

# Charities Act 2022– an overview Part 1

Thursday 5<sup>th</sup> May 2022 10:30- 11:15am

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# Purpose of legislation

- The purpose is to remove “*unnecessary burdens on trustees [which] act like barnacles on a boat, causing a drag when all should be plain sailing*”. (Lord Hodgson of Astley Abbotts)
- At the same time it is important to safeguard the public interest in ensuring charities are properly run.
- The Act is implementing the majority of the recommendations in the Law Commission’s 2017 report “Technical Issues in Charity law” (TICL) - 484 pages long.

# A long gestation...and then a quick birth...

- Charities Act 2006 (built-in 5-year review of fitness for purpose)
- Law Commission - Eleventh Programme of Law Reform, published in July 2011
- 2012 *“Trusted and Independent: Giving charity back to charities”* (Lord Hodgson’s review of Charities Act 2006)
- 2015: Technical Issues in Charity Law (“TICL”) – Law Commission consultation
- 2016 Supplementary Law Commission Consultation
- September 2017: TICL Report and draft Bill
- March 2021: Government response accepting most of the TICL recommendations
- 24 February 2022: Charities Act receives Royal Assent

# Charity Commission's position

- The Charity Commission has supported implementation of the vast majority of the TICL recommendations.
- A CC statutory objective – to promote the effective use of charitable resources.
- A CC statutory general function – to encourage and facilitate the better administration of charities.
- A CC statutory general duty – the Commission must, in performing its functions, act in a way which is compatible with the encouragement of voluntary participation in charity work.
- Strategic priority (2018-2023) - Giving charities the understanding and tools they need to succeed. *“Our goal as a regulator is to help charities to fulfil the purposes for which they were created by working with them as well as monitoring them.”*

# Key relevant changes

- Changing the law to help charities amend their governing documents more easily with Charity Commission oversight where appropriate.
- Giving charities more flexibility to obtain tailored advice when they sell land and removing unnecessary administrative burdens.
- Removing requirement for Commission authorisation for smaller ex gratia payments.

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- Increasing flexibility for charities to use their permanent endowment.
- (Charitable) corporate trustees of charitable trust = trust corporation
- Mergers
- Payment of trustees
- Name

# Phased implementation of Act

- The Charity Commission will implement these changes on a staggered basis. This will allow time for trustees and the public to understand the changes and will allow sufficient time for the Charity Commission to operationalise the changes in an effective manner.
- To implement the changes, the Commission will produce at least 12 pieces of new or updated trustee guidance, in addition to over 20 pieces of new or updated internal guidance. This will complement updates to internal casework processes, internal operational training, external messaging and communications, and online services. For example, complex digital system updates will be required to amend the online user journey for trustees wishing to amend their governing document, and will take some time.

# Anticipated timeframe

- [Charities Act 2022: implementation plan - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/106227/Charities_Act_2022_implementation_plan.pdf)
- Section 41 Charities Act 2022
- All other provisions expected to come into force in:
  - Autumn 2022
  - Spring 2023
  - Autumn 2023

# Some questions for you

- Do you hold assets (e.g funds held on a special trust in a will) for purposes that don't quite advance your mission in 2021?
- Do you deal with land disposals? Is compliance with the Part 7 regime (in particular obtaining section 119 reports) an effective use of your charity's time and money?
- Does your charity ever consider making ex gratia payments and if so are you asking the right question?

# Amending governing documents/ charitable purposes

- 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, thereby benefitting trustees who may not have access to professional advisers and encouraging better administration of charities.
- 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 as set out in section 62 of the Charities Act 2011. 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.

# Amending governing documents/ charitable purposes

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,~~<sup>123</sup>

# Amending governing documents/ charitable purposes

- Charitable companies

## NOW

Charity Commission consent:

- 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

Charity Commission consent:

- **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 in 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

- NB Section 37 (2) (b) Charities Act 2022 to insert new section 337(3A) Charities Act 2011:
  - 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 consent sought, or
    - (b) may require it to be given by the charity...
  
- Into force from Autumn 2022.

# 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.

# Amending governing documents/ charitable purposes

## Section 275, continued:

- Any resolution under subsection (2) must be passed by a majority of not less than two-thirds of the charity trustees who vote on the resolution.
- (6) Where charity trustees have passed a resolution under subsection (2), they must send a copy of it to the Commission, together with a statement of their reasons for passing it.

## Section 276

- Having received the copy of the resolution under section 275(6), the Commission may direct the charity trustees to give public notice of the resolution in such manner as is specified in the direction...
- ...and may also direct the charity trustees to provide the Commission with additional information or explanations.

# Amending governing documents/ charitable purposes

## Section 277

- Subject to section 278 (ie where the Commission objects), a resolution under section 275(2) takes effect at the end of the period of **60 days** beginning with the date on which the copy of it was received by the Commission.

# Disposing of land

- Part 7 (sections 117-129) of Charities Act 2011 imposes restrictions on dispositions and mortgaging charity land.
- The purpose of this regime is to protect charities from imprudent (or even reckless) decisions of charity trustees by ensuring that they obtain the best terms when they dispose of or mortgage land.
- This regime is retained, but is streamlined by the 2022 Act (remember the barnacles....) with effect from Spring 2023.

# Disposing of land

## The Act:

- provides that the Part 7 regime will not apply where land which is being disposed of is left to, or has been appropriated or assented to, multiple beneficiaries under a will, one or more of which is a charity;
- streamlines self-certification process on dispositions;
- widens/clarifies who can advise on dispositions and mortgages;
- stipulates that there will need to be a statement in the contract as well as in the conveyance that the Part 7 regime has been complied with

# Disposing of land

## Self-certification process

### NOW

Charity trustees must:

- obtain and consider report from **QUALIFIED SURVEYOR**;
- **ADVERTISE** proposed disposition as advised in report; (ie unless surveyor advises it would not be in the charity's best interests to advertise the proposed disposition; and
- decide they are satisfied, having considered the **SURVEYOR'S** report that the terms are the best that can reasonably be obtained for the charity.

### IN FUTURE

Charities trustees must:

- obtain and consider report from **DESIGNATED ADVISER**; and
- decide they are satisfied, having considered the **ADVISER'S** report, that the terms are the best that can reasonably be obtained for the charity

# Disposing of land

What should the report contain?

The Charities (Qualified Surveyors' Reports) Regulations 1992 will be replaced with regulations that require a designated adviser to provide advice concerning:

- what sum to expect (or, if an offer has already been made, whether the offer represents the market value of the land);
- whether (and, if so, how) the value of the land could be enhanced;
- marketing the land (or, if an offer has already been made, any further marketing that would be desirable); and
- anything else which could be done to ensure that the terms of the transaction are the best that can reasonably be obtained for the charity.

# Disposing of land

- “Designated advisers” will mean that fellows of the National Association of Estate Agents and fellows of the Central Association of Agricultural Valuers as well as members of the Royal Institute of Chartered Surveyors can provide a s119 report.
- Also, charity trustees, officers and employees of a charity will be able to provide a report (or advice under ss 120(2)(a), 124(2) and 124(7)) Charities Act 2011, including if they do so in the course of their employment by the charity

# Increased flexibility to make limited ex gratia payments

- New power to make small ex gratia payments without requiring authorisation from the Commission under section 106 of Charities Act 2011.
- The size of ex gratia payment that charity trustees can make using the new power will depend on the gross income of the charity in its last financial year, as follows.

Gross income of charity in last financial year	Size of ex gratia payment permitted without Commission authorisation
£25,000 or less	£1,000
Over £25,000 but not over £250,000	£2,500
Over £250,001 but not over £1 million	£10,000
Over £1 million	£20,000

- These thresholds apply per payment, not per financial year.

# Increased flexibility to make limited ex gratia payments

- Power can be excluded by trusts of charity.
- New statutory test where charity trustees:
  - have no power to take the action but
  - in all the circumstances could reasonably be regarded as being under a moral obligation to take it.
- Therefore it is a new “objective” rather than “subjective” test, meaning charity trustees can delegate the function.
- Overall responsibility for making ex gratia payments (as with any other decision made by a charity) rests with the charity trustees. It will therefore be for the charity trustees to decide whether they wish to make ex gratia payment decisions themselves, or to delegate some or all these decisions.

# Increased flexibility to make limited ex gratia payments

- Ex gratia payments are unusual and the power to make such payments “*is not to be exercised lightly or on slender grounds*” [Re Snowden [1970] Ch 700).
- Charities have a power, not an obligation, to make ex gratia payments and so even if trustees could reasonably be regarded as being under a moral obligation to make such a payment, there is no legal obligation to do so and no automatic expectation that a payment will be made.
- Charities should always be cautious about making ex gratia payments, as they involve the use of charitable funds for non-charitable purposes.

# Some thoughts for you to take away

- Restricted fund (special trust) audit?
- Using section 275 Charities Act 2011 while we still have it?
- Applying to amend charitable purposes before or after the new law comes into force?
- What benefit do you derive from section 119 reports?
- In future who should be providing your section 119 reports?
- Do trustees want to delegate any decision-making on ex gratia payments?
- If so do you need an ex gratia payment policy and/or to amend your scheme of delegation?

# More general thoughts in context of May 2022

- One-third of charities will struggle to survive because of the effects of the cost-of-living crisis, according to a survey of sector leaders.
- The research, conducted by the Charities Aid Foundation, described the combination of lower donations and rising demand for services as “a perfect storm” that will increase pressure on charities.
- Charities face rising costs, including their own fuel and energy bills (identified by 82 per cent of leaders), pressure to increase wages (80 per cent) and the cost of stock (65 per cent).
- CAF said in March that more than one in 10 of the public planned to donate less to charity in response to the financial situation.
- Third Sector (3 May 2022)

# Key guiding principles

- What is your charity's purpose and are you pursuing it?
- Are you getting maximum value for your assets?
- Legal not moral considerations.

# Questions



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# Feel free to get in touch...



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