for income

With markets still in turmoil about the overall direction of interest rates and the strength of the current economic recovery, charities are being advised to maintain a short duration when allocating funds into the credit markets to maintain income requirements. The opinion of Gillespie Macandrew is that interest rates are more than likely to creep up by the end of 2011 as global economic activity recovers, particularly in Asian and Emerging Markets. This will result in higher prices over a range of commodities and imports coming into the UK.

Unfortunately, the UK gilt market has become less attractive of late due to investors seeking safety in the sector that has pushed prices and yields to levels which are unsustainable. The only value

remaining in the gilt arena is possibly in the long dated index linked sector if investors are prepared to take a view that inflation will become an increasing threat to capital preservation in



The dilemma for charity investing is whether to adjust their risk profile

coming years. We therefore believe that the equity market offers better value in the current environment in that the corporate sector is well placed to maintain or increase dividends with the current yield offered on the all share index of approximately 3%. In addition to this there is the attraction of potential capital

appreciation. The dilemma for charity investing is therefore whether they need to adjust their risk profile to achieve reasonable income returns over the next five years in what is likely to be an ideal

environment for equity investing rather than find fixed income. This is the problem facing most investors.

The alternative solution for more risk averse charities is to maintain focus on the short end of the credit market looking at bonds or money market funds managing portfolios of diverse

government and corporate investments with maturities of less than two years. There are also opportunities to generate income in the international markets.

One solution is to consider a compromise using a mixture of the asset classes (index linked securities, short dated corporate bonds and money market funds, and equities if permitted within the charity's mandate) to achieve a reasonable total return.

Although equities are likely to outperform bonds over the next few years, charities will require to pay attention to the interest rate environment closely over the next two years as there is little question that rates are set to rise in the not too distant future – caveat the bond investor.

How might the proposed removal of the Default Retirement Age (DRA) affect you?

Employers currently enjoy the right to retire any employee aged 65 or over, provided they give at least 6 months prior notice and provided they consider any request by that employee to stay on. This is referred to as the default retirement age (DRA).

Given the UK's changing demographic and the increasing need or desire for many to work beyond traditional retirement ages, the coalition government is committed to phasing out the DRA and in July it published a consultation document setting out its proposals to abolish it. Whilst only just past the consultation stage, it is widely expected that the current proposals will become law in the coming months.

Under current proposals the DRA will be phased out (using transitional arrangements) from 6 April 2011,

and be abolished in its entirety from 1 October 2011.

Once the DRA is abolished, employers will effectively be left with two options in relation to retirement. Firstly, employers can simply refrain from using any particular retirement age and allow employees to remain on for as long as they want or need to, provided they remain capable of doing their job.

Alternatively, in spite of the DRA's abolition, it will still be possible for individual employers to operate their own compulsory retirement age under the contract of employment. However, this can only be used if it can be objectively justified as being a proportionate means of achieving a legitimate aim. Legitimate aims include, for example, economic factors such as the need for efficiency or other factors such as health, welfare and safety.

To pass the proportionality element of the test, the discriminatory effect must be significantly outweighed by the importance and benefits of the aim.

If an employer adopts a particular retirement age for a particular job and an employee objects to it, the question of whether it is objectively justified will ultimately be a question for the employment tribunals. Any employers looking to adopt a compulsory retirement age should therefore ensure they have sound reasons for doing so.

Removal of the DRA will have a significant impact on all employer organisations, and the timing of an upcoming retirement will be crucial. If you are considering retiring an employee now or in the coming months you should take legal advice as soon as possible to ensure you do not fall foul of any new law.

Contact: John Norrie, Associate e: john.norrie@gillespiemacandrew.co.uk t: 0131 260 7671



Employers looking to adopt a compulsory retirement age should ensure they have sound reasons for doing so



Client Spotlight: The Royal College of Physicians of Edinburgh

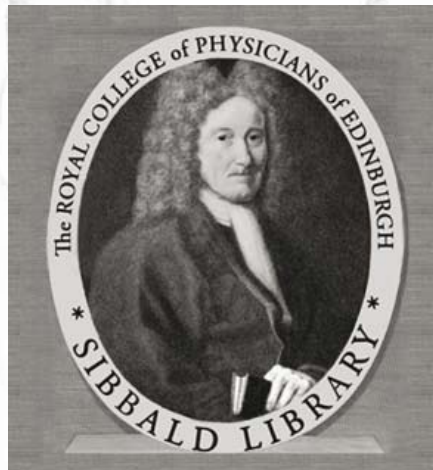
Protecting the Sibbald Library for Future Generations of medical practitioners

IML Donaldson, Honorary Librarian of RCPE

The library of the Royal College of Physicians of Edinburgh was founded in 1682 with a gift of books from Sir Robert Sibbald who had been instrumental in gaining a Royal Charter from Charles II to found the College in 1681. For the next 300 years and more the Library served the day-to-day needs of the Fellows (and latterly the Members) of the College in their medical practice. But with the increasing reliance upon professional journals rather than books, the enormous increase in the number of journals and, latterly, in their price it became impracticable, and unaffordable, for the College and the Library to sustain this service. Fortunately this coincided with the increasing availability of professional literature elsewhere and, in recent years, through electronic means which, in turn has further diminished the need for print-on-paper professional material.

However, the way in which the Library's contents were collected over the centuries when it provided a day-to-day working library for physicians has resulted in the formation of a magnificent collection of historical medical and scientific works, principally books, but including very significant 18th and 19th century manuscript materials. It can provide a snapshot of almost any aspect of medical practice at any time between the 15th and 20th centuries. The organic way in which they grew along with the subject of medicine itself distinguishes these library collections from others put together later post hoc by individual collectors specifically to form a 'collection'. The Library now holds one of the most important historical medical collections in the world.

A few years ago the College decided that the Library should become principally historical, that it should subsume other historical artefacts in the College's care



Sir Robert Sibbald, founder of the Library, after a portrait in the Great Hall, RCPE.

and develop to become a larger historical resource for scholars, for the general public – to whom the Library has always been open – and, of course, for the College's own Fellows and Members. It should direct its activities to conserving, and when possible enlarging, the existing collections and to making them more available to a larger audience, with explanatory material when appropriate. In pursuit of these aims the name was changed to the Sibbald Library after the founder, and a Sibbald Fund set up from the proceeds of the sale of a single book was added to by an appeal to the Fellows. This fund has helped to support the Library's historical activities over the last three years. However, the fund is very modest, has no continuing source of income, and needs to be increased to allow the Library to undertake more conservation and outreach. A considerable lack is a fund to purchase new (usually 'old'!) books, often to fill gaps in the existing collection, which needs to be available at short notice since there is usually no time to raise money when an item appears on

the market. Though the Collections are generally in extremely good condition, continuous expenditure on conservation is needed, the strong-room where the most delicate and valuable works are stored needs to have its temperature control and air-conditioning refurbished, and other storage space needs refurbishment to improve the environmental conditions.

In recent years the Library has been successful in attracting research grants from peer-reviewed competitive applications to provide a cataloguer and is currently recruiting a grant-funded archivist. But there is a need for longer-term funding to continue the production of the electronic catalogue (about 40% complete) and for longer-term work on the archive as well as to support more work on the preparation, presentation and distribution of electronic material and the preparation, mounting and curation of exhibitions.



The first print of the College Arms from Sibbald's *Scotia Illustrata* of 1684. They carry an unusual mark of royal approbation from Charles II – an 'Augmentation of Honour' in the form of what the King described as 'Our Royal Coat of Scotland', the arms of the king of Scots.

Legal aide memoire and looking ahead

Recent Changes

Public Services Reform (Scotland) Act 2010 changes include:

- Rules requiring charities to disclose certain information about themselves on documents extended to Web-sites.
- Charity Trustees now allowed to take out Trustee indemnity Insurance unless this is specifically prohibited by the charity's constitution.
- Reorganisation regulations are extended to restricted funds in certain circumstances.
- OSCR given power to appoint Charity Trustees in certain circumstances.
- OSCR given power to revoke, vary or review directions that it has given.

Finance Act 2010 changes include:

- A new tax definition of the word "Charity".

To fulfil the condition a body must meet the following tests:

- 1 Charitable purposes – the body must be established for Charitable purposes (as defined by the Charity test) only.
- 2 Jurisdiction – the body must be under the jurisdiction of either a UK or an EU court.
- 3 Registration – the body must be registered either with the Charity Commission, OSCR or an equivalent EU institution.

- 4 Management – the persons having the general control and management of the administration of the body must be fit and proper.

There are 2 significant outcomes from these changes. Firstly it will no longer be possible for bodies who have formerly been recognized as charities by HMRC but who were not entered on a Charity Register to obtain tax relief. Secondly it will now be possible for Donors to EU charities to obtain tax relief on donations made to them.

The Equality Act 2010

- Prohibits discrimination on grounds of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation.

These categories are known in the Act as **protected characteristics**. However there are certain exemptions for charities.

A Charity may restrict its benefits to only some people with a shared protected characteristic. However the restriction must be allowed by the document that sets out the charity's purposes ('governing document') and it must be justified for either of the following reasons:

- It helps to tackle disadvantages that particularly affect someone with a

protected characteristic, (for example a charity that helps elderly people with age related problems, or helps people with particular needs resulting from a specific disability); or

- It is for some other reason a fair, balanced and reasonable ('proportionate') way of achieving a legitimate aim.

The Act does not cover other defining characteristics such as residence in a particular geographical area or membership of a particular section of the public. although discrimination on grounds of skin colour is banned.

There are also certain other exemptions for fundraising; religion and belief organisations and schools.

Coming soon

- Scottish Government currently consulting on the Scottish Charitable Incorporated Organisation (SCIOs).
- Charity account thresholds to be raised.
- Fully accrued threshold raised to charities with incomes over £250,000.
- Fully audited accounts will be required for charities with capital over £3.26m or with income over £500,000.
- Gift aid – The Government intends to simplify administration for HMRC.

Contact: Tom Murray, Head of Charity Law e: tom.murray@gillespiemacandrew.co.uk t: 0131 260 7501

Ensure staff are properly trained in handling techniques

Solicitors in the charity sector tend to get lost in the woods of regulation. I lose sleep about annual returns, registration in Scotland for English charities and, in particular, the avoidance of personal liability for trustees – so much so that I sometimes lose sight of the trees – so from time to time it is important to see the charity 'in action'. That can sometimes put a focus on practical issues emanating from the actual running of the organisation.

Let me illustrate by example.

I previously acted for a veterinary charity. As is usually the case in the charity sector, its staff are powerfully driven by the desire to do good. That driver is so strong that the staff achieved miracles over the four or so years that I was involved.

I believe that an understanding of what the charity does on a day to day basis is important, so I arranged to go and see it doing its job 'at the coal face'. I found myself in a local hall. There were urns of tea and sandwiches for those waiting and the charity's staff doing important things. Over the day I was impressed with almost everything. The public were generous with their time and resources and the dedication and enthusiasm of the charity's staff were inspiring.

However, that very enthusiasm led the staff into potential danger. They were lifting heavy weights in confined spaces and working on platforms. Planning to lift a heavy weight, transferring it from person to person and swivelling with it are all

things that need care and a degree of skill. No amount of enthusiasm will cure a bad back. Platforms too can be dangerous. They must be stable and stationary.

If what your organisation does involves manual handling or working at a height it is important that your staff are trained and that training is kept up to date. That is to the benefit of your staff, your charity, your insurers and ultimately those who you intend to benefit by all of your work. An accident, a member of staff or of the public injured, can damage years of carefully nurtured human relationships as well as being costly in time and increased insurance premiums. These are old saws but that day brought them home to me afresh. There must be time for health and safety in all that we do.

Contact: John Stirling, Partner e: john.stirling@gillespiemacandrew.co.uk t: 0131 260 7774



Gift Aid changes

Transitional Relief ends 6th April 2011

Prior to the reduction of the basic rate of Income Tax to 20% in April 2008 it became clear that the amount that Charities would be able to recover under the Gift Aid Scheme would be significantly reduced. Following submissions to the government at the time transitional relief was introduced which allowed Charities to recover 28% of the amount Gift Aided to them. There are no indications that the present government will continue



This will have a significant impact on many charities

the current relief. If they do not charities will only be able to recover 25% of the amount Gift Aided to them after 6th April 2011. This will have a significant impact on many charities in a period when incomes are already declining but needs seem to be increasing. If possible Treasurers should ask donors to make any contributions for 2011 before 6th

April so that tax recoveries under the Gift Aid scheme can be made before Transitional Relief ends.

Fit and Proper Person Test

A new test will apply to any person who controls a charity's finances, not just the charities trustees. Under this new test HMRC will carry out additional checks on a charities 'financial controller' ranging from a basic identity check to a more thorough investigation where the FC has criminal convictions. HMRC could decline to pay any tax reclaimed.

Where charitable funds are misappropriated HMRC may look to recover tax reclaims already paid. Further guidance will be issued shortly on this.

Limits to the number and amount of freestanding Gift Aid repayment claims

The government is to consult on the number and amount of freestanding Gift Aid repayment claims that a charity may submit in any one year. The intention is to simplify the administration of Gift Aid for HMRC. There is also a new standard Gift Aid claim form being developed.

Contact: John McArthur, Partner
e: john.mcarthur@gillespiemacandrew.co.uk t: 0131 260 7521

Partner contact details



John specialises in Wills, Trusts and Executries and has significant experience in all areas of personal tax, tax planning and drafting the associated deeds. John is a member of the Society of Trust and Estate Practitioners (STEP), serving on their Scottish Branch Committee, the Association of Taxation Technicians and an Associate of the Chartered Institute of Taxation. He is therefore one of a few lawyers in Scotland who can call themselves a Chartered Tax Adviser.

John McArthur
Partner

e: john.mcarthur@gillespiemacandrew.co.uk
t: 0131 260 7521



Charles is head of the Investment team and acts as the firm's senior portfolio manager. He has over 30 years of investment experience, including 10 years with Merrill Lynch where he was a Vice President and a Senior Investment Manager advising small companies and high net worth individuals in currencies, commodities and international investing.

Charles Fotheringham
Senior Investment Manager

e: charles.fotheringham@gillespiemacandrew.co.uk
t: 0131 260 7502



John maintains his long standing interest in charity law and has worked with many charitable organisations. He specialises in Litigation and has been a Court of Session reporter in corporate reconstructions and capital reductions for many years and a specialist in property litigation since 2005.

John Stirling
Partner

e: john.stirling@gillespiemacandrew.co.uk
t: 0131 260 7774

For general enquiries call:
0131 225 1677

For more information and the latest legal developments visit:
gillespiemacandrew.co.uk