

Wales Charity Law conference 2007

Charities Act 2006 – a guide to the main provisions



(reproduced from the Charity Commission's website)

The Charities Act 2006 became law on 8th November. It's a major piece of charity legislation, reflecting both the changes in society and the charity sector over the last decade. We welcome the Act wholeheartedly and it's also good news for trustees. Essentially, it will set charities free from some of the previous bureaucracy, enabling them to adapt to new needs in society and new and effective ways of working. There are many opportunities on offer for charities that want to grow and develop in different ways. We hope the information provided in this update covers the main areas of interest to you.

The Office of the Third Sector has published an implementation plan outlining when each part of the Act will come into force. This can be found at:

http://www.cabinetoffice.gov.uk/third_sector/documents/charity_reform/implementation_plan.pdf.

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New descriptions of charitable purposes

The Act defines a charity as a body or trust which:

- is for a charitable purpose, and
- is for the public benefit

It includes descriptions of the main purposes which are charitable:

1. the prevention or relief of poverty
2. the advancement of education
3. the advancement of religion
4. the advancement of health or the saving of lives
5. the advancement of citizenship or community development
6. the advancement of the arts, culture, heritage or science
7. the advancement of amateur sport
8. the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
9. the advancement of environmental protection or improvement
10. the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
11. the advancement of animal welfare
12. the promotion of the efficiency of the armed forces of the Crown; or the efficiency of the police, fire and rescue services or ambulance services, and;
13. any other purposes charitable in law

This list covers the majority of purposes which are already charitable; the last category means that everything which is currently charitable is included.

Providing public benefit

The Act underlines the requirement that all charities must exist for the public benefit, and the Commission has a new objective to promote understanding and awareness of this public benefit requirement. Our first step was to hold a consultation with the sector and the wider public so that we can then provide general guidance on what the requirement means. One size won't fit all, and public benefit will look different for different groups of charities. We'll then start to talk to specific groups of charities about how they demonstrate public benefit in their work.

New thresholds for registration

For would-be registered charities the new income level for registration will be £5,000. Previously, small charities which had an annual income of £1000 or less didn't have to register unless they had a permanent endowment or the use, or occupation, of land. The Act gets rid of this permanent endowment or land requirement and raises the income threshold to £5,000. Put simply, if an organisation is charitable and has an annual income of £5,000 or above it must be registered with us.

In due course charities under this threshold will be able to register voluntarily if they want to when this part of the Act comes into force. Existing charities under this threshold will be able to ask to be removed from the register, but they'll still remain charities and have to abide by charity law. We'll be producing guidance on this process shortly.

Exempt charities

Exempt charities have not previously been allowed to register with the Commission because it's been assumed that they were adequately overseen by other public bodies, such as the Financial Services Authority or Housing Corporation. The Act now makes sure these charities are also monitored for their compliance to charity law. The Act puts previously exempt charities into two categories:

- Those already regulated by a body other than the Commission, which has agreed to take responsibility for ensuring they meet charity law. These charities will continue to be exempt and will be regulated by their current regulator, now known as a 'principal regulator'. The Commission will be able to investigate these charities if their principal regulator asks us to.
- If no suitable regulator exists then a previously exempt charity will stop being exempt and will have to register with the Commission. To ease the transition, only these charities with an annual income of over £100k will have to register with us.

All these charities will come under our jurisdiction – the £100k threshold for registration is an interim level and may be reduced in the future, but this won't happen for at least 5 years when there will be a review of the Act. The Office of the Third Sector are working with principal regulators to agree how the new arrangements will work and to make sure they have the powers they need for this role, and will take some time.

Excepted charities

Over the years some groups of charities were excepted from registering with the Commission. Examples include some religious charities, Boy Scout and Girl Guide charities and some armed forces charities. The Act will require some of these charities to register with the Commission. Again, initially only excepted charities with an annual income of £100k or over will have to register. Those under the £100k threshold won't have to register but will come under our jurisdiction. This £100k threshold is an interim level and may be reduced in the future, but this won't happen for at least 5 years when there is a review of the Act.

We need to identify excepted charities and make sure they're ready for registration.

Freedom for smaller charities to evolve and change

Under previous legislation, charities could make changes to their purposes through resolutions agreed with us. The new Act liberalises and extends these powers. It allows smaller, unincorporated (non-company) charities with income of less than £10k a year to take certain actions, outlined in this section, without having to come to the Commission for permission. We will still want copies of the resolutions passed by the trustees to make these changes.

Transferring assets

Trustees of these charities can transfer their charity's assets to another charity whose objects are consistent with their own.

Changing a charity's purposes

They can also replace their charity's purposes with new purposes that make more sense in today's society as long as the changes are consistent with what the charity was set up to do. So, for example, a charity set up to relieve sickness can update its purposes to participate in a health promotion scheme to encourage healthy living.

Amending admin rules

The Act gives the trustees of all non-company charities power to pass a resolution to alter the parts of their charity's governing document which set out how they administer their charity, for example the number of trustees needed to form a quorum at meetings. They will only need to use this power if it is not already included in the charity's governing document.

Flexibility for transferring the assets of 'failed' appeals or trusts

Charities occasionally run appeals that fail to get enough money to meet their original aim and funds can exist for which there are no longer any beneficiaries. The 'cy-pres' (literally 'near to') doctrine has previously restricted the Commission's and the Court's ability to allow charities to use these 'failed' funds in flexible ways. The Act allows the Commission and the Courts to take into account current social and economic circumstances when approached by charities seeking more freedom in how they can use donated money when they can't use it as originally planned, but it will also take into account the spirit in which the original donation was made.

Effective use of permanent endowment

Permanent endowment can be either charitable funds or property, such as land or a building, which a charity can't spend or sell in its entirety. Trustees of permanently endowed charities can use the income generated by permanent endowment but, except for very small charities, they can't usually spend the capital. The Act now allows a wider range of smaller charities to spend the capital, and for larger charities power to do the same in certain circumstances and if we agree.

Charitable companies

Charitable companies must come to the Commission to get prior consent if they want to make changes to their memorandum and articles of association. The Act cuts down the occasions where they'll have to seek our permission before making these changes, helping these charities make amendments more quickly and easily.

Making it easier to merge

One of the obstacles to charity mergers can be uncertainties about what will happen to legacies and donations which were left to those charities which 'disappear' as the result of a merger. The Commission will now keep a public register of charity mergers. Registering a merger with us will be voluntary. When a merger is registered, gifts and legacies to the previously separate charities will automatically be transferred to the new merged charity. This will reassure both charities and the donating public that the spirit of legacies will be honoured if a charity merges.

New structure for charitable companies

Charities which want a corporate structure currently have to register both as charities and as companies, which means they have to meet the dual regulatory burdens of both the Charity Commission and Companies House. The Act creates a new vehicle for these charities – the Charitable Incorporated Organisation (CIO). A CIO will have the advantages of a corporate structure, such as reduced personal liability for trustees, without the burden of dual regulation. Creating CIO's will require additional, secondary legislation and the recently formed Office of the Third Sector will start consultations in preparation for this legislation later this year. We will provide more information when we have it.

Payment of trustees

The Act does not allow trustees to be paid for being trustees. Voluntary trusteeship still remains a key principle of charity. However, the Act allows trustees to pay an individual trustee for providing an additional service to the charity – if they think it's in the best interest of the charity – without having to come to the Commission for authorisation to do so. An example of this could be a trustee who's a plumber providing plumbing services to the charity as long as the trustees agree that it's in the charity's best interest, for example, because the trustee is charging a better price or in some way delivering a better service than the trustees could get elsewhere.

Important points to remember:

- the number of trustees receiving payment in this way must be in a minority;
- the amount paid must be reasonable and set out in a written agreement between the trustee and the charity; and
- the trusts or governing document must not contain any specific provision forbidding this type of payment.

Publicity requirements for schemes

When we propose to make a scheme to allow a charity to do things that will affect the way they carry out their purposes or the way they are run, the charity currently has to advertise this at least one month in advance, usually in local papers. This gives charities an additional administrative burden and is often disproportionate to the change proposed. The Act gives the Commission discretion to decide whether publicity for a scheme is needed or not, with a default that it won't be needed unless absolutely necessary. Even if we feel publicity is needed, we can choose the length of notice period and whether publicity must occur in the local area of the charity. This will have the practical effect of fewer instances where publicity is needed and shorter notice periods.

Waiver of trustee's disqualification

We will generally have to grant a waiver for disqualified trustees who were removed from their role for misconduct or mismanagement in a charity, as long as the disqualification period has lasted for 5 years or more, and there are no special circumstances for not doing so. We can't grant it if the trustee is disqualified as a company director, is an undischarged bankrupt or has defaulted under a county court administration order.

Relief from personal liability for trustees

Recruiting new trustees can be made harder if potential trustees are worried they may be personally liable for mistakes they make which put the charity's assets at risk. Before the Act, only the courts could relieve trustees of this sort of liability. The Act allows charity trustees to apply to us, as well as the courts, for relief from personal liability for a breach of trust where the trustee has acted honestly and reasonably. This obviously only applies where mistakes have been honestly made. The Commission and the courts will still take deliberate breaches of trust by trustees very seriously.

Trustee indemnity insurance

Trustee indemnity insurance covers trustees from having to personally pay out when claims are made against them, such as health and safety breaches which cause an employee injury, as long as the mistake was honestly made and not the result of wilful misconduct. In practice, trustees are not held liable in this way for honest mistakes but anxiety about the possibility may have made people reluctant to become trustees. There was also the issue that the charity's funds should not be used to pay for insurance which would benefit trustees. The Act allows trustees to take out trustee indemnity insurance using the charity's funds without our permission, as long as there's no provision in the charity's governing document which specifically forbids this. If there is a specific prohibition in the charity's governing document then trustees will need to come to us so that we can amend this before they can buy trustee indemnity insurance.

Accounts

The Act simplifies the rules about when a professional audit is required and gives both charities which are companies, and those which aren't, similar thresholds. A non-company charity's accounts will have to be professionally audited if it has:

- gross annual income over £500k; or
- an aggregate value of assets over £2.8 million and gross annual income over £100k.

Below this threshold, for non-company charities, an independent examiner can be used instead of an auditor. An independent examination is not required if the charity's income is below £10,000. If the income is above £250,000 then the independent examiner must have an appropriate accountancy qualification.

For charities which are companies, accounts will have to be professionally audited if the charity has:

- gross annual income over £500k; or
- a balance sheet total (aggregate assets) over £2.8m.

Charitable companies with an income between £90k and £500k and assets of £2.8 m or less are not required to have their accounts audited if they provide an accountant's report. For a charitable company with income of £90,000 or less then neither a professional audit nor an accountant's report is required unless its assets are over £2.8m.

Group accounts

Charities often carry out trading activities, and sometimes charitable activities, through companies and other entities they own or control. To get a full picture of all the charity's activities and the resources it controls, it's good practice for these charities to prepare group accounts to consolidate the accounts of the charity and any subsidiaries. The parent charity is legally required to prepare its own entity accounts but there's no legal basis for preparing group accounts. The new Act enables a parent charity to provide group accounts which include these subsidiaries. There will be consultation to help decide at what threshold level group accounts should be required by law as opposed to good practice.

Protecting whistleblowers

Auditors who scrutinise the accounts of larger charities are sometimes able to identify abuse or significant breaches of trust during the audit process. The Act ensures that auditors of charity accounts will be protected from the risk of action for breach of confidence or defamation when they pass on relevant information to the Commission. Independent examiners of charity accounts will also be protected.

Suspending or removing trustees and others from membership of charities

When we have serious causes for concern about a charity and open an inquiry, occasionally a trustee, employee or other agent of the charity threaten the property or continued administration of the charity. This happens very rarely, but it can make it more difficult to conclude the inquiry as quickly as we'd like and can damage the charity's reputation. There are times in formal inquiries when the Commission has to suspend or remove a person from their position as trustee, officer, agent or employee. The Act allows us to make an order to suspend or remove the person from membership of the charity and so prevent them from seeking election to their former position. We are unlikely to use this power often but it will be helpful in those rare instances when a member of a charity under investigation threatens its effective running.

Specific directions for protecting a charity

The Act allows the Commission to direct trustees, officers, employees or a charity organisation to take specific actions to protect a charity, when an inquiry is open. This will be used in those rare circumstances where we've found that misconduct or mismanagement has occurred in the charity and we need to ensure that actions are taken to protect the charity's property or make sure that it's used for the purposes for which it was intended.

Ensuring charity property is used correctly

On rare occasions, charity trustees are unwilling to apply charity property for its intended purposes. The Act enables us to deal with this by giving us a power to direct them to do so. We can use this power without opening a formal inquiry.

Deciding a charity's membership

The Act gives the Commission the power to decide who a charity's members are, either if the charity applies to us to do so or if we need to find out during the course of an inquiry. The power also allows us to appoint someone else to do this, for example, the person who is appointed to undertake the inquiry.

Entering premises and obtaining documents

There are – very rarely – times when documents are deliberately destroyed by those involved in a charity when we tell them that we are opening an inquiry. Where we have reason to believe this might happen, the Act gives us the power to get a warrant from a Justice of the Peace to enter and search premises and take away specified material, including electronic material. It also gives us the power to prevent interference with, or the destruction of, specified documents, make copies of them and get information from the charity about what, and where, such documents are. These powers can only be used as part of an inquiry and we will have to satisfy the Justice of the Peace that we have strong reason to believe the documents are at risk before they will grant a warrant.

Fundraising solicitation statements

Currently professional fundraisers and commercial participators fundraising for charities must have a written agreement with the charity, and must make a statement telling potential donors that they are getting paid when they ask for money. This is so that potential donors can make an informed choice about giving. The Act makes two main changes these 'solicitation statements':

- they will have to include the amount the professional fundraiser or commercial participator will be paid for fundraising for the appeal, or if the specific
- amount isn't known, to give a reasonably accurate estimate of what they'll receive.

Slightly different statements will also have to be made by employees, officers and trustees of charities who act as collectors. This doesn't apply to volunteers.

Public charitable collections

The Act provides for a new system for licensing charitable collections in public. It applies to all such collections, including face-to-face fundraising, involving requests for direct debits. There is a new role for the Commission in checking whether charities and other organisations are fit and proper to carry out public collections and we will be responsible for issuing public collections certificates, valid for up to five years. We need to develop the right regulations and guidance so that we can take on this new role. We also need the necessary resources to set up the new systems and this will take time to set up. We don't envisage taking on this function for a few years yet.

Collections in public places

Previous legislation referred to 'street' collections. The Act extends this to collections in 'public places' which includes some privately owned land, such as railway station ticket halls and supermarket forecourts. Once a charity has a public collections certificate it will be able to apply to a local authority for a permit to hold collections at certain times in certain places in that local authority area. Local authorities will ensure that there are not too many collections taking place at the same time, in the same place.

Door to door collections

Previous legislation referred to 'house to house' collections. The Act refers instead to 'door to door' collections, to make clear that this includes business premises. A charity with a public collections certificate will be able to conduct door to door collections without permission from a local authority, but it must inform the local authority that the collection is taking place.

Local, short-term collections

Some collections will be exempt from licensing and will not require either a certificate or permit, but organisers will have to notify the local authority that the collection is taking place; so small scale activities like carol singing should not be disproportionately affected.

New Charity Tribunal

Sometimes charities and others affected by a legal decision we've made feel that the decision is wrong and want to challenge it. In order to appeal against a decision by the Commission, the case must currently be taken to the High Court, which is difficult and expensive. The Act will create a new Charity Tribunal to deal with appeals against, and reviews of, legal decisions by the Commission. It will also take referrals from the Commission or the Attorney General which involve the operation or application of charity law. Establishing the Tribunal is the responsibility of the Department for Constitutional Affairs and it's expected it will take at least a year to set it up. The Charity Tribunal won't deal with customer service complaints. These will continue to be dealt with by our internal complaints system and the Independent Complaints Reviewer.