

News in Brief from

Chappell Associates

Specialists in Charity Law and Social Enterprise

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SUMMER'S OVER and it's not just back to school for the kids.

With changes to the Companies Act in the offing, it may be time for some urgent cramming for you too!

As you know, **THE COMPANIES ACT 2006** and **CHARITIES ACT 2006** both became law in November 2006. Both Acts will be updating current law in stages until October 2008.

The latest tranche of changes will be effective from 1st October 2007 and we're focusing in this Autumn newsletter on those parts of the new legislation which may be of interest to charitable companies.

The key changes you may want to think about are set out in the **Companies Act** item. With many charitable companies having AGM's in the Autumn, now is the time to discuss amendments to your Articles of Association to take advantage of the changes being introduced on 1st October 2007. Most of the new company law requires a change to your Articles.

Non-companies cannot relax either as they might want to take advantage of the new rules under Charity Law to ease the burden of mergers – often a merger with a charitable company.

With this being such a big topic, other news is given in a very brief form, including the latest developments on **Criminal Record Bureau checks** and the progress of the **Gambling Act 2005** as it affects lotteries.

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Companies Act 2006



Companies Act 2006

General Duties of Directors

Previously the general duties of a company director were developed in case law. With effect from 1st October 2007 the Act provides a statutory code of conduct for directors, including a new duty to promote success for the company. The code sets out how directors (the Trustees in charitable companies) are expected to behave; it does not tell them in exact terms what to do. The Act applies to all charitable companies.

The duties
are owed
by every
Trustee of a
charitable
company

Duty to act within
their powers as stated
in the company's
governing document

Duty to promote
the success of
the company

Duty to exercise
independent
judgment

Duty to exercise
reasonable care,
skill and diligence

Duty to avoid
conflicts of interest

Duty not to
accept benefits from
third parties

Duty to declare
interest in proposed
transaction or
arrangement

General duties of Directors

The duties in brief

It is necessary to comply with every duty that applies in any given case. Further, the cumulative effect of the duties means that where more than one duty applies, the director must comply with each applicable duty. So, for example, the duty to promote the success of the company will not authorise the director to breach his duty to act within his powers, even if he considers that it would be most likely to promote the success of the company.

Certain aspects of the duty to avoid conflicts of interest and the duty not to accept benefits from third parties continue to apply even when a person ceases to be a Trustee or director for any reason – this is necessary to ensure that a director cannot, for example, exploit an opportunity of which he became aware, simply by resigning his position as director and Trustee.

The statutory duties **do not** cover all the duties that a director may owe to the company. Many duties are imposed elsewhere in legislation, such as the duty to file accounts and reports with the Registrar of Companies or the Charity Commission. These other duties still remain uncodified, such as any duty to consider the interests of creditors in times of threatened insolvency.

The duties explained

Duty to act within their powers as stated in the company's governing document

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
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Duty to promote the success of the company

Duty to exercise independent judgment

Subject to any prior written agreement, a director of a company must exercise independent judgment.

Duty to exercise reasonable care, skill and diligence

This means the care, skill and diligence that would be exercised by a reasonably diligent person with:

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
 - (b) the particular knowledge, skill and experience that the director has.
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Duty to avoid conflicts of interest

A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. There is a small exception for charitable companies where the Company's Articles permit a conflict to exist. However, the Articles must describe the transactions or arrangements which are to be so excluded from the general duty to avoid a conflict;

Duty not to accept benefits from third parties

A director of a company must not accept a benefit from a third party conferred by reason of:

- (a) his being a director, or
 - (b) his doing (or not doing) anything as director.
-

Duty to declare interest in proposed transaction or arrangement

If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

Complying with other applicable laws

As well as complying with all the duties under the Companies Act, the directors must continue to comply with all other applicable laws. The duties do not require or authorise a director to breach any other prohibition or requirement imposed on him elsewhere, for example, by Charity law.

The consequences of breach may include:

- damages or compensation where the company has suffered loss;
- restoration of the company's property;
- an account of profits made by the director; and
- undoing a contract where the director failed to disclose an interest.

Mandatory approvals concerning Directors

The Companies Act now requires members to approve by resolution – and (in the case of a charitable company) seek prior Charity Commission permission before agreeing to:

- **Any long-term service contracts of the directors.** In broad terms, these are contracts under which a director is guaranteed at least two years of employment with the company of which he is a director, or with any subsidiary of that company. Failure to obtain approval of the members allows the company to terminate the service contract at any time by giving reasonable notice. The reasoning behind this change is that a long-term contract can make it too expensive for the members to remove a director (by ordinary resolution) while allowing the members to approve longer arrangements if they wish.
- **A substantial property transaction.** These are transactions where the company buys or sells a non-cash asset to or from a director of the company (or a person connected with a director) where the value of the asset exceeds £100,000 or 10% of the company's net assets (subject to a minimum of £5k).
- **Some payments made to a director** (or former director) to compensate them for ceasing to be a paid director, or for losing any other office or employment with the company (or a subsidiary of it) including payments made in connection with retirement from employment.

Resolutions to remove directors

An ordinary resolution of the members is now sufficient to remove a director, but the Act requires that it be passed at a meeting of members so as to ensure the director's right to be heard is protected.

Changes to Written resolutions

Written resolutions signed by members are an alternative to calling meetings of members.

Written resolutions will no longer need to be signed by 100% of the members. Instead, the required majority will be a simple majority (51%) for passing ordinary resolutions, or 75% for passing special resolutions.

Proposed written resolutions will no longer have to be notified to the auditors in advance.

Using powers introduced by the Act previously, companies can choose to make more use of electronic methods. Written resolutions can be circulated by email or by other electronic methods such as websites, but only with prior member agreement. This will speed up the decision making process, and means most companies will be able to take most members' decisions more quickly without the need for holding a general meeting.

Changes to the AGM

From 1st October, the Companies Act introduces the concept that companies (including a charitable company) no longer require an AGM. Instead companies must "opt in" to hold an annual general – as evidenced by their Articles. If the Articles say there must be an AGM, the company must hold an AGM. If the Articles are silent, there is no need to hold an AGM. The new model Articles of Association will not mention AGM's.

Many charities will wish to retain the obligatory AGM but some may wish to change their Articles to opt out of the expense of holding an AGM. If the Articles are changed, then please remember to make consequential amendments, for example to the clauses regarding retirement by rotation of directors if linked to the AGM,

NB: The Members still have the right to receive annual accounts.

Notice of meetings now shortened

Meetings of members can now all be on a 14-day notice period, irrespective of the type of meeting to be held (AGM or EGM) and irrespective of the type of resolution to be passed unless different arrangements are specified in the company's Articles.

Notices can be circulated by email or by other electronic methods such as websites, with prior member agreement.

Please ask us about these arrangements.

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Charity Tribunal Rules Consultation

Earlier provisions in the Charities Act 2006 created the Charity Tribunal to hear appeals against Charity Commission decisions, and to help clarify or develop Charity law.

The **Charity Tribunal Rules** will govern the practice and procedure in relation to proceedings before the new Tribunal. They will ensure that proceedings before the Tribunal are handled as fairly, efficiently and as quickly as possible. The Rules are expected to come into force to coincide with the commencement date of the Tribunal, anticipated in early 2008.

The consultation can be accessed via:

<http://www.justice.gov.uk/publications/cp1907.htm>

and will run until 7 November 2007.

Community Interest Companies



The Annual Report for 2006-07 by the Regulator of Community Interest Companies has now been published. This report covers all the work of the CIC Office for the period July 2005 to March 2007.

www.cicregulator.gov.uk/guidance/CIC%20Annual%20Report%202006-07.pdf

Safeguarding vulnerable groups Vetting and Barring

The Government has launched a consultation on the processes for barring people who should not work with children and vulnerable adults as part of the next stage of the vetting and barring scheme under the **Safeguarding Vulnerable Groups Act 2006**. The scheme will be introduced from the Autumn of 2008. The consultation ends 14th September 2007.

www.dfes.gov.uk/consultations/conSection.cfm?consultationId=1476&dId=785&sId=4581&numbering=0&itemNumber=1

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Charity lotteries

Charities which raise money through lotteries may have to apply for a gaming licence once new rules come into force on 1st September 2007.

New legislation buried in the **Gambling Act 2005** will mean that charities holding lotteries raising over £20,000, or more than £250,000 in a year, will be required to have a gaming licence.

The good news is that the fees associated with the licence are not nearly as steep as in the past. Before the Gambling Act 2005, for lotteries earning over £100,000 a year, the registration fee was £5,000 plus an annual fee. Under the new rules, that application fee has been reduced to £165 with an annual fee of £348 (discounted by 25% in the first year).

For information on applying for a licence, visit the Gambling Commission's website at:

www.gamblingcommission.gov.uk/client/index.asp?ContentId=1

Employment guide for faith-based charities



The Church of England's **Church Urban Fund** has launched a free online resource, **Just Employment**, to promote excellence in employment by faith-based charities involved in social and community projects. The guide contains advice and case studies about the specific issues faced by faith-groups, such as whether discrimination laws prevent them from excluding people who are not Christian and what to do about employees whose values clash with an organisation's ethos.

The guide also includes sections that are applicable to any community group, covering such areas as policies and procedures on health and safety issues, disciplinary and grievance procedures, performance management, work-life balance and child protection laws. The documents, which will be updated annually, were put together by an employment specialist. The contract to produce the resource will run until 2010.

In order to access **Just Employment**, potential users must register via the following link:

www.cufx.org.uk

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Gift Aid consultation

The long-awaited consultation on Gift Aid was launched on 19 June 2007. The consultation is aimed at the voluntary sector rather than at donors, and seeks workable suggestions on how the Gift Aid scheme might be improved in terms of its profile, its accessibility, its ease of operations and the overall value that it delivers to the voluntary sector.

The terms of reference state that the consultation "will consider Gift Aid in the wider context of the need to minimise administrative burdens and costs on charities, donors and HMRC."

The deadline for responses is 30th September 2007.

Charities Act 2006



Charities Act 2006 2006 Chapter 50

The legislation received Royal Assent on 8th November 2006. The Act and explanatory notes that accompany it are available on the website of the **Office of Public Sector Information**.

Parts of the Act came into force early in 2007 (see our January newsletter on www.chappellassociates.com). Subsequent provisions roll out until 2009.

Second Commencement Order (October 2007)

The main provisions that will be commenced by this Order will be:

- Provisions relating to mergers of charities
- Updated rules on the Statements indicating the benefits for charitable institutions, professional fundraisers, and commercial participators
- Provisions relating to audit and accounting for charities, including group accounts and changes to the accounting regime for small charitable companies

Consultation on implementation of audit, accounting & reporting changes

The Charities Act 2006, together with the Companies Act 2006, makes several important changes to the audit, accounting and reporting framework for charities. The audit thresholds for both company and non-company charities have already been increased for financial years starting on or after 27th February 2007.

Further changes to the audit, accounting and reporting regime require secondary legislation before they can be implemented, which is the subject of another consultation exercise closing 14th September 2007.

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Snippets

Arts Funding in England 2007

DCMS has published a guide, the purpose of which is to help artists and arts organisations navigate their way around the arts funding system in England and identify specific funding opportunities.

Please see:

www.culture.gov.uk/NR/rdonlyres/90F28C34-5461-4107-905D-AFA4ADEC1A4A/0/GuidetoArtsFundinginEngland.pdf

Charity Commission website

The Charity Commission has launched its redesigned website, which it claims will make it easier and quicker for charities to meet their obligations to the regulator.

Features of the new site include:

- a secure online service allowing charities to update their details in (near) real time;
- an improved search capability;
- a secure facility to report serious incidents;
- the first annual return (AR07);
- and for smaller charities, the **Annual Update**, specifically designed to be completed online.

Visit: www.charitycommission.gov.uk

Annual returns: deregistration

Third Sector reports that the Charity Commission has decided that charities that fail to submit annual returns in good time will be taken off the Charity Commission register after 34 months.

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CHARITY
COMMISSION