

UPDATE ON THE CHARITIES ACT 2006

– PROVISIONS WHICH HAVE COME INTO FORCE SINCE NOVEMBER 2007

Francesca Quint

It may be said that the implementation of the Charities Act 2006 is a leisurely process, which gives charities and their professional advisers sufficient time to take the changes on board. This article outlines those provisions which have taken effect between the first anniversary of Royal Assent on 8 November 2006 (a date when, coincidentally, the Companies Act 2006 was also passed) and 1 May 2008. The relevant provisions range from the meaning of charity, to additional powers for the Charity Commission and increased flexibility for charity trustees, to new accounting rules for groups of charitable and other companies, to the establishment of a major new institution (the Charity Tribunal).

The most significant sections from the point of view of the substantive law are those which set out the meaning of 'charity'. After a definition by reference to the jurisdiction of the High Court of England and Wales in similar (but not identical) terms to the corresponding provisions in the Acts of 1960 and 1993 (s 1, in force from 1 April), there is a list of 'descriptions of charitable purposes' and a statement that charitable status depends on the organisation's purpose being also for the public benefit, a feature which can no longer be presumed (ss 2-4, also in force from 1 April). Finally there is a broadening of the purposes deemed charitable under the Recreational Charities Act 1958 to include organisations providing facilities only for males as well as those catering only for females, the exclusion of some miners' welfare trusts and a provision that Community Amateur Sports Clubs (CASCs) which have chosen to register with the Treasury are deemed not to be charities and need not therefore register with the Charity Commission (s 5, in force from 1 April).

The newly-defined charitable purposes are expressed in modern language and cover all purposes already accepted as charitable, and purposes analogous to them or to those which are specifically listed. It is worth noting, for example, the prevention of poverty, the advancement of human rights, the advancement of community development and the advancement of amateur sport as formal expressions of purposes which had recently been

informally recognised by the Charity Commission. It is also helpful to note the interpretation of religion, amateur sport and other concepts (s 2(3)).

The Act requires the Charity Commission to publish guidance for trustees and others on the application of the public benefit requirement (s. 4). This is consistent with the Commission's objective to promote awareness and understanding of the operation of the public benefit requirement (s. 1B of the Charities Act 1993 as inserted by s. 7, which has been in force since early 2007). Guidance of a general nature was published in January 2008, and in March the Commission issued a range of consultation documents containing draft supplementary guidance on public benefit concerning charities for the prevention and relief of poverty, educational charities, charities for the advancement of religion and charities which charge fees for their services respectively. Such guidance is not binding on charity trustees in the same way as legislation, but a statutory obligation is placed on all charity trustees to have regard to it (s. 4(6)). It is likely to be reviewed from time to time.

Certain provisions in the Act are designed to help and encourage people to become charity trustees, adding to the section which came into force in early 2007 which enables charities to pay for trustee indemnity insurance (s. 39). In the first place, the Charity Commission is now able to relieve trustees from actual or potential liability for a breach of trust, rather than the trustee having to apply to the court (s. 38, in force from 1 April). Secondly, trustees may now – within limits and subject to various procedural safeguards – receive reasonable remuneration from their charity for professional or other services supplied to the charity other than acting as a trustee. Note that this does not apply where there is an express prohibition in the governing document, such as appears in many Charity Commission schemes (ss. 36 and 37, in force from 18 March).

Other provisions should make life easier for the trustees of unincorporated charities by facilitating constitutional change. New powers, extending to unincorporated charities with an annual income of £10,000 or less, enable trustees to pass a resolution to transfer the charity's assets to another charity or to change its charitable purposes, subject to procedural safeguards (ss. 40 and 41, in force from 18 March). These add to the power to administrative provisions (s. 42), in force since early 2007, which has no upper income limit.

In addition, the Act relaxes the requirements relating to *cy pres* schemes, as to which, from early 2007 the Commission has been able to dispense with the need to advertise (s. 22). More emphasis is placed on the surrounding social and economic circumstances in both assessing the need for a *cy pres* scheme and determining its provisions (ss. 13-18, in force from 18 March).

Finally, there is a greatly extended power for trustees to release permanent endowment from the legal restriction on expenditure. For charities with an income of more than £10,000 this will require the concurrence of the Charity Commission (s. 43, in force from 18 March). The Commission has yet to publish its policy on the circumstances in which it will be prepared to concur.

For charitable companies, there is also a slight relaxation of the requirements for obtaining Charity Commission consent to changes in the memorandum and articles (s. 31, also in force from 18 March).

The new form of charity, called the Charitable Incorporated Organisation (CIO) has not yet become available. The relevant provisions (s. 8 and Schedule 7) are unlikely to be brought into force until early in 2009, although a consultation paper is about to be published on the subject, containing draft regulations and model forms of constitution.

The Act sets out to assist and encourage the merger (including incorporation) of charities, whether they are corporate or not, and whether the merger consists of one charity's assets being transferred to another or involves two or more charities winding up and transferring their assets to a new charity. There is a new register of mergers, maintained by the Charity Commission. Once a merger is registered, gifts to the original charities will take effect as gifts to the merged charity, with the intention that there should be no need to retain the original charities as a shell to receive legacies etc. (s. 44, in force from 28 November 2007).

There appears to be a trap for the unwary in that a residuary gift to a group of charities in specified shares commonly provides that the share of any charity which ceases to exist before the testator's death will accrue to the other charities, and the new provision does not in so many words provide that after registration of a merger the original charities are actually deemed to continue to exist. Whether a charity has ceased to exist will depend in

many cases on whether it was/is corporate or unincorporated: Re Finger's Will Trusts [1972] 1 Ch 286.

Changes to charity accounting are brought not only by the 2006 Act itself but also by secondary legislation under it. 'Whistle-blowing' to the Charity Commission by charity auditors who discover evidence which the Commission may need to investigate is now specifically provided for, together with suitable protection for the auditor in respect of his duty of confidentiality (ss. 29(1) and 33, in force from 1 April). Guidance on whistle-blowing was posted on the Commission's website (www.charity-commission.gov.uk) in April 2008.

It is compulsory, for accounting periods starting from the end of March 2008, for consolidated accounts to be prepared where a charity forms part of a group, e.g. with a trading company (s. 30 and Schedule 6, also in force from 1 April). The two pieces of subordinate legislation, which take effect from the same date, are the Charities Act 2006 (Charitable Companies Audit and Group Accounts Provisions) Order 2008 (SI no. 527) and the Charities (Accounts and Reports) Regulations 2008 (SI no. 629).

A modest change is made to the provisions relating to professional fund-raising and commercial development in the Charities Act 1992, in that the required statements by those seeking to raise charitable funds in those ways concerning for example their remuneration and the net payment to charity are re-stated (ss. 67 and 68 (in part), in force from 1 April). It should be noted that the substantive provisions regarding public collections are not yet in force and it may be more than a year before they are implemented (the bulk of ss. 45-66).

One of the purposes of the Act is to strengthen the role of the Charity Commission as regulator. A new power is conferred on the Commission to suspend or remove trustees from membership of a charity, and/or to prohibit such a person from resuming membership without the Commission's consent (s. 19, in force from 1 April). This applies where trustees of a charitable company or unincorporated association are being suspended or removed during a formal inquiry. It is complemented by the Commission's power, in force since early 2007 (s. 25), to determine who are the members of a charity, or appoint someone to ascertain this.

In addition, the Commission is empowered to give specific directions to charity trustees or officers (or to corporate charities themselves) either to take certain action which is in the Commission's view expedient for the protection of the charity or to apply charity property in a specified manner (ss. 20 and 21, in force from 1 April). The first power arises only in the course of a formal inquiry, and the second only where the Commission considers that the trustees or others in control of the property are unwilling to apply it properly for the charity's purposes, i.e. whether or not an inquiry has been started. These provisions constitute an exception to the statutory requirement that the Commission should not act as a trustee or interfere in the administration of a charity (s. 1E of the 1993 Act inserted by s. 7, in force in that respect from 1 April). They may avoid the need for the appointment of an interim manager, or even the opening of an inquiry, in some cases.

The enactment of the Human Rights Act 1996, together with pressure from within the charity sector, led to the view that system for appeal to the High Court against decisions of the Charity Commission, whether quasi-judicial or administrative, was inadequate. As a result, the Act establishes the Charity Tribunal to hear appeals from such decisions made on or after 18 March (s. 8 and Schedules 3 and 4, in force from that date). Some decisions, such as decisions on registration, are subject to appeal whereas others, such as the refusal to consent to a particular land transaction, are subject to review. There is also provision for issues to be referred to the Tribunal by the Commission or the Attorney General. The members of the Tribunal include a legally qualified President and other legal members as well as members drawn from the charity sector. The Charity Tribunal Rules 2008 (SI no. 221), detailing the procedure for hearings before the Tribunal, came into force on 27 February 2008. It is expected that the Tribunal will start functioning in June 2008.

***Francesca Quint is a member of the Chancery Bar Association
and a Barrister at Radcliffe Chambers***