

The Charities Act 2006

The 2006 Act is in addition to and amends the 1992 & 1993 Acts (it does not repeal them)

THE CHARITY COMMISSION

The Charity Commission becomes a body corporate and non-ministerial government department, outside the direction or control of government ministers. The Commission will take on the functions of the Charity Commissioners. Its objectives, functions, duties and powers are defined in the Act. The objectives will be:

- to increase public trust and confidence in charities;
- to promote awareness and understanding of the operation of the public benefit requirement;
- to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- to promote the effective use of charitable resources;
- to enhance the accountability of charities to donors, beneficiaries and the general public.

The Charity Commission has, in addition to its current power to demand documents and to search records, a new power to enter premises and seize documents in certain circumstances. This will require a warrant and the Commission has said it expects the power to be used only rarely.

DETERMINING CHARITY MEMBERSHIP

Where there is doubt or a dispute about who the members of a membership charity are, the Charity Commission has power to decide authoritatively—or appoint a person to determine—who the members are. The Commission can exercise this power only if the charity applies for a decision, or if the Commission has started an inquiry into the charity under s.8 of the Charities Act 1993.

WAIVER OF TRUSTEE DISQUALIFICATION

A person who has been removed as a charity trustee by the Charity Commission, High Court or Court of Session in Scotland is disqualified from serving as a trustee for any charity unless the Charity Commission waives the disqualification. The Commission has to grant any application for a waiver where the person has been disqualified under these provisions for more than five years, unless it has good reason for not granting the waiver. However the Commission cannot grant a waiver under these provisions where the person would become a trustee of a charitable company, and he or she is an undischarged bankrupt or is disqualified from serving as a company director.

RELIEF OF TRUSTEE LIABILITY

Trustees can apply to the Charity Commission as well as the court for relief from personal liability for breach of trust or duty if they have acted honestly and reasonably. [Note that incorporation does not provide protection from personal liability for breach of

trust.] The Commission is also able to grant relief to a charity's auditor, independent examiner or reporting accountant.

PURCHASE OF TRUSTEE INDEMNITY INSURANCE

Trustees can use charitable funds to purchase trustee indemnity insurance, if they believe it is in the best interests of the charity to do so—even if it is not authorised by the governing document. Charity Commission consent is required only if the governing document explicitly prohibits using the charity's funds for trustee indemnity insurance. The Act sets out what can and cannot be covered by such insurance.

AMENDING AN UNINCORPORATED CHARITY'S GOVERNING DOCUMENT - (Powers and procedures)

In an unincorporated charity of any size the constitutional provisions relating to the powers exercisable by the trustees in administering the charity, and provisions regulating the charity's administrative procedures will be able to be amended, even if there is no amendment power in the governing document. If the charity is a membership body (with members distinct from the charity trustees) the amendment must be approved by a general meeting of the members. If the charity is not a membership body, the trustees can make the amendment.

Where the governing document contains amendment provisions, they must be followed.

The trustees of an unincorporated charity with annual income no more than £10,000 and which does not hold land designated for specific purposes, may amend by a two-thirds majority the charity's purposes (objects). The new purposes must be charitable and must consist of or include purposes similar to the ones that are being replaced, and the trustees must be satisfied it is in the interests of the charity for the purposes to be changed. The trustees must send a copy of the resolution and their reasons for passing it to the Charity Commission.

OBLIGATION TO PROVIDE ANNUAL REPORT TO ANYONE WHO ASKS

Under s.47 of the **Charities Act 1993**, all charities—even if not registered with the Charity Commission—had to provide their annual accounts to anyone who asked, and could charge a reasonable fee for this. The trustees' statutory annual report must now also be provided

AUDIT OR INDEPENDENT EXAMINATION OF UNINCORPORATED CHARITIES

The level of **expenditure** is no longer a factor in determining whether an unincorporated charity must have a full audit, nor is level of income or expenditure in the preceding two years. An audit is required if the charity's annual **income** is £500,000 or more (increased from the previous threshold of £250,000), or if its annual income is more than £250,000 and it has total assets valued at more than £3.26 million.

An unincorporated charity with income over £25,000 and up to £500,000 must have either an independent examination or a full audit. Level of expenditure is no longer a factor in determining whether a charity needs an independent examination. Independent examiners for charities above the £250,000 threshold but below the new

£500,000 threshold must have a professional qualification or be a fellow of the Association of Charity Independent Examiners. Above this level they must have professional qualification.

ACCOUNTING THRESHOLDS FOR UNINCORPORATED CHARITIES

Expenditure will no longer be a factor in determining whether a registered charity has to submit an annual return to the Charity Commission. For financial years ending on or after **1 April 2009**, unincorporated charities with annual income no more than £25,000 no longer need to send their annual accounts and report to the Charity Commission, and should not do so unless the Commission requests it. The threshold above which an unincorporated charity must prepare accrual accounts — rather than having the option to prepare a simpler receipts and payments account instead — is increased from £100,000 to £250,000.

FAILURE TO SUBMIT ANNUAL REPORTS OR RETURNS

It is an offence not to submit charity reports or returns to the Charity Commission if required, and each person who was a trustee immediately before the report or return was due can be fined. It is a defence for the trustee to be able to prove that he or she took reasonable steps to try to ensure the report or return would be submitted in time.

RESTRICTIONS ON CHARITY MORTGAGES

The rules relating to charity mortgages are extended to cover mortgages relating to grants as well as those relating to loans. But at the same time the requirements are eased. Provided there are no constitutional or other restrictions on the charity's power to mortgage its property, and provided the trustees comply with the statutory requirements (for example to obtain proper advice), the trustees are unlikely to be required to get consent for the mortgage from the Charity Commission or court.

CONNECTED PERSONS FOR CHARITY LAND TRANSACTIONS

The definition of **connected person** for the purpose of disposing of charity land is extended to include a business partner of a trustee or person connected with a trustee, a civil partner of a trustee, and a person living with a trustee as if they were civil partners.

PUBLICITY FOR CHARITY COMMISSION SCHEMES

There is no longer a statutory requirement for Charity Commission schemes and some orders to be publicised. Schemes and orders are made to allow a charity to do something it would otherwise be prevented from doing, because of restrictions in charity law or its governing document. Advertising of changes will be a matter of Commission discretion, which should speed up the process and reduce costs for charities.

REGISTRATION THRESHOLD FOR SMALL CHARITIES

The threshold at which charities have to register with the Charity Commission is increased from £1000 to £5000. If an organisation based in England or Wales is

charitable and has annual gross income of £5000, it must be registered with the Charity Commission unless it is excepted or exempt from registering. **Gross income** is defined as gross income in the immediately preceding financial year, unless the Charity Commission determines otherwise in relation to a specific charity.

Under the 1993 Act, charities which occupy rateable land or have permanent endowment were required to register even if their income was under the threshold. This requirement does not apply under the 2006 Act.

Charities with income under the threshold can register voluntarily. Charities under the threshold which are already registered will remain on the register unless they ask to be removed. Even if a charity is not registered with the Commission it must comply with charity law and is under the jurisdiction of the Commission.

CHARITY COMMISSION

New or extended Charity Commission powers:

- Power of the Commission to give specific directions for protection of charity property
- Power to direct application of charity property
- Power of the Commission to give advice and guidance

CHARITABLE PURPOSES

The current four heads (categories) of charity, originally defined in a case in 1891, will be replaced with 13 purposes:

- prevention or relief of poverty;
- advancement of education;
- advancement of religion (which includes religions which involve belief in more than one god, or do not involve belief in a god);
- advancement of health (including the prevention or relief of sickness, disease or human suffering) or the saving of lives;
- advancement of citizenship or community development (including rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities);
- advancement of the arts, culture, heritage or science;
- advancement of amateur sport (sports or games which promote health by involving physical or mental skill or exertion);
- advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- advancement of environmental protection or improvement;
- relief of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage (including relief given by the provision of accommodation or care);
- advancement of animal welfare;
- promotion of the efficiency of the armed forces of the Crown, or the efficiency of the police, fire, and rescue services or ambulance services;
- other purposes currently recognised as charitable under charity law or s.1 of the **Recreational Charities Act 1958**, and any new purposes which are analogous (similar) to another charitable purpose.

Virtually all of these are already charitable, so the new provisions will make little difference to most existing charities.

PUBLIC BENEFIT GUIDANCE, REPORTING AND ASSESSMENTS

All charities must exist for the public benefit. Since 1 April 2008, the presumption that organisations established for the relief of poverty, the advancement of education and the advancement of religion operate for the benefit of the public unless proved otherwise has been abolished. When applying for charitable status such organisations now have to show — as do organisations established for all other charitable purposes — that they will benefit the public. In addition, existing charities which were presumed to be for the benefit of the public, especially those which charge high fees, are being reviewed to ensure they meet the public benefit test. The chair of the Charity Commission, Dame Suzi Leather, said on 7 October 2009 that charities that are found not to be meeting the test could be given up to five years to do so. In early 2010 the Commission will carry out public benefit assessments in relation to fee-charging arts charities (Royal Opera House Covent Garden, Young Concert Artists Trust, Castle Players, and Gwent Ballet Theatre). Later in the year it will assess charities for the advancement of health, and charities working in sports and recreation. The Commission's guidance on public benefit, published in January 2008, requires all charities to comply with two principles:

- There must be an identifiable benefit or benefits. It must be clear what the benefits are; the benefits must relate to the charity's aims; and benefits must be balanced against any detriment or harm.
- Benefits must be to the public, or a section of the public. The beneficiaries must be appropriate to the aims; the ability to benefit must not be unreasonably restricted by geographical or other restrictions or by ability to pay any fees charged; people in poverty must not be excluded from the opportunity to benefit; and any private benefits must be incidental.

Since then the Charity Commission has produced supplementary guidance on what the public benefit test means for charities for the advancement of religion, advancement of education or the prevention or relief of poverty, and for fee-charging charities. It consulted on public benefit and the advancement of moral or ethical belief systems in late 2008, but in October 2009 published a summary of responses and said it would not be publishing guidance. Further consultations on draft supplementary guidance on benevolent funds and charities for the advancement of human rights are expected to take place.

Charity trustees have a statutory duty to consider the Charity Commission's guidance on public benefit when exercising powers or duties to which it is relevant, and for financial years starting on or after 1 April 2008 must report on public benefit in their annual reports. Charities with annual income below £500,000 have to include a short statement on how they meet the public benefit requirement, and larger charities must give more details about how their activities during the year have provided public benefit. The Commission has provided fictional examples of reports for a small charity (youth club), a large charity (drugs advice centre), a parochial church council, a mosque/community centre, a grant-making trust, a fee-charging independent school, a theatre/arts centre,

and an overseas aid charity.

The Commission's guidance on public benefit, the supplementary guidance for specific sectors, the reporting examples, and its public benefit assessments of individual charities are at www.charitycommission.gov.uk/publicbenefit/default.asp.

RECREATIONAL CHARITIES, MINERS' WELFARE ORGANISATIONS, SPORTS CLUBS

When the relevant provisions of the Charities Act 2006 come into effect on **1 April 2010**, miners' welfare trusts will retain their charitable status if they meet the new statutory definition of charity; if they do not, they will not be able to retain charitable status. Until then, they retain their charitable status.

Sports clubs registered with HM Revenue & Customs under the community amateur sports club (CASC) scheme are not charitable even if their objects are charitable.

AMENDING A CHARITABLE COMPANY'S MEMORANDUM AND ARTICLES

The Charities Act 1993 requirement to obtain prior Charity Commission consent for any change in the memorandum or articles of association "directing or restricting the manner in which the property of the company may be used or applied" will no longer apply. Consent will be required only for changes to the objects clause in the memorandum of association, changes relating to use of property when the company is dissolved, or changes relating to the provision of benefit to directors or members of the company or persons connected with them.

POWER TO TRANSFER ALL PROPERTY

The current procedures under which unincorporated charities with annual income of no more than £5000 can transfer all the property of the charity to one or more other charities or change the charity's objects will be simplified, and the threshold will be increased to £10,000. These provisions will not apply where the charity holds land which must be used for the purposes, or any particular purpose, of the charity.

GROUP ACCOUNTS

A parent unincorporated charity will have to prepare group accounts for itself and its subsidiary charities, rather than just for the individual charities in the group.

Also charitable company groups will prepare their accounts under charity law rather than company law.

CHARITY MERGERS

Two types of "merger" will be defined: one where one charity (or more) transfers all its property to another charity, and the first one ceases to exist; and one where two or more charities create a new charity and transfer all their property to it, and then cease to exist. The Charity Commission will establish a register of such mergers. The process for transferring property in such a merger will be simplified, and there will be new provisions ensuring that gifts such as legacies which fall due after a charity has merged and ceased to exist will be treated as if they had been made to the existing charity.

CY PRÈS PROVISIONS

Charities Act 2006- [https://owa.hants.gov.uk/exchange/musmie/Inbox/For the website please.EML/Charities Act 2006 -Summary.doc/C58EA28C-18C0-4a97-9AF2-036E93DDAFB3/Charities Act 2006 -Summary.doc?attach=1](https://owa.hants.gov.uk/exchange/musmie/Inbox/For%20the%20website%20please.EML/Charities%20Act%202006%20-Summary.doc/C58EA28C-18C0-4a97-9AF2-036E93DDAFB3/Charities%20Act%202006%20-Summary.doc?attach=1)

The rules relating to *cy prè*s schemes, when the Charity Commission or court authorises a charity's property to be used for purposes other than those originally intended, are eased. Unless a donor makes a "relevant declaration" to the contrary at the time of donating money or property for a specific purpose or purposes, a charity will be able to use the gift *cy prè*s if it cannot be used for the intended purpose(s).

Where a *cy prè*s scheme is made, the need for the new purpose(s) to be as close as possible to the original purpose(s) is no longer paramount. "The spirit of the gift" and the social and economic circumstances at the time of the proposed change must also be considered.

PROFESSIONAL FUNDRAISERS, COMMERCIAL PARTICIPATORS AND OTHERS RAISING FUNDS

Professional fundraisers will have to state the amount of remuneration they are receiving in connection with an appeal, and how the remuneration is decided. If that amount is not known at the time of the appeal, they will have to give as accurate an estimate as possible. At present, professional fundraisers only have to state in general terms the method by which their remuneration is determined.

Commercial participators will have to state the amount (or estimate, if the amount is not known at the time) from their charitable promotion that will be given to charities or used for charitable purposes.

Rules similar to those for professional fundraisers are being extended, and will include officers, employees and trustees of charitable institutions or companies connected with charitable institutions. If such individuals are acting in that capacity as a collector for a public collection, and are remunerated either in their role as officer, employee or trustee or as a collector, they must disclose certain information, including the fact that they are receiving remuneration. There is an exception for people in this category who receive less than £5 per day, £500 per year or £500 for a specific collection.

PUBLIC CHARITABLE, PHILANTHROPIC AND BENEVOLENT COLLECTIONS

(Expected 2010) A collection in a public place will require a public collections certificate (PCC) issued by the Charity Commission **and** a permit from the relevant local authority, and a door-to-door collection (whether for money or goods) will require a PCC and notification to the local authority. An exemption for local short-term collections applies where the collection is local in nature, takes place within a prescribed period of time, and the organisation has notified the local authority about the collection.

PCCs will be valid for up to five years. There will be special provisions for the certificate to be transferred from its holder(s) to another trustee or trustees within the same unincorporated charity.

POWER TO SPEND PERMANENT ENDOWMENT

The rules allowing the expenditure of capital (also known as permanent endowment) will be relaxed and will be extended to all unincorporated charities, not just those with annual income under £1000, where the income from permanent endowment is too small to be effectively spent. Similar rules, but with more safeguards, will be put in

place for larger endowment funds with a single purpose or given by a single individual or institution.

SUSPENSION OR REMOVAL FROM MEMBERSHIP

When the Charity Commission exercises its power under s.18 of the Charities Act 1993 to suspend or remove from office a trustee, officer, agent or employee of a charity, it will also have power, if the person is a member of the charity, to remove the person from membership.

REMUNERATION OF TRUSTEES

A trustee or person connected with a trustee (a "relevant person") will be able to be remunerated for services provided to the charity (but not for services as a trustee or as an employee) provided:

- there is no express provision in the governing document prohibiting the relevant person from receiving the remuneration;
- the trustees (excluding the trustee who would be paid or who is connected to the person who would be paid) decide it is in the interest of the charity for the services to be provided by that person, and agree the amount or a maximum amount to be paid;
- before entering into the agreement, the trustees consider Charity Commission guidance about such payments;
- the amount is not more than is reasonable for the provision of those services by that person;
- the amount or maximum amount is then set out in a written agreement between the charity and the person; and
- only a minority of the trustees are at any time entitled to remuneration under such agreements or other arrangements.

The Charity Commission is already making it easier for such payments to be made. The relevant trustees will be disqualified from acting as a trustee in relation to decisions or other matters about the agreement. The Charity Commission will be able to require the trustee or connected person to repay remuneration or the value of any benefit in kind where this disqualification rule has not been followed.

A connected person is (a) a child, parent, grandchild, grandparent, brother or sister of the trustee; (b) the spouse or civil partner of the trustee or of any person falling within (a); (c) an institution which is controlled for a charity trustee or by any person falling within paragraph (a) or (b), or by two or more such persons; or (d) a body corporate in which any connected person falling within any of paragraphs (a) to (c) has a substantial interest, or two or more such persons, when taken together, have a substantial interest.

WHISTLEBLOWING BY AUDITORS AND INDEPENDENT EXAMINERS

Auditors and independent examiners of unincorporated charities and charitable companies will be obliged to report significant abuse or breaches of charity law to the

Charity Commission. Less significant abuse or breaches may, but do not have to be, reported.

CHARITABLE INCORPORATED ORGANISATION

Expected Late 2010 The Charities Act includes details of the new legal structure of **Charitable Incorporated Organisation**.

The whole point of the CIO is to create a structure with charitable status that has the advantages of legal personality and limited liability, without the burdens of company law and the confusions of dual registration with—and dual accountability to—the Charity Commission and Companies House. An unincorporated charity that needs the advantages of incorporation now should look at becoming a charitable company now, rather than waiting for the CIO to become available.

Schedule 7 of the 2006 Act inserts new ss.69A-69Q and a new schedule 5B into the Charities Act 1993. The provisions in schedule 7 will be expanded in regulations. The main provisions in schedule 7 are:

- New s.69A CIOs must have a constitution, a principal office in England or Wales, and one or more members. Members may be either not liable to contribute to the assets of the CIO if it is wound up, or liable to contribute up to a maximum amount each.
- s.69B The constitution must include name, purposes, whether the principal office is in England or Wales, liability of members, eligibility and procedure for membership, eligibility and procedure for trustees, use of the CIO's property on dissolution, and such other matters as will be specified in regulations. The constitution must be in the form set out in the regulations, or as near to that form as possible.
- s.69C The CIO's name must appear on specified documents, and if the name does not include "charitable incorporated organisation" or "CIO" the fact that it is a CIO must also appear.
- s.69D It is an offence, punishable by a fine, to issue or sign, or authorise to be issued or signed, a document that does not have the CIO's name and status when it should do. A person who signs or authorises a document to be signed without the necessary information can be personally liable for the cheque, order etc if it is not honoured by the CIO.
- s.69E Sets out the basic procedures for registration with the Charity Commission and when the Commission must or may refuse registration. The details will be set out in regulations.
- s.69F Any property vested in the applicants for the charitable purposes of the CIO becomes, on registration, vested in the CIO.
- s.69G Charitable companies and charitable Industrial and Provident Societies (IPS) can apply to be converted to a CIO, but not if they are exempt charities or if they have a share capital and some of the shares are not fully paid up. (At the moment all IPSs are exempt charities, but when schedule 5 of the Charities Act 2006 comes into effect, many IPSs will cease to be exempt. The existing company or IPS must pass a resolution in a specified form and provide specified documents to the Charity Commission. Where the converting organisation is a company limited by guarantee, the amount of the guarantee (the amount the company members must contribute if the company is wound up) must be

included in the CIO constitution. But if the guarantee amount is £10 or less, the guarantee is extinguished when the company converts to a CIO, and there is no need to include a guarantee in the CIO constitution.

- s.69H Sets out how the Commission will consult on applications for conversion, and when it must or may refuse an application for conversion.
- s.69I Sets out procedures for the registrar of companies or the Financial Services Authority to cancel registration of the company or IPS when it has been registered as a CIO.
- s.69J Provides for regulations to be made about conversion of a community interest company (CIC) into a CIO.
- ss.69K-69L Set out the procedure for two or more CIOs to amalgamate into one new CIO (but there is no provision for a charitable company or IPS to merge with a CIO, or for two companies or IPSs to become a CIO by merger).
- s.69M Sets out the procedure for a CIO to transfer all of its property, rights and liabilities to another CIO.
- s.69N Provides for regulations to be made about winding up CIOs, their insolvency, their dissolution, and revival and restoration to the register following dissolution.
- New schedule 5B to the 1993 Act Sets out provisions some of which will, in due course, form the basis for the model CIO constitution. These include powers, duties of members and trustees, personal benefit and payments, internal procedures, and constitutional amendment.

The Act allows only for a two-tier structure, but new s.69B(6) makes clear that the members and trustees can be the same people. This is the same as in charitable companies.

One of the interesting differences between a CIO and a charitable company is that the directors of a charitable company, as charity trustees, must act in the interests of the company/charity when they are acting as directors/trustees, but when they are acting as company members (i.e. in decisions at general meetings) there is no obligation to act in the interests of the company/charity. Under para.9(a) in the new schedule 5B, the duty to act in the interests of the charity will apply to **CIO members** as well as trustees.

CHARITY TRIBUNAL

A new independent tribunal will be established, to make it easier to appeal against Charity Commission decisions. In addition, the Commission or Attorney General will be able take questions of charity law to the tribunal. The proposal for a "suitors fund" to help cover the cost of appeals did not make it into the Act.

REGISTRATION OF EXCEPTED CHARITIES

Since 31 January 2009, many charities which were previously excepted from registration are required to register with the Charity Commission if their annual gross income is over £100,000. Those up to and including £100,000 are not at present required to register but are now under the jurisdiction of the Charity Commission. These changes primarily affected churches and similar religious bodies, armed forces charities, and Scouts and Guides. The £100,000 limit will be reviewed in 2011 and may be reduced.

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REGISTRATION OF EXEMPT CHARITIES

When the relevant provisions start coming into effect in **early 2010**, exempt charities which have a "principal regulator" who will monitor them for compliance with charity law will remain exempt from registration with the Charity Commission. These exempt charities will not be within the jurisdiction of the Charity Commission, although the Commission will have power to investigate such an exempt charity if the principal regulator requests this. Principal regulators are expected to be appointed in early 2010 for most universities in England (the Higher Education Funding Council for England), museums and galleries (the secretary of state for culture, media and sport), and Kew Gardens (the secretary of state for the environment, food and rural affairs). Decisions are expected to be made in **April-June 2010** about principal regulators for industrial and provident societies in England that are registered social landlords (housing associations), and further education corporations in England. Where there is no principal regulator, previously exempt charities will become **excepted** charities, will come under the jurisdiction of the Charity Commission, and if their annual income is over £100,000 will be required to register with the Commission. Universities in Wales, student unions in England and Wales, and colleges of the universities of Oxford, Cambridge and Durham are expected to become excepted charities in early 2010. Further education corporations in Wales, charitable industrial and provident societies in Wales, and charitable IPSs in England which are not registered social landlords, are expected to become excepted charities by June 2010. A decision is expected to be made by June 2010 about whether foundation and voluntary aided schools in England and Wales will be excepted, or will be exempt with a principal regulator. The £100,000 registration threshold may be reduced after review in 2011.

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