

SHOOSMITHS

Charities legal and regulatory preview

Wednesday, 12 July 2023



"I skate to where the puck is going to be, not where it has been."
Wayne Gretzky

What matters?

Consider if your charity objects or any special trusts need amending and weigh up when to seek the regulator's approval to change them.

Review schemes of delegation e.g. for property disposals and ex gratia payments.

Don't consider the forthcoming new power of the regulator to approve trustee remuneration as a get out of jail free card.

If your charity will be covered by Martyn's Law then make provision for a standard terrorism evaluation/ enhanced terrorism risk assessment within your existing risk assessment process.

Prepare for introduction of the offence of failing to prevent fraud.

Prepare your board for rolling out of *My Charity Commission Account*.

Ensure your charity has appropriate policies, that they are implemented and that your people are regularly trained on them.



Implementation of the rest of the Charities Act 2022

Amending governing documents/ charitable purposes (by end of 2023)

The criteria for Charity Commission consent for changing charitable objects will be more consistent across different types of charities. This should reduce potential confusion in the sector.

The current regime for unincorporated charities to change their charitable objects may be considered inflexible, requiring the trustees to identify a *cy-près* occasion before the charitable objects can be changed. If the trustees fail to identify a suitable *cy-près* occasion, then the objects cannot be changed. This is unduly limited and inconsistent with regimes for other charitable legal structures.

For charitable companies, only changes which **alter the charitable purpose** will be regulated alterations:

198 Alteration of objects by companies and Commission's consent

(1) Any regulated alteration by a charitable company—

- (a) requires the prior written consent of the Commission, and
- (b) is ineffective if such consent has not been obtained.

(2) The following are regulated alterations—

- (a) an amendment of the company's articles of association which alters the charitable purpose of the company, adding, removing or altering a statement of the company's objects,¹²³

Amending governing documents/ charitable purposes

- **Charities Act 2022: change in test adopted by Charity Commission when considering whether to approve change of objects of **charitable companies****

NOW

- Are new objects **EXCLUSIVELY CHARITABLE?**
- Is the trustees' decision to make the change a **RATIONAL** one in the circumstances?
- Ensure the new objects **DO NOT WORK AGAINST** the previous objects

IN FUTURE (BY END 2023)

- **PURPOSES** of charity **WHEN IT WAS ESTABLISHED**
- Desirability of securing that the **PURPOSES** are (so far as reasonably practicable) **SIMILAR TO THE PURPOSES BEING ALTERED**
- Company to have purposes which are **SUITABLE AND EFFECTIVE IN LIGHT OF CURRENT SOCIAL AND ECONOMIC CIRCUMSTANCES**

Amending governing documents/ charitable purposes

- Unincorporated charities: new statutory power to amend governing document – new ss280A-B replace s280.
- Very wide power:
 - Cannot be excluded or modified by governing document
 - This is in addition to express powers
 - Some changes are subject to prior Charity Commission approval.
- Amending purposes – no requirement for cy-près occasion (**next slide**) but instead the same criteria are to apply for changing an unincorporated charity's purposes as for charitable companies and CIOs (**see previous slide**).
- The provisions standardising how the Charity Commission decides whether to authorise changes to charities' purpose – regardless of their structure - will be introduced **by the end of 2023** (put back from “Autumn 2023”)

Amending governing documents/ charitable purposes

Unincorporated charities: *cy-près occasions* include where original purposes:

- have been fulfilled or cannot be carried out;
- provide a use for part only of the property;
- were laid down by reference to a class of persons or an area which has ceased to be suitable, regard being had to the appropriate considerations;
- have been adequately provided for or have ***ceased to provide a suitable and effective method*** of using the property available by virtue of the gift, regard being had to the appropriate considerations.

“*Appropriate considerations*” means (a) the spirit of the gift and (b) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

Amending governing documents/ charitable purposes

New sub-sections to section 337 Charities Act 2011: **Public notice as regards Commission orders etc**

- (3ZA) Where the Commission's written consent **is sought** under section 67A, 198, 226 or 280A in relation to a charity, the Commission—
 - (a) **may itself give such public notice as it thinks fit of the contents of the consent sought, or**
 - **(b) may require it to be given by the charity.**

- (3A) Where the Commission gives written consent under section 67A, 198, 226 or 280A in relation to a charity, the Commission—
 - (a) may itself give such public notice as it thinks fit of the giving or contents of the consent, or
 - (b) may require it to be given by the charity

Amending governing documents/ charitable purposes

Section 275 Charities Act: use it before you lose it?

- It applies to a charity if–
 - (a) its gross income in its last financial year did not exceed £10,000,
 - (b) it does not hold any designated land, and
 - (c) it is not a company or other body corporate.
- The charity trustees of such a charity may resolve for the purposes of this section that the trusts of the charity should be modified by replacing all or any of the purposes of the charity with other purposes specified in the resolution.
- But the charity trustees of a charity do not have power to pass a resolution under subsection (2) unless they are satisfied–
 - (a) that it is **expedient in the interests of the charity** for the purposes in question to be replaced, and
 - (b) that, **so far as is reasonably practicable**, the new purposes **consist of or include purposes that are similar in character to those that are to be replaced.**

Disposal of charity land

- Need for a statement in the **contract as well as** in the **transfer** that the Part 7 regime has been complied with – but **no need** for any certification in transfer/conveyance from trustees in their individual capacity.
- This means protection for buyers in good faith **from exchange**, instead of from completion.



Trustee remuneration

186A Remuneration etc for work already carried out¹²¹

- (1) This section applies to a person who—
 - (a) has carried out work for or on behalf of a charity, and
 - (b) is a charity trustee or trustee for the charity (or was one when the work was carried out).
- (2) If the condition in subsection (3) is met, the Commission may by order—
 - (a) require the charity trustees of the charity to pay the person such remuneration for the work as must be specified in the order;
 - (b) authorise, to such extent as must be specified in the order, any benefit already received in connection with the work to be retained.
- (3) The condition in this subsection is that the Commission considers that it would be inequitable for the person not to be paid the remuneration or not to retain the benefit.
- (4) In determining whether to make an order under this section, the Commission must in particular have regard to—
 - (a) whether, if the person had not carried out the work, the charity would have paid someone else to carry it out,
 - (b) the level of skill with which the work was carried out,
 - (c) any express provision in the trusts of the charity prohibiting the person from receiving the remuneration or retaining the benefit, and
 - (d) whether remunerating the person or allowing the person to retain the benefit would encourage breaches of trust or breaches of duty by persons in their capacity as charity trustees or trustees for charities.

Ex gratia payments/ orders- some practical considerations



Review/ production of ex gratia policies



Possible revision to governing documents?



More standardised approach to assist with gathering of evidence to assess ex gratia claims?



Collection of data on claims and sharing of (non personal data) by charities to identify trends?



Legacy team training?



Reputational management when a charity does not feel under a moral obligation but in the circumstances might feel public pressure to “reasonably” regard itself as being under a moral obligation? A charity **doesn't have to** apply for permission/ make a payment **if it doesn't want to.**

A photograph of three people engaged in a tree-planting activity in a rural field during sunset. On the left, a man with a beard and reddish hair, wearing a colorful patterned sweater and blue jeans, holds a shovel. In the center, a man wearing a grey beanie, a dark vest over an orange shirt, and blue jeans is smiling while holding a black plastic pot containing a young tree. On the right, a woman with her hair in a bun, wearing a brown leather jacket over a beige turtleneck and blue jeans, carries a large teal bucket filled with more saplings. The background shows rolling hills under a bright, hazy sky with the sun low on the horizon, creating a warm, golden glow. The word "Delegation" is overlaid in white text in the center of the image.

Delegation

Failure to prevent fraud offence: Economic Crime and Corporate Transparency Bill

The ‘what’, the ‘why’ and the ‘how’?

What?

- New failure to prevent fraud offence to make businesses (inc. charities) liable where a specified offence is committed by an employee or agent

Why?

- To hold organisations to account if they profit from fraud

How?

- If the organisation does not have reasonable fraud prevention procedures in place. Knowledge is not a requisite

Application of the offence

- Offence will apply to all bodies corporate and partnerships – goes beyond the initially drafted “large organisations”
- Organisations and employees based overseas are captured where fraud offence committed under UK law or which targets UK victims
- Will encompass “fraud” such as fraud by false representation; fraud by failing to disclose information; fraud by abuse of position; fraudulent accounting; obtaining services dishonestly

Impact on charities

- Charities are not exempt
- Increased likelihood of prosecutions (including private prosecutions)
- Unlimited fines
- No personal liability but consider reputational repercussions

Next steps

- Consider current fraud risk assessments (if any!)
- Review anti-fraud policies, systems and controls – all “reasonable procedures”
- Expected to become law by the end of 2024



Martyn's Law: Terrorism (Protection of Premises) Bill

Aims of the Bill

- To ensure people's safety
- To reduce the impact of terrorist attacks
- To provide clarity on responsibility for security
- To enhance national security via preparedness for terrorist attacks

Standard vs. Enhanced

Two tiers of qualifying premises:

- Standard duty premises – 100+
- Enhanced duty premises – 800+
- Qualifying public events will also be subject to the enhanced duty

Impacts on charities

- Charities are not exempt
- Financial obligations - £2,000 for “standard” and £80,000 for “enhanced”
- Administrative duties, including appointment of a designated senior officer
- Potential civil and criminal repercussions (including personal liability)
- Try not to re-invent the wheel – incorporate into existing risk assessments

What's next?

- Pre-legislative scrutiny by the Home Affairs Select Committee
- Enforcement date yet to be announced – legislative process
- Shoosmiths can keep you informed about updates



ROLL OUT OF TRUSTEES' MY CHARITY COMMISSION ACCOUNT AND THE REVISED ANNUAL RETURN.

THE WAY THE REGULATORY WIND IS BLOWING

Orlando Fraser's inaugural speech May 2022

*We must aim to excel in all aspects, and take pride in that excellence. This must, and will, also **embrace the opportunities given to us by automation, digital, and artificial intelligence**, to be a truly effective and pro-active regulator.*

Common to all three is the gathering and effective use of data – data is the currency of effective, proactive regulation. Good data helps us identify sparks in the sector or parts of the sector before they become wildfires. It ensures we can more quickly identify wrongdoing and respond robustly. Data also helps us reach individual trustees with information at a time and in a format that is directly relevant to them.

And, of course, the sensible sharing of data helps us, as a society, better understand the work that charities do, how they do it, and where.

Helen Stephenson speech April 2023 Our commitment

to supporting trustees - and what we expect in return

We know that there is more we – the Commission – can do to reach out to meet you where you are, rather than always expecting you, as busy trustees, to make the journey to us.

This, in large part is what the new My Charity Commission Account is all about.

With time, we hope this new service will be a one-stop-shop for individual trustees.

Internally we're referring to it as trustees' 'digital front door' into the Commission and the services we provide.

The place where you can log on for information that is tailored to you and your charity– what it does, and how it does it, when its filing deadline falls, your own length of service and experience as a trustee.

It will take time for the service to fulfil its potential, and I should stress that initially, the main interaction you will have through My Charity Commission Account, will be to file your charity's annual return.

But in time, I hope the service will quietly revolutionise our relationship with individual trustees, supporting them to make good, responsible, lawful decisions in their charity's best interests.

In the meantime, we're writing out to charity contacts, asking them to log in to My Charity Commission Account, so that each charity has at least one log in and can start using the service when we roll it out.

Please help us by ensuring you have the right person registered as your charity's contact, and that their email address is up to date.

ROLL OUT OF TRUSTEES' MY CHARITY COMMISSION ACCOUNT AND THE REVISED ANNUAL RETURN.

Charity Commission Business Plan 2023 to 2024 (June 2023)

This is a transition plan – it aims to deliver against the commitments made in the last year of our current strategy, while setting us up ready to deliver a new strategy from 2024. Our plan for 2023-24 is shaped around four priorities:

PRIORITY ONE: We will regulate effectively, being clear about our role and our decision-making

PRIORITY TWO: we will strengthen our support and interventions to ensure charities are run well

- ***With the launch of our 'My Charity Commission Account' this year, we will put in place groundwork that will help us, over time, to reshape our relationship with trustees.***

- *Together with conducting research to inform the future development of the Account, we will have taken important steps towards our ultimate ambitions for the service: providing a more efficient and tailored communications channel and an improved customer experience for trustees, which proactively serves them with the guidance and reminders they need to be compliant.*

PRIORITY THREE: in challenging times, we will improve how we use our voice, data and intelligence to help charity deliver impact.

- *Through our activity, we will be more proactive in anticipating wrongdoing, dealing with it speedily where we find it. We will continue to deploy our increasingly sophisticated approach to intelligence gathering and data analysis, improving how we use data and intelligence to inform our work, helping us to identify and address the issues and risks that emerge.*

- ***This will be supported by the introduction of the improved Annual Return 2023 question set***

PRIORITY FOUR: we will invest in our people and our systems so that we continue to be an expert Commission.

MY CHARITY COMMISSION ACCOUNT

Phase 1 (currently planned from Nov 2022 – summer 2023)

This phase is to prepare charity contacts (the person registered with the Charity Commission as the contact for your charity), so their accounts are set up and ready to access our online services when we fully launch ‘My Charity Commission Account’ in phase 2.

Phase 2 (from summer 2023 onwards)

In summer 2023, ‘My Charity Commission Account’ will ‘go live’ and will be the new way you access our online services. From this date:

- contacts can enable trustees and authorised third parties to set up their accounts – we will

- provide guidance on this
- trustees, contacts and authorised third parties who have set up an account will be able to access a range of our online services

“We recommend that any charities using a shared email address, such as ‘info@charityname.org.uk’ for both the charity contact and trustees, change these to individual email addresses used by that person only.”

NEW ANNUAL RETURN QUESTIONS FOR ACCOUNTS

Which of the following policies and procedures did your charity have in place at the end of the financial period of this annual return?

(Tick all that apply)

a. internal charity financial controls policy and procedures

b. safeguarding policy and procedures

c. financial reserves policy and procedures

d. complaints policy and procedures

e. serious incident reporting policy

and procedures

f. internal risk management policy and procedures

g. trustee expenses policy and procedures

h. trustee conflicts of interest policy and procedures

i. investing charity funds policy and procedures

j. campaigns and political activity policy and procedures

k. bullying and harassment policy and

procedures

l. social media policy and procedures

m. engaging external speakers at charity events policy and procedures

GREEN = CC expectation that these policies will be in place

YELLOW = CC considers having these policies may be appropriate



To wrap up

ESG 360 | Shoosmiths lawyers



Sign up (shoosmiths.com)



Autumn date for your diaries – Wednesday, 11 October 2023

We will be in conversation with four charity CEOs about how collaboration with charities can create possibilities for business to unleash the power of civil society (Shoosmiths London office, St Mary-le-Bow)

Email – events@shoosmiths.com for more information

Thank you for joining us today...



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WHAT
MATTERS**