

# Charities Act 2022 – a brief overview Part 2

Thursday 12<sup>th</sup> May 2022 10:30- 11:15am

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# Purpose of legislation



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# 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
- Names
- Charity mergers
- Payment of trustees

## Increased flexibility for charities to use permanent endowment (Spring 2023)

- Permanent endowment (PE) will be defined [for the purpose of Charities Act 2011] as property that is "*subject to a restriction on being expended which distinguishes between income and capital*".
- Possible examples of PE under this definition:
  - A gift of shares subject to a restriction that only the income from the shares (i.e. dividends) can be spent to further the charity's purposes.
  - A gift of property subject to a restriction that the property itself cannot be sold and the proceeds applied for the charity's purposes, but the rental income may be spent on those purposes.
- However this new PE definition will not capture:
  - Special trust property, such as a fund that it can only be expended on a specific purpose (within the charity's wider purpose); or
  - A fund held subject to a general restriction that only a certain percentage of it (whether capital or income) can be spent each year.
- NB Powers in Charities Act 2011 do not apply to *functional* permanent endowment (This is property that must be used for a specific purpose or purposes of a charity but may not produce an income.)

# Increased flexibility for charities to use permanent endowment

- The Charities Act 2022 clarifies that sections 281 and 282 Charities Act 2011 do apply to corporate charities holding PE.
- An application will have to be made to the Commission to use PE where the fund value exceeds £25,000 (adjusted if the PE fund is borrowed from – see next-but-one slide).
- At present, no CC oversight required (under s281) to release PE where the charity's gross income in the last financial year exceeded £1,000 AND the market value of the endowment fund exceeds £10,000.
- This self-regulation regime for using PE under s281 will apply where the “adjusted market value” of the endowment fund does not exceed £25,000.
- (Evidence given at the Special Bill Public Committee in H of L in October 2021 suggested the cap ought to be increased from £25,000 to £50,000 - but this proposal was not accepted, so if the market value of an endowment fund is say £40,000 but annual income is £900 then an application will have to be made to CC under new provisions - when it doesn't at present.)

# Increased flexibility for charities to use permanent endowment

- New section 282: where adjusted market value of the fund exceeds £25,000, the charity trustees may resolve for the purposes of this section that the fund, or a portion of it, ought to be freed from the restrictions with respect to expenditure of capital that apply to it if they are satisfied that the purposes set out in the trusts to which the fund is subject could be carried out more effectively if the capital of the fund, or the relevant portion of the capital, could be expended as well as income accruing to it, rather than just such income (s282(2)(3))
- The charity trustees must send a copy of any resolution to the Commission, together with a statement of their reasons for passing it (s282(4))
- Time limit for Commission to respond is reduced from 3 months to 60 days.
- Any time period may be extended for compliance with any Commission requirements to give public notice or provide information.

## Increased flexibility for charities to use permanent endowment

- New statutory power to borrow from PE:
  - in addition to any express power;
  - can be restricted or excluded by the trusts of the charity.
- Power:
  - to borrow a permitted amount (up to 25% of PE);
  - subject to repayment within 20 years.
- Limited new power to invest PE in social investments.

## (Charitable) corporate trustee of charitable trust = trust corporation (Autumn 2022)

- If land is to be held on charitable trust by a sole trustee, that sole trustee must have sole corporation status in order for:
  - the outgoing trustees to be discharged from their responsibilities as trustees, and
  - the sole trustee to be able to deal with the land by giving a valid receipt to a purchaser.
- A new section 334A Charities Act 2011 confers trust corporation status on any trustee of a charitable trust that is a body corporate *and itself a charity*, in its capacity as trustee of a charitable trust.
- Example:
  - Trustees X and Y are the current trustees of charitable trust A.
  - Charitable company Z is later appointed to be trustee of charitable trust A, replacing Trustees X and Y (who will become trustees/company directors of Z)
  - Trustees X and Y are discharged from their responsibilities as trustees of A.

# Names (Spring 2023)

- Section 42 Charities Act 2011 is amended to extend the power of the Charity Commission to require a charity to change its name, to cover “*working names*” as well as the charity’s formal name.
- The Commission may give a direction requiring the name of the charity to be changed or requiring a working name no longer be used as a working name, where “*the name or working name is the same as, or in the opinion of the Commission, too like, the name of working name of another charity.*”
- Working names are important. These are the formal names of some well known English charities – do you know which they are?
  - Charity Projects
  - The Kynge’s College of Our Ladye of Eton Besyde Windesore
  - Royal Commonwealth Society for the Blind

## Charity mergers (Autumn 2023)

- New clause 311(2) Charities Act enables gifts to a charity which has since merged (as part of a “*relevant charity merger*”) to take effect as a gift to the new charity. This will be the case even where the gift specifies that it will only take effect if the charity continues to exist on the date the gift takes effect.
- This new clause will close the loophole highlighted in *Berry –v- IBS – STL (UK) Ltd* [2012] EWHC 666:

*“If any charity or charitable organisation which I have named as a beneficiary in this Will is found never to have existed or to have ceased to exist or to have become amalgamated with another organisation or to have changed its name before my death then the gift contained in this Will for such charity or charitable organisation shall be transferred to whatever charitable institution or institutions and if more than one in whatever proportions as my Trustees shall in their absolute discretion think fit.”*

- No further need for shell charities on register of charities?

## Payment of trustees (Autumn 2023)

- The High Court has an inherent jurisdiction, in exceptional circumstances, to order the payment of remuneration to a trustee (or the retention of an unauthorised benefit received by the trustee) in connection with work that has been undertaken by the trustee for the benefit of the trust.
- A new power for the Commission will prevent the need for an application to court to authorise the payment of an equitable allowance.
- An equitable allowance will only ever be awarded to a trustee (in breach of fiduciary duty) and so the provisions do not apply to “connected persons”.

# Payment of trustees (Autumn 2023)

- New section 186A Charities Act 2011

## 186A Remuneration etc for work already carried out<sup>121</sup>

- (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.

# Payment of trustees (Autumn 2023)

## New section 186A Charities Act 2011

- (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.

# Some thoughts for you to take away

- Making maximum use of your assets.
- Restricted funds/ permanent endowment audit? (Any low-earning funds over £10K?)
- Are you protecting all your IP?
- Checking your governing document, in particular regarding authorisation of trustee benefits
- Be familiar with CC12: [Trustee expenses and payments - GOV.UK](https://www.gov.uk/guidance/trustee-expenses-and-payments)  
[www.gov.uk](https://www.gov.uk)

# Questions?



# Giving back

- [Shoosmiths Foundation | Shoosmiths Lawyers](#)



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# Feel free to get in touch...



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