

Should you register your trading subsidiary as a CIC?

There is a growing trend for charity trading subsidiaries to be established as community interest companies. *Philip Reed, associate at Farrer & Co, explains further.*

Trading breaks down into primary purpose trading (PPT) and non-primary purpose trading (NPPT). PPT is trading that directly advances a charity's objects, such as when a homelessness charity charges a fee for a hostel place or a museum sells tickets for access to its exhibitions. NPPT is carried out purely with a view to making money and does not directly achieve any charitable outcome. The profits of PPT (including any trading ancillary to it) are tax exempt, but those arising from NPPT are generally subject to tax.

Typically if a charity undertakes NPPT above a certain level (there is a tax exemption that applies in respect of very low levels of NPPT carried out by a charity), then the relevant activity will be hived-off into a non-charitable trading subsidiary. That subsidiary will then donate its distributable profits to its parent, thereby delivering tax efficiency. Using a subsidiary also isolates the charity from risks associated with the trading.

A community interest company (CIC)

is a particular type of company, often used for social enterprise, ie trading with the aim of making profit and doing social good. It is not (and cannot be) a charity, although it must operate for the benefit of the community. There are three reasons why using a CIC rather than a common-or-garden company limited by shares might be an attractive option for trading purposes.

“ A charity may be able to fund a CIC via a programme-related investment ”

First, branding. The suffix CIC is becoming more recognised as social enterprise gains ground and it might be attractive to potential customers.

Secondly, funding. Providing working capital for a trading subsidiary can be a challenge, but in certain circumstances, a charity may be able to fund a CIC via a programme-related investment.

Here the CIC's activities would advance

the charity's own objects (although the trustees would obviously need to approach this carefully and act in line with their investment duties). Separately, third-party investors in the CIC may be eligible for social investment tax relief (SITR), which increased in scope in April.

Finally, CICs are not generally entitled to the beneficial tax treatment enjoyed by charities, but some local authorities have granted them discretionary rates relief (that said, this treatment is rare, so don't count on being able to gain this).

CICs are subject to a slightly heavier regulatory regime than other non-charitable companies. They are regulated by the CIC Regulator, to whom they must report on their activities (that must be for the benefit of the community), and which has quite extensive powers. And their assets are subject to a lock such that they may only be deployed for the benefit of the community, disposed of by the CIC to another asset-locked body or transferred for market value (allowing the proceeds to be applied for the benefit of the community).

Housing associations face new property disposal regime

Darren Hooker, associate at Trowers and Hamlin, explains a recently-issued reminder by the Charity Commission to social housing providers.

The Charity Commission has issued a reminder regarding the disposals regime set out in sections 117 to 121 and s124 of the Charities Act 2011. Housing associations may be unfamiliar with the requirements and unwittingly fall foul of them.

The Act has become relevant due to a chain of events that began last year when the Office for National Statistics (ONS) undertook a review into registered providers of social housing. It concluded that they were in fact public bodies and should be reclassified for the purpose of national accounts and other ONS economic statistics. That was not welcomed since

it meant that housing association debt would be included on the public sector balance sheet, meaning government could potentially then restrict housing associations' ability to borrow.

“ The concern is that the regime will lead to a significant increase in costs ”

In order to reverse the effect of that decision, various deregulation provisions were introduced in the Housing and Planning Act 2016. That act removed some of the Homes and

Communities Agency's (HCA) powers, including the power to consent to disposals of property.

Previously housing associations were able to obtain consent to disposals from the HCA under the Housing and Regeneration Act 2008. However, now that the HCA no longer has power to grant consent to disposals, housing associations which are registered charities will have to comply with the Charities Act disposals regime.

In summary, the regime requires registered charities to obtain a qualified surveyor's report covering certain prescribed conditions. The report must provide a view as to the best terms reasonably obtainable by the charity and the charity must advertise the property as advised by the surveyor

to ensure those terms are obtained.

In its reminder, the Charity Commission said that the “legal framework supports trustees in making responsible and well-informed decisions about charity property and provides safeguards to deal with conflicts of interest and protect the interests of charity beneficiaries”. That is undoubtedly true. The intent of the Charities Act disposals regime is clear and sensible. It exists to ensure that charities obtain best value for their property so that they can best fulfil their charitable purpose.

The reminder goes on to say that the regime “is not onerous and involves taking appropriate professional advice”. This is more controversial. For many charities, disposal of a property is a rare and significant event. However, housing associations can have very large property portfolios, numbering in the tens of thousands of units, and disposals are a necessary part of their everyday work. They can undertake disposals where there is no market, such as the staircasing of shared ownership properties (selling further shares to residents), yet they may still

be required to take professional advice as to advertising. The concern is that having to now comply with the Charities Act disposals regime will lead to a significant increase of costs.

The disposals regime only applies to housing associations which are registered charities. Those which are community benefit societies, a form of exempt charity, are not subject to the Charities Act disposal regime. What we have started to see, and expect to see more of, is housing associations which are registered charities converting to community benefit societies.

Crowdfunding criminal prosecutions: an opportunity?

There are now significant opportunities for charities to crowdfund private prosecutions, says [Melinka Berridge](#), partner at Kingsley Napley.

In April a jury at the Old Bailey acquitted Gail Purcell of killing a cyclist, Michael Mason, by dangerous driving. Such a case would not, ordinarily, have attracted media attention. However, it made front-page news because it was the first private prosecution in Britain to be brought by a charity and paid for entirely through crowdfunding.

In England and Wales, most criminal trials are prosecuted by the Crown Prosecution Service (CPS). However, in this case the Metropolitan Police didn't refer the file to the CPS. So the family invited Cycling UK's Cyclists' Defence Fund (CDF) to exercise its right to commence criminal proceedings as a private prosecutor under the Prosecution of Offences Act 1985.

Private prosecutions can be started by any person or organisation and are becoming increasingly commonplace when the state authorities, for budget or other reasons, decline to get involved in a case. It is an alternative way to publicly bring a criminal offender to justice and can be effective where the prosecutor wants to deter others and send a message to the public about intolerable behaviour.

Sufficient funds need to be available to conduct the case from beginning to end. In the Purcell case CDF is reported to have raised over £80,000 to cover

legal costs. Costs will vary significantly depending on the case.

Historically, it has been uncommon for charities to prosecute criminal offences in their own right. Many have not been willing because of the costs involved and risk of reputational fallout if things go wrong. RSPCA is perhaps the most well-known exception here. It was recently subject to criticism not only for the way in which it carries out enforcement, but also for the fact that it took an enforcement role at all.

“Criminal proceedings provide a way to act in furtherance of charitable objectives”

An Environment, Food and Rural Affairs Select Committee into animal welfare carefully considered those criticisms and decided that “the RSPCA should retain the ability to bring private prosecutions where it reasonably believes that there is no statutory alternative and where such a prosecution would further its charitable objectives”.

Given this and the recent growth of crowdfunding platforms, there is absolutely no reason why charities should not become more active in

private prosecutions, provided they can demonstrate they act with consistency, fairness and balance in holding to account those that break the law.

For those charities whose interests align with policing priorities, such as preventing child cruelty, race crime or domestic abuse, the state will take on the responsibility of prosecuting on their behalf. However, the state does not have limitless funds. Environmental charities, charities representing the elderly or disabled and charities with a retail shop network might be among those who become more active in private prosecutions.

Critics of private prosecutions may say that the acquittal of Purcell shows that criminal prosecutions are better left to the state. However, the bringing of the private prosecution ensured that evidence was placed before a jury to enable them to decide on the guilt or innocence of the accused. The role of the prosecutor, whether public or private, is to ensure that a just verdict is reached at the end of the trial process and hence not all prosecutions will result in a conviction. That is the nature of justice.

So notwithstanding the acquittal verdict, Purcell is important and a sign of things to come. It shows that in the right circumstances, criminal proceedings provide a visible way to further charities' objectives and act for the public benefit.