

Liability, Risk & Insurance

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Seminar Handout
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Charities Act 2006 (Ch. A. 2006)

Introduction

Enacted 8th November 2006

Will amend the Charities Acts of 1992 and 1993. It is not a 'consolidating' act.

Not all coming into force at once.

Planned timetable for implementation:-

- First Commencement Order – 27th February 2007
- Second Commencement Order – "second half 2007"
- Third Commencement Order – "early 2008"

Also required:-

- Consultation and guidance on the public benefit test

Secondary legislation -

- Registration Threshold Order
- C.I.O. Regulations
- Commission Regulations

27th February 2007 – First Commencement Order

The Charity Commission – replaces “the Charity Commissioners for England and Wales”.

(Sections 6 & 7 & Schedules 1 & 2 Ch. A. 2006)

Body Corporate

English name – The Charity Commission for England and Wales

Welsh name – Comisiwn Elusennau Cymru a Lloegr

Detailed statutory objectives, functions, duties and powers (many sections and much of Schedule 8 are consequential to this).

What difference will you see? - Very little if anything.

Public Benefit Consultation

Underway at present according to the Indicative Programme: Taking Forward Public Benefit published on Charity Commission website dated October 2006.

Guidance to be published before new Public Benefit provisions in Section 3 Ch. A. 2006 is brought into force (expected for “early 2008”).

Charity Commission Powers – generally updated but note especially a new section to the 1993 Act.

“The Commission has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties” – actual!

AND also sections 24, 25 and 26.

- Power to give advice and guidance (updated S.29 1993 Act)
- Power to determine membership (new S.29A)
- Power to enter premises and seize documents etc (new S.31A)

AND

- Power to waive trustee disqualification after 5 years (new S.72(4A))

More new and updated powers for the Commission to come in 2008.

Things which may affect you rather more!

"Medium-sized" charities – the threshold above which a professional audit is required is raised to £500,000 income for financial years *beginning* after 27/02/07.

"Small" charities – the *income* threshold which triggers a requirement to register is raised to £5,000 from a date to be declared by Order – likely to be 01/04/07. (But no charity will be "forcibly" removed from the register).

Other registration changes – the occupation of land or receipt of 'permanent endowment' (capital which cannot be spent as income) will not trigger a requirement for a small charity to register.

Trustee Indemnity Insurance – if the trustees of a charity believe it is in the best interests *of the charity* and unless it is expressly prohibited by the governing documentation new section 73F of the 1993 Act permits trustee indemnity insurance to be bought and paid for out of the funds of the charity, subject to the rules set out in the section.

Section 38 Ch. A. 2006 gives the Commission the *power to relieve trustees* and others such as auditors from liability for breach of trust or duty. This is a power that the courts already have and is applicable only where the trustee (or other) has acted honestly and reasonably and ought fairly to be excused. This power cannot be used to relieve a trustee of a contractual liability they have incurred.

Power to amend powers and procedures of unincorporated charities (trusts and unincorporated associations). Section 42 Ch. A. 2006 brings in a new section 74D to the 1993 Act. If the governing document either doesn't have an amendment power, or can only be amended in a certain way, this new power enables charity trustees to resolve to change administrative powers and procedures. In the case of an unincorporated association with members other than the trustees, a second resolution will need to be passed at a general meeting of members by not less than a two-thirds majority of those entitled to attend and vote at the meeting. Other powers for unincorporated charities will be brought in by the 'early 2008' Commencement Order.

A welcome change for charities which are recipients of *grants* some terms of which are to be secured by a mortgage or charge over the charity's land is brought in by Section 27 of the new Act. This amends S.38 Charities Act 1993 so that the Commission's consent to the charge is not required where the trustees of the charity are able to comply with the statutory 'advice' provisions set out in this section. Until now, this has only applied where the charge was to secure a loan. This has meant legal expense in obtaining Charity Commission consent under Section 38 for secured grants which wouldn't have been incurred if the charity had a potentially more onerous loan!

More changes brought in are:

Section 22 brings changes to the *publication rules for Charity Commission 'schemes' and orders*. The Commission will now be able to decide that public notice need not be given and whilst this may not seem a huge change, it will potentially save time and advertising expense for charities in this situation. An example would be where a disused local chapel is transferred by way of a Charity Commission Scheme or Order to an organisation like the Welsh Historic Buildings Trust. In the past the old charity has had to pay for the scheme to be advertised in the *Western Mail* and/or the *Echo*, the local free newspaper in the area and also put up in, for example, the local library.

Annual Returns – will no longer be required for charities where income is less than £10,000 but expenditure is over £10,000. This applies to financial years beginning after 27/02/07.

There are new rules relating to investment in Common Investment Funds and Common Deposit Funds but these will not affect England and Wales registered charities.

Another change to the law affecting *charity land transactions* is brought in by the minor and consequential amendments schedule to the Act, Schedule 8.

The definition of a 'connected person' for Section 36 Charities Act 1993 changes to include business partners and persons living together as if they were civil partners.

This is important where a charity wishes to dispose of land/buildings to such a person as Charity Commission consent to that disposal will now be required. This seems to plug a small loophole which previously existed but is unlikely to affect many charities.

Additional First Commencement Order Issues

The Minister for the Cabinet office receives a reserve power to make regulations to control fundraising by charitable institutions. This is intended to be used if parliament perceives self-regulations by the sector to have failed.

Section 70 Ch. A. 2006 gives express power to Secretaries for State and the Minister for the Cabinet office to provide financial assistance to charitable, philanthropic or benevolent organisations. S. 71 gives a similar power to the National Assembly for Wales. In England the power comes in on 01/04/2007, in Wales on 27/02/2007.

Additional powers are granted by the Act to the Commission and the Minister for the Cabinet Office to make regulations required to bring other sections of the Act into force in particular the regulations affecting C.I.O's (which will be the subject of the 'early 2008' Commencement Order).

Lastly, the first Commencement Order brings in the new statutory rules governing disclosure of information between the Commission and other public authorities. Tighter controls are to affect disclosure of Revenue and Customs information.

What's Next for 2007?

We are expecting the 'second half 2007' Commencement Order to bring in:

- The new Register of Merger provisions designed to make tracing the recipient of legacies and donations after mergers much easier and more certain.
- The amendments to Section 60 Charities Act 1992. These are the statements and disclosures required when soliciting fundraising donations from the public. For the first time the requirements are extended to employees and trustees. In simple terms the appeal documents must state the amount the fundraiser is to be paid in either a realistic estimate or a specific amount. This does not apply to volunteer fundraisers of course.
- There will also be other accounting and audit changes brought in but these are not detailed here.

To Look Forward to in 2008

Proposed third Commencement Order.

This is to make the main changes to charity law as we have known it over the last four centuries. This Order will bring in:

- The new definitions of charity and the public benefit test

There will now be 12 defined express categories of charities and a 13th 'catch all' category of "any other purpose within subsection (4)". The section also contains various definitions to expand on the categories. Therefore the list (from the date of the 'early 2008' Commencement Order) will be:-

"(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes.

- (a) the prevention or relief of poverty;*
- (b) the advancement of education;*
- (c) the advancement of religion;*
- (d) the advancement of health or the saving of lives;*
- (e) the advancement of citizenship or community development;*
- (f) the advancement of the arts, culture, heritage or science;*
- (g) the advancement of amateur sport;*
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;*
- (i) the advancement of environmental protection or improvement;*
- (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;*
- (k) the advancement of animal welfare;*
- (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;*
- (m) any other purposes within subsection (4)*

(3) In subsection (2) –

- (a) in paragraph (c) "religion" includes-*
 - (i) a religion which involves belief in more than one god, and*
 - (ii) a religion which does not involve belief in a god;*
- (b) in paragraph (d) "the advancement of health" includes the prevention or relief of sickness, disease or human suffering;*
- (c) paragraph (e) includes –*
 - (i) rural or urban regeneration, and*
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;*

- (d) *in paragraph (g) "sport" means sports or games which promote health by involving physical or mental skill or exertion;*
 - (e) *paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and*
 - (f) *in paragraph (l) "fire and rescue services" means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c.21).*
 - (4) *The purposes within this subsection (see subsection (2)(m)) are -*
 - (a) *any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c.17);*
 - (b) *any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and*
 - (c) *any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph."*
- *The Charity Tribunal* – for appeals from decisions of the Commission. It will be governed by the rules and provisions in Section 8 and Schedules 3 and 4 of the Charities Act 2006.
- *Further Commission Powers* – to suspend or remove trustees from membership of a charity; to give directions for the protection of charity property and to direct the application of charity property.
- *Payment of trustees* – this part of the Act will allow a charity to pay an individual trustee for providing an additional service to the charity (i.e. not for just being a trustee), but only if the trustees think it is in the best interests of the charity to do so and as long as the governing document does not expressly prohibit such payment. The trustees will have to abide by a number of sensible statutory rules.

- *Expanded powers for unincorporated charities* – to make administration and spending of charity funds easier, such as power to transfer property, replace the charity's purposes and spend capital.
- *The Charitable Incorporated Organisation* – as new form of Corporate body which will be incorporated by registration with the Charity Commission (but will not require registration with Companies House). As yet the Regulations required for this part of the Act are not available.

Other Matters intended for 2008 & Later

The 2006 Act will eventually make changes to the registration requirements for some charities which are currently *Exempt* or Excepted from registration.

At first it will only affect charities with incomes over £100,000.

Examples of affected Exempt Charities are:-

Industrial and Provident Societies which are not Registered Social Landlords, and
The Representative Body of the Church in Wales.

Examples of affected Excepted charities include religious charities such as Church in Wales parishes (with income over £100,000).

This threshold may be reduced in future.

So other than the provisions just brought in, what should we watch out for?

- Consultation on public benefit (also consultation on CRB disclosure for trustees)
- Draft CIO Regulations
- The Plain English guide to the act promised by the Commission, and, hopefully one day;
- A consolidated Charities Act!

This briefing note is intended solely as an overview of the law. It was last updated on 27 February 2007. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

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