

News in Brief from *Chappell Associates*

Specialists in Charity Law and Social Enterprise

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A summary of the changes you can expect in 2007, 2008 and 2009 as a result of the **Charities Act 2006**.

How changes to the **Companies Act 2006** will make life easier for charities.

Wave goodbye to outdated and unnecessary regulation with the passing of the **Legislative & Regulatory Reform Act 2006**.

And then nibble on a few **snippets** we hope will whet the appetite for future issues.

Finally, **A HUGE THANK YOU** to all our clients and associates who supported us throughout 2006. We thoroughly enjoyed advising you – and sharing in your successes and challenges keeps our business focused on the need for practical as well as legal advice.

We do hope to continue doing business with you in the New Year. And, with the New Year in mind, we hope you had a relaxing Christmas holiday, refreshed to tackle the huge amount of change that 2007 rolls out.

So here's to a successful and prosperous New Year!

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Chappell Associates

Specialists in Charity Law and Social Enterprise

Charities Act 2006 – an overview

The Act is on the statute book, but not yet in force

Further '**Commencement Orders**' will state which sections of the Act come in to force, and when

The four heads of charitable purpose **are expanded to thirteen categories**

There is a **new emphasis on public benefit** so that charities will have to demonstrate what it is they do which benefits the community

Widened regulatory powers for the Charity Commission and a new Charity Tribunal for Appeals against Commission decisions

New rules to simplify restructuring and mergers, including the protection of legacies on mergers

The option for charities to adopt a new corporate structure as a '**Charitable Incorporated Organisation**'

New rules regarding trustee remuneration and the power to spend capital

A new framework for the regulation of public charitable collections

Additional commitments from Government

Preparation of a plain English guide to the Charities Act, aimed particularly at small charities – expected to be published early in 2007;

Consolidation of charity law: this is a matter for the Law Commission, but the Office for the Third Sector understands that it has been accepted into the Commission's work programme and may be enacted during 2007-08;

A review of the financial thresholds in the Charities Acts, to take place within a year of Royal Assent. The aim of the review will be to determine the scope for raising or simplifying existing thresholds. The thresholds can be changed by an order made by the Minister; and any proposals will be subject to consultation during 2007;

A review of existing Secondary Legislation under the Charities Acts 1992 and 1993, to identify whether any existing regulations can be simplified – such as the current 1994 fundraising regulations – to take place during 2007 with any proposals for change subject to public consultation;

A review of the impact of the public benefit requirement within three years of the public benefit requirement coming into force; and

An evaluation of the impact of the Charities Act 2006 by November 2011



Charities Act 2006 2006 Chapter 50

New charities now have thirteen suggested charitable objects (referred to as 'purposes') to choose from under the Act, but all existing registered objects will continue to be charitable.

Charities Act 2006 – in detail

THE CHARITIES ACT does not replace the existing legislation but it does introduce significant change. The much talked about measures of allowing some trustees to be paid, and having the opportunity to appeal a decision won't, however, come into effect until 2008! Fast forward to the ghost of Christmas Future!

We take a look at some of the changes and the order in which they will come in to effect, as opposed to ranking the changes in order of impact...

Expected early 2007 – the ghost of Christmas present?

The new Charity Commission

The functions of the new look Commission should give more autonomy to the Commission than has previously been the case, but otherwise these internal changes will have little direct impact on charities. [The Charity Tribunal which gives charities the right to appeal against decisions, directions or orders made by the Commission will not come in to being until 2008. Even then it is intended that customer service complaints will continue to be dealt with via the Commission's internal complaints system and the Independent Complaints Reviewer].

Guidance on the Public Benefit test

All charities will in future need to prove (i) charitable purpose and (ii) public benefit. **ALL** charities will need to show "public benefit" is delivered by the charity – but not yet! The actual implementation of the new public benefit rules will not take place until 2009 or thereabouts. It is the consultation exercise which takes place in 2007.

The Act does not define "public benefit" but passes the whole issue across to the Commission to decide after yet more consultation. It is anticipated that the Commission's 'guidance' on public benefit will take the form of a good read rather provide a single definition. Once that guidance is published, Trustees must take that guidance on board when exercising any of their powers or duties. The guidance will **NOT** be introduced by the back door; the Government assures us the guidance will be given ample publicity.

With good legal advice and charities putting in place some impact measurement systems ahead of schedule, public benefit need not be the ghost of Christmas future.

registration changes

Interim changes to the registration threshold for Small Charities

Charities (other than excepted and exempt charities for which special rules apply), whose gross income is not anticipated to exceed £5000 in the first year, are not required to register with the Commission, but they may register – and will probably continue to do so. The previous permanent endowment and land criteria are abolished to leave gross income as the only test. 'Gross income' is not defined.

schemes

The relaxation of publicity requirements relating to Schemes

A scheme is needed when a charity cannot run effectively in accordance with its existing governing document and the trustees are not permitted to make, or are prohibited under the governing document from making, the necessary changes themselves. Currently the whole procedure by which the Commission can authorise changes to be made to the governing document is very detailed as regards publicity. The Act frees up some of this detailed regulation.

Changes to the Audit threshold for unincorporated and incorporated charities

- **Charities which are not companies**

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 £2.8m and gross annual income over £100k

Below this threshold an independent examiner can be used instead of an auditor. (Even an independent examination is not required if the charity's income is below £10,000.) Remember to tell your Treasurers, however, if the income is above £250,000 then to be an 'independent examiner' they must have an appropriate accountancy qualification.

audit changes & group accounts

- **Charitable companies**

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**

The new Act enables a parent charity to provide group accounts which include its subsidiaries. There will be consultation to help decide at what threshold level group accounts should be required by law.

Inquiries

New powers for The Charity Commission

The Act gives the Commission new Inquiry powers; the Commission may now apply for a warrant from the Magistrates Court to enter and search premises and take away specified material (including electronic material) to preserve documentation it fears will be destroyed, and other powers to copy, prevent interference or the destruction of documents, and a power to demand information from a charity.

mortgage rules relaxed

Changes to the restrictions on mortgages of charity land

Charity Commission permission will NOT be required in the case of a mortgage to secure the repayment of a proposed loan or grant taken on by a charity **IF** the charity has taken proper written advice from a financial expert confirming

- (a) the loan or grant is necessary in order for the charity to pursue the particular course of action for which the loan or grant is needed;
- (b) the terms of the loan or grant are reasonable; and
- (c) the charity has the ability to repay the loan or grant in accordance its terms.

In the case of a mortgage to secure the discharge of any other proposed obligation, the advice must confirm it is a reasonable action for the charity to take in all the circumstances.

help for trustees

Disqualification and waiver for Trustees

Trustees will remain personally responsible for the losses of the charity but they may be entitled to an indemnity out of the charity funds to the value of those surplus funds. Additionally or in the alternative, trustees may now apply to the Charity Commission as well as to the Courts, for relief from personal liability for a breach of trust where the trustee can show he or she acted honestly and reasonably in all the circumstances, and ought fairly to be excused for the breach of trust or duty. In such cases the Commission may make an order relieving that trustee wholly or partly from any such liability. The Commission may also waive an earlier disqualification order against a trustee in certain circumstances.

relaxation of the insurance rules

Trustee Indemnity Insurance

The old chestnut of having to seek prior Commission permission to purchase trustee indemnity insurance, has at last been 'cracked'. The Act allows this personal insurance to be purchased with charity funds without seeking prior authority – so long as there isn't any provision in the governing document prohibiting such insurance being bought. As one would expect, there are some provisos; namely, that the insurance cannot be used to let a trustee off the hook for a personal fine or for fraud, dishonesty and the like. If there is a prohibition in the governing document against trustee personal benefit or buying insurance, Charity Commission permission is still needed to first make an amendment to remove the prohibition.

the small charities bonus

The power for unincorporated charities to modify powers or procedures

This power only applies to a charity which is (i) not a company (ii) has an income of less than £10k. Trustees and members may now pass a special resolution (and we can advise on the wording) to vary the procedural restrictions on how the trustees carry out their duties and how they exercise their powers. The idea is to restore the flexibility associated with charitable

associations and charitable trusts. The power will be of limited value to most charities.

The reserve power to control fundraising

The Act makes it clear that there will be statutory regulation of fundraising in the UK if the sector fails to properly and voluntarily self regulate its fundraising activities. The Regulation of Fundraising Scheme is independent of the Institute of Fundraising, and sets out how the Government will assess the effectiveness of this "self regulation". Long term and specific targets have not been set, with the Government preferring to adopt more flexible soft outcomes on an annual target basis. Further details of the self regulation scheme are available from the Institute of Fundraising at www.institute-of-fundraising.org.uk

Second half of 2007 – Second Commencement Order

**mergers
made easier**

Provisions relating to mergers of charities

The Act requires the Charity Commission to give more help with mergers and to keep a public register of charity mergers. Registering a merger will be voluntary but when a merger is registered, gifts and legacies to the previous 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.

**charities with
professional
fundraisers...**

watch out!

Statements indicating benefits for charitable institutions, professional fundraisers and commercial participators

Currently fundraisers and commercial participators (those who sell goods on the back of a promise that some of the monies will go to charity) must have a written agreement with the charity, and must make a statement informing the public that the participator/fundraiser is getting paid. The Act makes two significant changes to these "solicitation statements":

- the statements will now have to include the amount the professional fundraiser or commercial participator will be paid for their fundraising, or if the specific amount isn't known, give a reasonably accurate estimate of what they'll receive.
- similar statements will now have to be made by employees, officers and trustees of charities who act as collectors – but this doesn't apply to volunteers.

**the really
helpful
provisions!**

**public benefit
arrives**

**to pay or
not to pay?**

Early 2008 – Third Commencement Order

The new definition of Charity and the Public Benefit Requirement

Notwithstanding all the hype about public benefit, the implementation will not take effect until 2008. This gives charities a year to consider evaluation techniques, introduce measuring systems to capture results, and to report on the impact of charity services.

It is critical that charities track that data now so that they have tangible results and material to evidence public benefit each and every year. If a little too much mission drift has allowed private gain to take centre stage, charities have a year to redress the balance and get back on track with their original objects. Activities must fit the objects (the purposes) not the other way round, no matter how lucrative the funding opportunities for some charitable activities.

The Charity Tribunal

The Charity Tribunal which gives charities the right to appeal against decisions, directions or orders made by the Commission will not come in to being until 2008. This right to appeal is a new right which did not previously exist.

Remuneration of Trustees providing services to a Charity

The Act does not say all trustees can be paid or indeed that any trustees can be paid. What the Act does is facilitate self-authorisation for charities to pay its trustees in certain circumstances. The Act allows charities to self authorise payment to an individual trustee where that trustee provides an additional service to the charity which is over and above that of being a trustee – provided always the other trustees think it is in the best interest of the charity, that the trustee stays out of the room whilst his payment is discussed, and the agreement is in writing and everything properly minuted.

An example of this could be a trustee who is an accountant providing book keeping services to the charity; as long as the trustees agree that it is 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, the charity can pay that trustee

Important points to remember:

- the number of trustees in a charity receiving payment in this way must be a minority of the total number of trustees in that charity
- 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 payment of the trustees.

Powers for unincorporated charities to transfer all property, to replace purposes or to spend capital

Trustees of these charities will be much more able to do all these things and even transfer their charity's assets to another charity whose objects are consistent with their own.

The Charitable Incorporated Organisation (CIO)

This Act does not bring Christmas cheer to those charitable associations looking for a quick and cheap transformation from an association to a company – it will be at least another year before we can fast forward to this new form of charitable company. For the time being charities wishing to incorporate will still need to set up a new company and transfer the assets from the association to the company. Creating CIOs will require additional secondary legislation and the recently formed Office of the Third Sector will start yet more consultation in the New Year.

Exempt and Excepted Charities

Provisions relating to the registration of certain 'excepted' charities, and provisions relating to charities 'exempt' from registration, are not expected to come into force before 2008. The current law which enables the Charity Commission to exercise its discretion in relation to applications for voluntary registration will continue in force.

2009 – Public Charitable Collections

The Act will share the regulatory burden under the new licensing system for public charitable collections, street collections, and other 'face to face' and 'door to door' collections, between Local Authorities and the Charity Commission.

The Act also extends the law to collections in 'public places' which includes some privately owned land, such as railway station ticket halls and supermarket forecourts. The Commission will decide if a particular charity is fit and proper to hold a collection at all (issuing a confirmatory certificate lasting five years). Once a charity is issued with 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 control the number of collections taking place at the same time, in the same place.

In relation to 'door to door' collections (no longer referred to as 'house to house' collections because the new regulations also catch collections from business premises), charities with a public collections certificate need only inform (not seek permission) the Local Authority that the collection is taking place. Some collections may even 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 (an action point before sending out the 2007 carol singers!)

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and
eventually
... the CIO

new look
collections
regime

NEW * NEW * NEW

Companies Act 2006

Although for charities the big event of the legislative year was obviously the passing of the **Charities Act 2006**, there were two other major pieces of legislation that should not be overlooked.

Companies Act 2006

The Companies Act 2006 received Royal Assent on 8 November 2006. Again the provisions are to be introduced over the coming year, some with effect from 20 January 2007 but most not being introduced earlier than 6 April 2007.



Companies Act 2006 2006 Chapter 46

As well as introducing major reforms of company law it also consolidates and replaces the existing companies' legislation. The online version of the Act is now available with the hard copy version available from the end of December 2006. The Act simplifies the language of the current law to make it more accessible for smaller companies and, therefore, many charitable companies.

Two major amendments which charitable companies would find useful is that the Act, when the provisions are effective, will:

- **allow written ordinary resolutions** to be passed by a simple majority (ie. over 50%) and **written special resolutions** to be passed by a 75% majority. At present, written resolutions can only be passed if all the members are in agreement (ie. by unanimous consent). This has created a headache for many charitable companies that have needed to urgently update and amend their constitutions, but do not want to go through the lengthy process of having to convene an Extraordinary General Meeting to do so.
- charities may **dispense with the requirement to hold Annual General Meetings** unless they wish to do so. However, many charities with large memberships find holding Annual General Meetings an excellent way to involve their members and supporters in relation to charities' progress and plans for future projects.

The 2007 and 2008 AGM's

Companies should consider whether any action to deal with the Act should be taken at an AGM held before autumn 2008, by which time the whole of the Act will probably be in force. In the absence of transitional provisions it is not possible to give definitive advice or produce a comprehensive list of topics that might have to be dealt with, but it may be necessary to consider resolutions on, for example, electronic communications, altering the company's articles of association and dispensing with the AGM.

In due course, companies will also need to review all documentation on general meetings, including the notice of meeting and proxy form.

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Snippets

The **Legislative and Regulatory Reform Act 2006** also received Royal Assent on 8 November 2006. The intention of the Act is to facilitate Government doing more to remove outdated and unnecessary regulation.

Government departments and some regulators will publish specific deregulation proposals, some of which will require primary legislation.

It is also proposed that, where appropriate, the Act will be used to help merge the existing 31 national regulators into seven themed bodies.

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Lottery 2009

The Government launched a major online public consultation to inform the way in which future Lottery funding should be divided between the arts, film, sports and heritage from January 2009. This date may seem far off. However, final decisions relating to the allocation of future funding have already been made. You can find the consultation on the DCMS website at www.lottery2009.culture.gov.uk

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Safeguarding vulnerable groups

The Charity Commission has recently updated its previous guidance on protecting children, and will do so again in light of the Safeguarding Vulnerable Groups Bill. The Bill proposes a new vetting and barring scheme for people who work with children and vulnerable adults.

The guidance for safeguarding children (persons under 18 years of age) requires all charities having contact with children to have an appropriate child protection policy in place. The guidance on protecting children can be found at: www.charitycommission.gov.uk/supportingcharities/protection.asp

Please contact us for further detail on the Bill.

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Summary Information Returns

Charities with an annual income of over £1m must now file a **Summary Information Return** (SIR) in addition to the Charity's Annual Report. Some 700 existing SIRs can be viewed online via the Charity Commission website.

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