

Charities Act 2006 – a guide

October 2010

stewardship[®]

PO Box 99, Loughton, Essex, IG10 3QJ

t: 08452 26 26 27

e: enquiries@stewardship.org.uk

w: www.stewardship.org.uk

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CONTACT DETAILS

Stewardship

PO Box 99, Loughton, Essex IG10 3QJ

t 08452 26 26 27 or 020 8502 5600

f 020 8502 5333

e enquiries@stewardship.org.uk

w www.stewardship.org.uk

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Executive Summary

After 4 years with over 80 hours of Parliamentary debate in both Houses of Parliament, the Charities Act 2006, along with the mammoth Companies Act 2006, finally reached the Statute Book at the end of 2006.

This Briefing Paper provides a reasonably comprehensive review of this major piece of legislation as it applies to Christian charities, including churches. It describes both new laws and, where appropriate, highlights how previous laws have changed. Reference is also made to the specific charity provisions of the Companies Act 2006.

Charities Act 2006

The Act is in 4 parts.

Part 1

Defines 'charity' and provides for a 'public benefit' requirement which applies to all charities, including religious ones.

Part 2

- Establishes the Charity Tribunal (now known as 'The First Tier Tribunal (Charities)') - who receive appeals from Charities against decisions of the Charity Commission.
- Requires the registration of charities according to new thresholds and criteria. Most notably, churches from the historic denominations who, until now, came within the "excepted charity" status, are required to register if gross income exceeds £100,000 per annum. All other churches are required to register if gross income exceeds £5,000 per annum. For these purposes, being a 'registered place of worship' under the Places of Worship Registration Act 1855 has no legal bearing on the requirement to register with the Charity Commission. Changes in Finance Act 2010 make it highly desirable for charities to be registered, where charity law says that they should be. There is, therefore, now little room for complacency.
- Provides for revised audit and independent examination thresholds. Under the Act, charities can opt for an independent examination if their gross income is up to £500,000, although examiners of charities with income between £250,000 and £500,000 have to hold one of the accountancy qualifications specified in the Act. If gross assets exceed £3.26 million¹, the audit threshold is reduced to £250,000¹.
- Introduces a new charity structure, the Charitable Incorporated Organisation, giving limited liability status through a single regulator, the Charity Commission.
- Permits trustees to be remunerated for services provided to the charity (other than as a trustee), so long as defined safeguards are met.
- Permits trustee indemnity insurance to be purchased out of charity assets, even where there is no power to do this in the governing document, provided that document does not specifically prohibit the purchase.

¹ Threshold at the date of publication of this Briefing Paper.

Part 3

Introduces a revised regime for public charitable collections, amends the rules for professional fundraisers and provides the Government with power to regulate fundraising activities in the future, should they deem it desirable.

It also provides power to the Government to give financial assistance to charitable, benevolent or philanthropic institutions.

Part 4

Contains largely administrative and operational provisions.

Companies Act 2006

The Companies Act, which is a substantial piece of legislation applying mainly to commercial companies, also makes some additional changes relevant to charitable companies:

- The time limit for filing accounts is reduced from ten months from the financial year end date to nine months.
- Provisions were introduced that harmonise the accounting and independent examination regimes for company and non-company charities for the first time. Further details of these changes are given in Section 10.6.

1 Introduction

- 1.1 This Paper seeks to provide a comprehensive review of the Charities Act 2006 as it applies to Christian charities, including churches. It does not cover charity law in general and makes no comment on the Charities Acts of 1992 and 1993, unless the context requires it.
- 1.2 Unless otherwise stated, reference to 'The Act' or 'The Charities Act' means the Charities Act 2006. Other Acts are referred to in full. The term 'charity' or 'charities' can be taken to include churches, unless otherwise stated.
- 1.3 Reference is also made to the specific charity provisions made in the Companies Act 2006, which received Royal Assent on the same day as the Charities Act.

2 The birthing of the Act

- 2.1 The Charities Act has perhaps been one of the most debated Acts in history, having been introduced in three Queen's speeches.
- 2.2 It started life in July 2001, when the Prime Minister commissioned a review of the law and regulation of charities and not for profit organisations. This resulted in the Cabinet Office Strategy Unit publishing a consultation paper 'Private Action, Public Benefit' in September 2002. A draft Act was published in May 2004 and an actual Act in December of that year. After falling because of the General Election, the Act was reintroduced in the Lords in May 2005.
- 2.3 After 4 years of drama and some measure of political theatre altogether consuming over 80 hours of Parliamentary debate in both Houses, the Charities Act 2006, along with the mammoth Companies Act 2006, finally reached the Statute Book on 8 November 2006. With so much debate, we should expect the Act to represent well thought out law that will stand the test of time!

3 Structure of the Act

- 3.1 The Act is divided into four parts and this Paper broadly follows this structure. Somewhat disappointingly, it is not a consolidating Act and therefore it has to be read alongside and amends provisions in the earlier Acts.
- 3.2 The four parts deal with:
 - the definition of charity and charitable purposes;
 - the regulation of charities;
 - fundraising by and funding of charities and other benevolent or philanthropic organisations;
 - legal administrative provisions.

4 Geographical jurisdiction of the Act

- 4.1 Save for a few very limited circumstances, the Act has jurisdiction in **England and Wales only**.
- 4.2 Scotland has its own charity legislation now embodied in the Charities and Trustee Investments (Scotland) Act 2005. That Act applies in general to Scottish charities, but there are implications for cross border charities (English and Welsh charities 'operating'

in Scotland). All Scottish charities must register with the Office of the Scottish Charity Regulator ('OSCR') as there is no concept of 'excepted charities'.

- 4.3 Designated Religious Bodies ('DRB's') are entitled to limited exemptions under the Scottish Act. The bodies accepted by OSCR as DRB's are: The Church of Scotland, The Free Church of Scotland, The United Free Church of Scotland and seven specific Roman Catholic dioceses and archdioceses in Scotland.
- 4.4 Northern Irish charities continue to be 'regulated' by HM Revenue and Customs. However, Charities Act (Northern Ireland) 2008 established the Charity Commission for Northern Ireland ('CCNI'). As in Scotland, all churches in Northern Ireland, along with charities in general will be required to register with CCNI. However, at present (2010), the registration process has been held up by a technical issue with the wording in the Northern Ireland Charities Act.
- 4.5 Stewardship plans to provide Briefing Papers covering charities in Scotland and Northern Ireland in due course.
- 4.6 The rest of this Paper deals with the law as it applies in England and Wales.

5 What is charity?

Statute

- 5.1 Until Charities Act 2006, there was no statutory definition of what constituted charitable activity. The meaning of the term 'charitable activity' was derived from the court case of *Special Commissioners of Income Tax v Pemsel* (1891). Even following the Act (which lists "charitable purposes as including ... ") the Pemsel case, and the long line of case law that has followed it, remain the base point for deciding what is or is not charitable activity today.
- 5.2 Lord Macnaughten in Pemsel's case set out to define a charity in a legal sense. In his judgement, he concluded that the term comprised of four principle divisions, the so called 'Heads of Charity':
 - the relief of poverty;
 - the advancement of education;
 - trusts for the advancement of religion;
 - other purposes beneficial to the community and not falling within any of the above three heads.

Case law

- 5.3 The development of the legal definition of 'charitable purposes' has been by virtue of case law rather than Statute for several hundred years. Indeed, the Courts expanded the meaning of charity, principally under the last head ('other purposes beneficial to the community') as society developed and perception of what constitutes activity beneficial to the community has broadened.

Definition of charity within the Act

- 5.4 For the first time, the meaning of charitable purpose is defined in Statute. The Act is worded in such a way as to attempt, for the most part, to preserve what is currently understood to be charitable, taking account of the various court decisions over the years, whilst allowing for the development of the meaning of charity in future – in much the same way as the term has been widened over the last 400 years.

- 5.5 A charity must have charitable purposes only; a body with both charitable and non charitable purposes cannot be a charity.
- 5.6 The charitable purposes specified in the Act are not intended to be all encompassing, but are meant to provide broad heads covering the great majority of purposes that are recognised as charitable. The Act recognises that there will be other charitable purposes not specifically listed.

What does the Act change?

- 5.7 In terms of defining what is and what is not charity, the Act makes few changes and, for the most part, does not seek to disturb the underlying case law. However, there are several areas that are worthy of note.

Public benefit

- 5.8 One deliberate change concerns public benefit. Prior to the Act, it was legally assumed that purposes for the advancement of religion, advancement of education and relief of poverty were for the public benefit. No other "purposes" benefited from this presumption and therefore it was felt appropriate that this should be withdrawn.
- 5.9 This change, which is viewed by many in the Christian Sector as both a significant change and a potential threat, is considered further in Section 6.

Definition of Religion

- 5.10 The Act contains a definition of 'religion':

"Religion" includes—

- a) a religion which involves belief in more than one god, and
- b) a religion which does not involve belief in a god

- 5.11 This definition was included in the Act to give certainty to non-theist and multi-theist religions that they fall within 'advancement of religion'. This follows on from older case law which defined religion as involving belief in "a" god.

- 5.12 An attempt by a vociferous group of secular humanist peers during the House of Lords debates on the Act to amend the main head of charity to "The advancement of religion or belief or other systems or philosophies of belief or ethics which are not included in ... [the definition of religion, as above]" was defeated.

The Heads of charity in the Act

- 5.13 The Act provides for 13 'Heads' of charity. These are not fully stated purposes in themselves, but rather heads under which lie a range of different purposes capable of fulfilling the description:

- a) the prevention or relief of poverty;
- b) the advancement of education;
- c) the advancement of religion;
- d) the advancement of health or the saving of lives;
- e) the advancement of citizenship or community development;
- f) the advancement of the arts, culture, heritage or science;
- g) the advancement of amateur sport;

- h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- i) the advancement of environmental protection or improvement;
- j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- k) the advancement of animal welfare;
- l) the promotion of the efficiency of the armed forces of the Crown, or the efficiency of the police, fire and rescue services or ambulance services;
- m) any other purposes within subsection (4).

Subsection (4) covers purposes recognised as charitable under existing charity law or the Recreational Charities Act 1958, purposes analogous or within the spirit of any purposes as charitable under existing charity law etc. and purposes analogous to any purposes subsequently regarded as analogous. The last sentence is a parliamentary draftsman's way of including the possibility of growth and development of charitable purposes over time.

- 5.14 The advancement of health includes the prevention or relief of sickness, disease or human suffering.
- 5.15 The advancement of citizenship or community development includes:
 - a) rural or urban regeneration, and
 - b) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
- 5.16 The advancement of amateur sport means sport or games which promote health by involving physical or mental skill or exertion ; and
- 5.17 Paragraph (j) above encompasses relief given by the provision of accommodation or care to the classes of persons mentioned.
- 5.18 Note the insertion of the prevention as well as relief of poverty! Times and attitudes have surely changed since the relief of poverty was first identified as a charitable purpose in the Statute of Charitable Uses in 1601!

6 Public benefit

- 6.1 For an activity to be charitable in law, it has to be carried out for the public benefit. Until the 2006 Act, there was a legal assumption that, unless shown to the contrary, activities within the first three heads of Paragraph 5.2 (including the advancement of religion) were carried out for the public benefit.
- 6.2 The withdrawal of the presumption is in part prompted by a desire to see a level playing field between charities, but also in the light of the past registration of (for example) religious bodies offering dubious public benefit and possibly even, in many eyes, public damage. There was also significant debate over the nature of the benefit offered by public schools.
- 6.3 Many inside the church expressed concern that, whilst they are clear that the promotion of Christian principles, acts of worship etc. do provide a public benefit, this is not easily demonstrated in objective terms, often being more in the nature of an intangible benefit.

6.4 In order to address and allay these concerns, Stewardship has produced a separate Briefing Paper focussing solely on the issue of Public Benefit. This not only reviews the law in this area in simple terms, but provides practical examples and also reviews and draws out the lessons from the Charity Commission's Public Benefit Assessment Reports, undertaken in relation to charities for the advancement of religion. The Stewardship Briefing Paper can be accessed from:

www.stewardship.org.uk/documents/public_benefit_and_advancement_religion.pdf

6.5 Readers should particularly note that the Charity Commission has produced a number of publications on Public Benefit as is applied in general and to specific classes of charities. If you are a charity trustee, you should make sure that you are aware of their **statutory guidance**:

- "Charities and Public Benefit"
- "Supplementary Guidance: The Advancement of Religion for the Public Benefit"

Charities Act 2006 **requires** charity trustees to have due regard to the Commission's statutory guidance on public benefit (including any relevant Supplementary Guidance) and to **report** in the charity's annual report and accounts that they have done so.

The Commission have published a useful short summary entitled "Charities and Public Benefit: Summary Guidance for Trustees".

All of these publications are available from the dedicated Public Benefit section of the Charity Commission website:

www.charity-commission.gov.uk/Charity_requirements-guidance/Charity-essentials/Public-benefit/default.aspx

6.6 The Charity Commission do not see the provisions of the Act as having a dramatic effect on the law and still regard themselves as bound by previous court decisions as to what constitutes 'public benefit'. So, churches that find themselves having to register for the first time because they have previously fallen within Exception from Registration Order (see later comment) should have little to fear from the 'new' public benefit requirement, as their particular form of 'advancement of religion' should already be accepted by the Commission without requiring further proof.

7 The Charity Commission

7.1 The Act establishes The Charity Commission for England and Wales as a body independent of Government Ministers and Departments, but responsible to the Crown.

7.2 The Commission is given 5 statutory objectives as follows:

- to increase public trust and confidence in charities;
- to promote awareness and understanding of the operation of the public benefit requirement;
- to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of charities;
- to promote the effective use of charitable resources;
- to enhance the accountability of charities to donors, beneficiaries and the general public.

- 7.3 It also has 6 general functions under the Act:
- determining whether institutions are or are not charities;
 - encouraging and facilitating the better administration of charities;
 - investigating misconduct or mismanagement of charities and taking appropriate action to protect charities;
 - the issue, etc. of public charitable collections certificates;
 - disseminating information in relation to the Commission's objectives or functions;
 - giving information or advice or making proposals to Ministers in relation to the Commission's objectives or functions.
- 7.4 The above functions include the maintenance of the public register of charities. They have a duty to exercise their functions in a proportionate, accountable, consistent and transparent way.
- 7.5 A theme of the Act is to make the Charity Commission more accessible to the public and less 'Civil Service' orientated, to separate out the functions of advisor and policeman and to provide for an independent Charity Appeals Tribunal to whom appeals against decisions of the Charity Commission can be taken.

8 The First Tier Tribunal (Charities)

- 8.1 Under the law prior to Charities Act 2006, a right of appeal existed in relation to some decisions of the Charity Commissioners, but only to the High Court - a difficult and expensive process.
- 8.2 This Act, therefore, created a new Charity Tribunal to act as the "court of first instance" to deal with appeals against, and reviews of, legal decisions by the Commission. It will also take referrals from the Commission or the Attorney General which involve the operation or application of charity law.
- 8.3 Matters on which a decision can be appealed are set out in what is now Schedule 1C to the Charities Act 1993. Further details can be found by reference to the Tribunals Service dedicated web page: www.charity.tribunals.gov.uk
- 8.4 The Tribunal does not deal with customer service complaints. These will continue to be dealt with internally or through the Independent Complaints Reviewer.

9 Registration of charities

- 9.1 The previous charity registration thresholds are abolished. This includes the tests that referred to occupation of land or permanent endowment.
- 9.2 Under the Act, all charities are required to register with the Charity Commission if their gross income exceeds £5,000, unless prior to the Act's enactment, the charity was:
- 'excepted' from registration;
 - exempted from registration
- in which case, slightly amended rules will apply. Excepted status is to be withdrawn under the Act and therefore a transitional registration threshold applies.
- 9.3 'Excepted charities' include some, but not all, churches. Churches that can claim excepted status are broadly limited to churches within:

- The Methodist Church
- Baptist and Congregational churches
- Independent churches affiliated to the Fellowship of Independent Evangelical Churches (FIEC)
- The Presbyterian Church of Wales
- The Church of England
- The Church in Wales
- The Religious Society of Friends (Quakers)
- The United Reformed Church

These churches have a compulsory requirement to register if gross income exceeds a threshold of £100,000. This is a transitional measure with the threshold reducing over time to converge with the threshold applying to charities generally.

- 9.4 For churches not listed in Paragraph 9.3 above, the registration threshold is £5,000 and not £100,000. Very few, if any, Christian charities will qualify as exempt charities.
- 9.5 The Act includes a statutory obligation on the Commission to register charities that request to be voluntarily registered.

Registered Places of Worship

- 9.6 Confusion has been created by the exception from registration of 'registered places of worship' both under the Charities Act 1993 and the 2006 Act. Readers should note that registration as a registered place of worship under the Places of Worship Registration Act 1855 applies only to the church building and not to the working funds (or congregational funds) of the church. These charitable funds must be registered with the Charity Commission if the relevant registration threshold is exceeded.
- 9.7 This point is all the more important following tax changes for charities in Finance Act 2010. **From 6 April 2010**, any church (or charity) that is not registered with the Charity Commission where there is a legal requirement to be registered **will no longer be entitled to charity tax reliefs, including gift aid.**
- 9.8 Further detail on this new tax measure (and its associated rules) is given in the Stewardship Briefing Paper:

www.stewardship.org.uk/Budget%20June%202010-implications%20for%20charities%20and%20Christian%20charities.pdf

10 Audit and independent examination of accounts

Audit – unincorporated charities

- 10.1 The Act introduced new thresholds and a new 'assets test' for determining whether or not a full statutory audit of the charity's accounts is required. The main threshold was increased from £250,000 to £500,000 p.a., and now applies to gross income only.
- 10.2 A second, asset based test applies to gross income at a lower level. So, where gross income exceeds £250,000², if 'gross assets' exceed £3.26 million², then despite gross

² In The Act, these thresholds were set at £100,000 and £2.8 million. They have subsequently been increased by Statutory Instrument.

income being below the main threshold, a statutory audit by a *registered auditor* will still be required.

- 10.3 The Act does not override any specific provision in the charity's Governing Document that requires a full audit. In cases of doubt or the need to interpret imprecise or old fashion language in the Governing Document, suitable professional advice should be taken. It may also be possible to amend the provision in question by following proper procedure.

Definition of 'gross assets'

- 10.4 The Act does not use the phrase 'gross assets' but refers to "the aggregate value of its assets (before deduction of liabilities)". The word 'value' is not defined in The Act. However, the Charity Commission define 'Gross (Total) assets' as "the aggregate amount of assets of a charity, before the deduction of liabilities, as at the balance sheet date, i.e. at the close of the last day of the charity's financial year". Therefore, one can safely assume that the value referred to is that recorded in the charity's (accruals) accounts.

- 10.5 Trustees of smaller charities should, therefore, carefully consider the question of property revaluation and 'gearing up', e.g. to finance perhaps significant property acquisitions. As Lord Phillips commented in the early debates on the Bill:

"Why is the £2.8 million taken before deduction of liabilities? That seems very odd, even bizarre, if you have a land charity with £3 million in assets and a mortgage of £2.5 million"

Lord Bassam for the then Government undertook to look at this again and give Lord Phillips a private response. Unfortunately, nothing has changed since then and the nature of the Government's response to a perfectly valid question is not known.

- 10.6 Charities with a modest gross income, but holding a perhaps historic but valuable property that has been revalued in their accounts, may find that they are subject to statutory audit.

Audit – charitable companies

- 10.7 Companies Act 2006 introduced provisions that harmonised the accounting and independent examination regimes for company and non-company charities for the first time.

Now, where gross income is not more than £500,000 in the year and the balance sheet total is not more than £3.26 million, the company will be exempt from audit *provided that* an independent examination in accordance with the Charities Act 1993 provisions (as amended by Charities Act 2006) is carried out (for which, see Paragraph 10.11). The 'balance sheet total' refers to the aggregate of the assets (only) shown in the company's balance sheet.

- 10.8 More specifically, the audit requirements for charitable companies contained in the Companies Act were removed and 'small' charitable companies³ became subject solely to the external scrutiny provisions of Charities Act 1993 (as amended by Charities Act 2006). Only medium and larger sized charitable companies will be subject to a Companies Act audit. These changes took effect from accounting periods beginning on or after 1 April 2008.

³ 'Small' is defined in Companies Act 2006

10.9 So, for accounting periods ending on or after 1 April 2009, charitable companies are required to have their accounts audited by a registered auditor only if one of the following conditions are met:

- gross income exceeds £500,000, or
- gross assets exceed £3.26 million and gross income exceeds £250,000, or
- the company's Articles of Association require an audit.

Where an audit is not required under the Companies Act (because the charitable company is 'small'), the directors must provide a specific statement that says that the company is exempt from the requirements for a Companies Act audit. Companies House offers guidance about the format the statement should follow.

10.10 Note, that if 10% or more of the members of a charitable company request that an audit is obtained, the above exemption is disapplied.

10.11 If a charitable company's gross income exceeds £25,000, but is under the above thresholds, the directors / trustees may opt to have an independent examination instead of an audit (unless the Articles of Association specifically require an audit).

10.12 Under The Companies Act, the following additional provisions apply in relation to charitable companies:

- accounts must be prepared using UK rather than International Accounting Standards;
- in all cases, company accounts must meet the true and fair view standard and, therefore, must be prepared on the accruals basis of accounting in full compliance with SORP 2005: Accounting and Reporting by Charities.

Independent examination

10.13 An independent examination of the accounts represents an alternative to an audit where the income of the charity falls below the audit threshold. Provided that there are no conflicting requirements, such as in the charity's trust deed or governing document, trustees can opt to have an independent examination instead of an audit up to the gross income limit of £500,000.

10.14 Where gross income is less than £25,000, no examination of any kind is necessary.

10.15 The Act also introduced a new restriction on the trustees' choice of examiner, where gross income is between £250,000 and the statutory audit threshold of £500,000. Within this income bracket, the proposed examiner must either be a member of one of the accountancy bodies listed in s43(3A) Charities Act 1993⁴ or be a Fellow of the Association of Charity Independent Examiners. Broadly, this means that a fully qualified accountant must be used or, if not, they must be a Fellow of ACIE.

10.16 The restriction in Paragraph 10.15 does not in any way diminish the trustees' responsibilities under s43 Charities Act 1993 to only appoint an examiner who they believe has the "requisite ability and practical experience to carry out a competent examination of the accounts". It should not be assumed that, just because an accountant is professionally qualified, they possess practical experience to carry out a competent examination of **charity** accounts.

⁴ Inserted into the 1993 Act by SI 2008/527. Accountants qualified to act under s43(3A) include chartered accountants, certified accountants, and members of AAT, CIMA, ISCA or CIPFA.

Responsibilities of auditors and examiners

- 10.17 Amendments are made by the Act to tidy up and ensure consistency in duties of auditors on the one hand and independent examiners on the other, to report matters to the Charity Commission and for protection of them against actions by trustees for breach of confidence.
- 10.18 Broadly, auditors and examiners have a duty to report directly to the Charity Commission, without reference to the charity:
- Abuse or significant breaches of charity law or regulation
 - Any matter relating to the activities or affairs of the charity which they have reasonable cause to believe is or is likely to be of material significance for the exercise of the Charity Commission's functions under section 8 of the 1993 Act (power to institute inquiries into charities) or their protective powers under section 18.
- 10.19 Auditors and examiners also have a discretionary power to communicate directly with the Charity Commission any other matter that they have reasonable cause to believe will be relevant to any of the functions of the Charity Commission.

11 Group accounts

- 11.1 Charities often carry out trading activities, and sometimes charitable activities, through companies and other entities they own or control. Best practice dictates that these charities should prepare a single set of 'group accounts' to consolidate the accounts of the charity and any its subsidiaries, in order to give a full picture of all the charity's activities and the resources it controls.
- 11.2 The parent charity is legally required to prepare accounts for the standalone charity, but there is no legal basis for preparing 'group accounts'. The Act introduces a requirement for a parent charity to prepare group accounts, which include the charity's subsidiaries in compliance with regulations as to form and content made by the Minister for the Cabinet Office.
- 11.3 As these provisions are relevant to relatively few charities, they are not covered in any further detail here.

12 New form of charity – the Charitable Incorporated Organisation

- 12.1 At present, the main forms of charitable body are either an unincorporated trust or a company limited by guarantee and exclusively established for charitable purposes.
- 12.2 Trustees of an unincorporated charitable trust can often feel unduly exposed to personal liability, being jointly and severally liable for the actions of the charity. There may, therefore, be a desire to run the charity's activities through a limited liability (incorporated) structure. Not only does this structure offer more protection, but can also be perceived more favourably by funders, banks and even the public.
- 12.3 But charities that want a corporate structure currently have to register both as charities and as companies. This means that they have to meet the dual regulatory burdens of both the Charity Commission and Companies House, comply with charity law and company law and prepare statutory accounts that comply with two separate accounting regimes at the same time.
- 12.4 The Act creates a new vehicle for these charities, the Charitable Incorporated Organisation (CIO). A CIO will have the advantages of a corporate structure, such as reduced personal liability for trustees, without the burden of dual regulation.

Overview

- 12.5 In overview, a CIO will:
- be a legal body (i.e. with 'legal personality') in its own right;
 - have members and trustees – who do not need to be the same body of persons;
 - be able to sue and be sued in its own name;
 - have limited liability, offering protection to its trustees / directors;
 - be registered only with the Charity Commission, who will be its sole regulator;
 - prepare accounts according to Charity Accounting regulations, with no reference to Company Law accounting requirements;
- 12.6 Existing charities should be able to convert to a CIO with relative ease. Unincorporated charitable trusts will transfer the net assets and operations to the new body; a charitable company (or charitable society under the Industrial and Provident Societies Act 1965) will be able to go through a conversion process.
- There are some specific and detailed restrictions that may prevent a minority of charities from converting to a CIO.
- 12.7 Further detail on the nature of the proposed CIO and the processes for converting an existing charity to a CIO can be found in our Briefing Paper on the subject:
- www.stewardship.org.uk/documents/briefing-papers/CIOanewformofcharitystructure.pdf

Implementation

- 12.8 The introduction of the CIO is one of the few areas of Charities Act 2006 that are still to be implemented. For various reasons, the appearance of the CIO option has been a long time in the birthing. Draft regulations for their introduction have been prepared, consulted on and re-drafted. It is now hoped that the first CIO's will become available some time in 2011.

13 Trustee remuneration issues

- 13.1 It is well established that, unless a specific power allows (for example, in a charity's trust deed or by virtue of a Charity Commission Order), trustees and persons connected with them should not receive any form of remuneration or benefit. To do so would be breach of trust and render the trustee vulnerable to repayment of the remuneration or benefits received.
- 13.2 The Act makes some slight relaxations here. However, trustees should not become too relaxed. It will still be the case that a trustee or a connected person cannot be remunerated without a specific power (which is unusual in any event) if the proposed remuneration or benefit relates to their capacity as:
- A trustee, or
 - An employee.
- 13.3 Nor do the new rules override any provision in a charity trust deed, an Order of the Commission or any statutory provision.
- 13.4 Subject to the above, remuneration will be permissible if:
- stated safeguards are complied with (13.5 below);

- there is no express provision in the trusts of the charity that prohibits that person receiving remuneration;
- remuneration is provided for services to the charity (other than as a trustee).

13.5 The safeguards that must be adhered to are:

- the amount or maximum amount of the remuneration is both reasonable in the circumstances and set out in a written agreement between the charity and recipient. The trustees must have regard to any guidance issued by the Charity Commission concerning the making of such agreements;
- the trustees must be satisfied that the arrangement is in the best interests of the charity;
- the trustee(s) to be remunerated should take no part in any decision to remunerate or other matter connected with the relevant agreement (above);
- remunerated trustees must remain a minority in number of the total trustees.

13.6 The Charity Commission will have power, by Order, to:

- require repayment in whole or in part of any remuneration that a trustee has received if he has taken part in the decision to remunerate himself (or a person connected with him);
- to prevent remuneration in whole or in part from being paid;
- relieve a trustee (as well as an auditor or independent examiner) of a personal liability for breach of trust where the Commission are satisfied that the trustee, auditor or examiner has acted honestly, reasonably and where the trustee, etc. ought fairly to be excused for the breach of trust. Currently, such an Order can only be obtained by application to the courts.

14 Trustee Indemnity Insurance

- 14.1 Trustee Indemnity Insurance (TII) indemnifies trustees from personal liability for claims made against them for breach of trust, negligence or default, as long as the mistake was honestly made and not the result of wilful misconduct. In practice, trustees are not held liable in this way for honest mistakes, but anxiety about the possibility may give rise to reluctance on some people's part to become trustees.
- 14.2 Generally, a charity's own funds cannot not be used to pay for TII as this would bring an impermissible personal benefit to the trustees.
- 14.3 The Act now provides a statutory authority for trustees to purchase TII out of the charity's own resources, without the prior permission of the Charity Commission, so long as they are satisfied that it is in the best interests of the charity to do so and there is no provision in the charity's governing document which specifically forbids the purchase.
- 14.4 If there is a specific prohibition in the charity's governing document, then trustees can still approach the Charity Commission with a request for an amendment so as to permit the purchase.

15 Charity mergers

- 15.1 When two or more charities merge, concerns can arise over legacies and donations bequeathed to charities that are a party to the merger, but may disappear as the result of a merger. Consequently, these charities are retained as dormant entities to

protect against the possibility of the loss of a legacy that may become receivable at an unspecified future point.

- 15.2 The Act provides for the Commission to keep a public register of charity mergers. Registering a merger will be voluntary but where it is, gifts and legacies subsequently made to the previously separate charities will automatically be transferred to the new merged charity.
- 15.3 The Act allows the registration of mergers that took place prior to the Act coming into being. This enables charities to tidy up by striking off dormant charities and avoiding the unnecessary administration that maintenance of these would otherwise entail.
- 15.4 The Register, introduced on 28 November 2007. Notification of a merger can be made to the Charity Commission using their online form at:

www.charity-commission.gov.uk/forms/merger.aspx

Online advice can be found at:

www.charity-commission.gov.uk/Manage_your_charity/Merge_or_close_index.aspx

The Register itself can be viewed online at:

www.charitycommission.gov.uk/Charity_requirements_guidance/Your_charitys_activities/Working_with_others/rom.aspx

16 Fundraising

Fundraising solicitation statements

- 16.1 Professional fundraisers and commercial participators fundraising for charities have, for some time, had to enter into a written agreement with the charity and make a statement telling potential donors that they are getting paid, when they ask for money.
- 16.2 The Act made changes to these 'solicitation statements'. From 1 April 2008:
 - the Statement has to include the *amount* the professional fundraiser or commercial participator will be paid for fundraising for the appeal, or if the specific amount isn't known, to give a reasonably accurate estimate of what they'll receive.
 - slightly different statements also have to be made by employees, officers and trustees of charities who act as collectors. This doesn't apply to volunteers.
- 16.3 Detailed Guidance has been published by the Cabinet Office and is available from:
<http://www.cabinetoffice.gov.uk/media/110668/amended%20guidance%20final.pdf>

Important note:

The following provisions, described in Paragraphs 16.4 to 16.11 are not yet in force. For very good, more detailed guidance on the current law and regulation around fundraising, please refer to the Charity Commission publication CC20: Charities and Fundraising, available from:

www.charity-commission.gov.uk/Library/guidance/cc20text.pdf

Public charitable collections

- 16.4 The Act provides for a new system for licensing charitable collections in public, replacing previous rules dating back to 1916 and 1939. It applies to all such collections, including face-to-face fundraising.

- 16.5 There is a new role for the Commission in checking whether charities and other organisations are fit and proper to carry out public collections and will be responsible for issuing public collections certificates, valid for up to five years. A collection in a public place will not be permitted unless the organisation concerned both holds a certificate and has obtained a permit from the relevant local authority. Failure to comply will result in a fine of up to £5,000.
- 16.6 Because of the need for the Charity Commission to develop the regulations and guidance and set up the new systems for their role, the new regime is not expected to be functional for a few years.

Collections in public places

- 16.7 Previous legislation referred to 'street' collections. The Act extends this to collections in 'public places', which includes some privately owned land, such as railway station ticket halls and supermarket forecourts. Once a charity has a public collections certificate, it will be able to apply to a local authority for a permit to hold collections at certain times in certain places in that local authority area.
- 16.8 Local authorities will ensure that there are not too many collections taking place at the same time, in the same place.

Door to door collections

- 16.9 Previous legislation referred to 'house to house' collections. The Act refers instead to 'door to door' collections, to make clear that this includes business premises.
- 16.10 A charity with a public collections certificate will be able to conduct door to door collections without permission from a local authority, but it must inform the local authority that the collection is taking place.

Local, short-term collections

- 16.11 Some collections will be exempt from licensing and will not require either a certificate or permit, but organisers will have to notify the local authority that the collection is taking place; so small scale activities, like carol singing, should not be disproportionately affected.

17 Other Provisions

Freedom for smaller charities to evolve and change

- 17.1 The Act liberalises and extends the powers for a smaller, unincorporated charity, with income of less than £10,000 a year, to make a resolution without having to go through the Charity Commission to:
- make changes to its objects (purposes);
 - transfer their assets to another charity whose objects are consistent with their own;
 - modify particular powers and procedures in the trusts of the charity.
- 17.2 Very small charities can now benefit from amended rules allowing them to spend capital ('permanent endowment'). Previously, the trustees had to satisfy themselves that the charity's property was too small for any useful purpose. The test is now amended to one of whether the purposes for which the fund was established 'can be carried out more effectively' by spending some or all of the capital. For these small charities, there is no longer a need for Charity Commission concurrence before the capital funds are spent.

Power to spend capital: larger charities

- 17.3 A similar power to that in Paragraph 17.2 above is available for larger funds with a single purpose but subject to safeguards given the larger amounts involved. Charity Commission concurrence is required and they will give due consideration to the intentions of the original donor.

Charitable companies amendment to Memorandum & Articles of Association

- 17.4 Charitable companies must obtain the prior consent of the Charity Commission if they want to make changes to their memorandum and articles of association. The Act cuts down the occasions where they have to seek permission before making these changes, making the process both quicker and easier.

Flexibility for transferring the assets of 'failed' appeals or trusts

- 17.5 Charities occasionally run appeals that fail to get enough money to meet their original aim and funds can exist for which there are no longer any beneficiaries.
- 17.6 The 'cy-pres' (literally 'near to') doctrine has previously restricted the Commission's and the Court's ability to allow charities to use these 'failed' funds in flexible ways.
- 17.7 The Act allows the Commission and the Courts to take into account current social and economic circumstances, when approached by charities seeking more freedom in how they can use donated money when they can't use it as originally planned, but it also allows them to take into account the spirit in which the original donation was made.

Charity Commission power to ensuring charity property is properly used

- 17.8 On rare occasions, charity trustees are unwilling to apply charity property for its intended charitable purposes. The Act enables the Commission to deal with this by making a direction for them to do so with or without opening a formal inquiry.

18 If further help is needed

Stewardship offer a modestly priced Consultancy Helpline, providing e-mail and telephone support on a range of legal, tax, accounting, property and HR issues relevant to Christian charities:

For further details, please visit:

www.stewardship.org.uk/smartweb/support-services/consultancy:-employers

Appendix

Public Benefit and the Advancement of Religion: Charities Bill 2006 Parliamentary Debates

During the passage of the Charities Bill through Parliament, some useful debate between the Labour Government and the Conservative Opposition took place on the subject of public benefit and the advancement of religion.

Opposition members tested the Government on their attitude to public benefit during the Standing Committee debates. In particular, they challenged the Charity Commission's stated position that public benefit must be assessed "in the light of modern conditions" and that keeping up with "modern society" is required if a charity is not to have its charitable status revoked. This was an important challenge, since the Charity Commission is responsible under the Act for producing guidance on and for policing the public benefit requirement.

Religious charities would be quite rightly concerned if 'keeping up with modern society' in effect meant that they are required to abandon or water down some of their key tenets and moral codes, rather than by holding to them to advance a better world than modern society offers.

Thankfully, the Government did defend the church's position quite robustly during the latter stages of the debates on the Bill. The Government comments as recorded in Hansard take on particular significance in relation to the Public Benefit issue, given that the Charity Commission and, ultimately, the courts in reaching decisions on matters relating to an Act of Parliament must take account of the intention of Parliament in bringing a particular provision. The extracts that follow can therefore provide charities established for the advancement of the Christian faith with considerable comfort against fears that may otherwise arise:

Ed Miliband, Parliamentary Secretary, Cabinet Office, responding to Anne Widdecombe, Standing Committee A, 25 October 2006, Col 1608:

"... I want to reassure her that removing the presumption that the advancement of religion provides public benefit is not intended to lead to a narrowing down of the range of religious activities that are considered charitable. Nor is the process intended to be onerous for individual religious institutions."

Anne Widdecombe: "... will the Minister say briefly whether it is his understanding that the fact that a particular religion teaches a traditional and certainly non-modern sexual morality could never be held by the Charity Commission to disqualify that religion from charitable status? It is as simple as that".

Edward Miliband: I can certainly give the right hon. Lady that assurance".

Standing Committee A 25 October 2006, Col 1608

"I want to reassure the right hon. Member for Maidstone and The Weald [Anne Widdecombe] on the point of principle. I also want to reassure her that the burdens will not be onerous for religious charities. As with all charities, public benefit has two dimensions. First, there must be an identifiable benefit. Secondly, it must be accessible not only to the adherents of a particular religion, but to the wider community. However, the Government, the courts and the Charity Commission have recognised that religious activities bring benefits not only to those who take part in them, but to the whole of society. Religion has an important role to play in society through faith and worship, motivating charitable giving and contributing in other ways to stronger communities. Both those dimensions will thus usually be apparent from the doctrines, beliefs and practices of a religion. The Charity Commission is clear that most established religions should not have any difficulty in demonstrating their value to society from their beliefs."

Standing Committee A 25 October 2006, Col 1609

Andrew Selous MP: "I would be extremely grateful if the right hon. Lady confirmed that, as her colleague Lord Bassam of Brighton [*Government Minister, House of Lords*] said in the Lords on 3 February 2005, the proselytising activities of religious charities will still be deemed to be a public benefit. In Committee on 4 July, the hon. Member for Doncaster, North (Edward Miliband) said that he could offer reassurance so far as missionary work was concerned. Given that the Charity Commission will interpret these matters, I should like the right hon. Lady to put it on the record that proselytising activity will still be deemed to be a public benefit.

Hilary Armstrong Minister for the Cabinet Office: "It certainly will; my understanding, based on my discussions with the Charity Commission, is that it has no problem with that at all".

Standing Committee A 25 October 2006, Col 1617

The questions that were raised on this subject during the passage of the Bill through Parliament should serve to encourage church leaders to sharpen their focus on the impact and outcomes of their church's endeavours – so as to demonstrate public benefit in tangible as well as intangible ways. Demonstrating a Christian distinctive is an important aspect of this.