

GUIDANCE TO VAGA MEMBERS ON THE MAIN CHANGES INTRODUCED BY THE CHARITIES ACT 2006

The Charities Act 2006 introduced some important changes in Charity law which all directors of arts organisations which are registered charities ('charity trustees'), or who are thinking of applying for charitable status, should be aware of.

This note only gives guidance of a general nature and is not intended to constitute advice in any specific circumstances. Please contact us if you need specific advice.

The **main changes** are:

- New approved 'charitable purposes'
- New guidance on Public Benefit
- Trustees' remuneration
- Trustees liability insurance
- New rules on altering constitutions
- New rules for professional fundraisers and commercial participators
- Charitable Incorporated Organisations (CIOs)

1. New Charitable Purposes

In order to be a charity an organisation needs to:

- (a) have **charitable purposes** or 'objects' which are defined as 'charitable' in law; and
- (b) have charitable aims which are for the **public benefit**.

The new Act introduces a new broader list of approved charitable purposes including:

- The advancement of citizenship or community development
- **The advancement of the arts, culture heritage or science**
- The advancement of human rights, conflict resolution or reconciliation
- The advancement of environmental protection or improvement
- Other purposes that are currently recognised as charitable or are in the spirit of any purposes currently recognised as charitable

However in practice, in the light of the new rules on 'public benefit', the longer list of purposes is unlikely to enable many organisations to register as charities which would not have been eligible before.

2. Public Benefit

- In future all charities will have to demonstrate **public benefit** in accordance with the new Commission Guidance on Public Benefit (see below).
- There will no longer be a **presumption of public benefit** for charities for relief of poverty, advancement of education, and religion.

- In future all charity trustees will be under a legal duty to demonstrate on an ongoing basis that their charity operates for the public benefit, having regard to the Charity Commission's Public Benefit Guidance.
- Each charities will in future have to report on its public benefit activities in its annual Report (more or less detailed depending on size).

Charity Commission Guidance on Public Benefit

Following a lengthy consultation, the Charity Commission published its General Guidance on Public Benefit in January 2008. This stated **two key principles**:

- (a) There must be an identifiable benefit or benefits
 - It must be clear what the benefits are
 - The benefits must be related to the aims
 - Benefits must be balanced against any detriment or harm
- (b) The benefit must be to the public or a section of the public
 - The beneficiaries must be appropriate to the aims
 - Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted
 - People in poverty must not be excluded from the opportunity to benefit
 - Any private benefits must be incidental

The Appendix sets out the Questions the Charity Commission suggest that charity trustees should ask as a means of self-assessing their charity's public benefit.

In December 2008 the Commission issued its Supplementary Public Benefit Guidance on **Fee Charging Charities, Charities for the Prevention or Relief of Poverty, the Advancement of Education and the Advancement of Religion**. See Appendix for the Charity Commission website references.

3 Remunerating Trustees

Trustees and 'connected persons' can now be paid for providing services to the charity. The previous rules were unclear.

The following conditions must be met:

- (a) The amount or the maximum amount of remuneration must be set out in a written contract and the amount must not exceed what is reasonable in the circumstances; the contract must be signed before the services are provided.
- (b) The trustees must be satisfied it is in the charity's best interests for the services to be provided by the trustee/connected person, for the remuneration set out in the agreement.
Note: Decisions should be properly minuted.
- (c) The paid trustees must always be a minority of the trustees.
- (d) The charity's constitution/Memorandum and Articles of Association must not prohibit the relevant person from receiving remuneration. Note: charities whose constitution does prohibit payments

can resolve at a General Meeting to amend the constitution, see para 5 below; the Charity Commission's approval will not normally be required to effect this.

- (e) The trustees must have regard to the Charity Commission's Guidance on paying trustees.
- (f) The trustee to be paid must not vote or take part in any discussions about the appointment.

4. Trustees Indemnity Insurance

The Act now allows all charities to take out Trustees Indemnity insurance **unless** prohibited by the constitution. The insurance must **exclude** any indemnity for:

- A fine imposed in criminal proceedings
- A penalty due to a regulatory authority
- Any criminal convictions for fraud dishonesty or wilful or reckless misconduct
- Any conduct which the trustee knew (or should have known) was not in the best interests of the charity or did not care whether it was or not.

The charity trustees must be satisfied it was in the best interests of the charity to take out the insurance.

5. Amending a Charitable Company's Memorandum and Articles

Charity Commission approval is now only needed for 'Regulated Alterations' to the Memorandum and Articles, which are alterations which:

- amend the Objects clause
- amend provisions directing the application of the charity's property on dissolution
- authorise a direct or indirect benefit to members or trustees. Note: this does not include amendments introducing provisions for remunerating trustees, see para 3(d) above.

Charity Commission approval is no longer needed for other changes e.g. administrative changes, changes to membership etc.

6. Fundraising Changes

First, a reminder of the **existing law**:

- Paid fundraisers and companies involved in charity promotions ('commercial participators') must have written agreements with the charity including some mandatory terms.
- They must also make a mandatory 'statement' each time they solicit funds which is intended to give the public information about the expected benefit to the charity, etc.
- They must pay the charity within a fixed time-limit.

The **new law** requires fundraisers and commercial participators to make a **fuller statement** which:

- names the charity/ies to benefit
- if more than one charity is to benefit, gives the percentage in which the charities are to benefit
- gives the method by which the fundraisers are remunerated; and
- gives the 'Notifiable Amount' of the fundraiser's remuneration which is either:
 - The actual amount if known
 - An estimate, calculated as accurately as possible.

For charities involved in public collections (on the street or house-to-house) a new licensing regime is to be set up from 2009.

7. Charitable Incorporated Organisations (CIOs)

The new Charities Act introduces a new form of charitable company which is intended to avoid the present system of 'dual regulation' which has meant that charitable companies are supervised by the Charity Commission **and** the Registrar of Companies. The following are the main elements:

- New legal form for charitable companies
- Single registration with Charity Commission only
- Provides for separate legal status and limited liability for trustees/directors
- Less onerous reporting requirements for constitutional and governance changes
- Lower costs
- Codified duties for trustees and members which reflect the charitable nature of the CIO.

The Charity Commission and the government have been involved in a lengthy consultation about the secondary legislation that will be required in order to introduce CIOs, and it is unlikely that this will be in place before the end of 2009.

Formation Requirements:

The CIOs' constitution must state:

- Name
- Purposes
- Whether its principal office is in England or Wales
- Whether members are liable to contribute to its assets on a winding up and how much
- Who is eligible for membership and how someone becomes a member
- The appointment of charity trustees and any conditions as to eligibility
- The application of property on dissolution
- 2-tier structure (members and trustee/directors)
- Similar disclosure requirements as Companies Limited by Guarantee
- Can be formed by new registration or by converting an existing company

8. Minor Changes

Annual Returns

All charities with gross income for the year exceeding £10k must submit Annual Return (the Act removes the previous threshold based on expenditure).

Accounts Audit Threshold

Raises threshold for full audits from £250k to £500k.

Annual Reports thresholds

All registered charities with gross income for the year exceeding £10k must submit an Annual Report plus statements of account within 10 months of year end (the Act removes the previous threshold based on expenditure).

Public Access to Annual Report and accounts

All charities must now allow any member of the public to be sent a copy of the most recent annual report and accounts on payment of a reasonable fee. The trustees must comply within 2 months of the request.

Registration

Charities need only register with the Charity Commission if their gross income exceeds £5,000 (previously £1k).

New powers of the Commission

The Commission has the following new powers:

- to enter premises and search for documents
- to institute inquiries
- to suspend membership of charities
- to relieve Trustees from liability for breach of trust or duty if the Commission is satisfied that Trustee has acted honestly and reasonably.

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APPENDIX

The Charity Commission's General Public Benefit Guidance

The final General Guidance published in January 2008 suggests that trustees and professional advisers of existing charities might find the following questions useful as a means of self-assessing the charity's public benefit, and provide information that will help the Commission to assess whether or not an organisation's aims are for the public benefit:

Principle 1: There must be an identifiable benefit or benefits

1. *What are the benefits that arise from your organisation's aims?*
2. *Is there any detriment or harm that, in your view, might arise from carrying out your organisation's aims? Are you aware of any widespread views among others that such detriment or harm might arise?*

Principle 2: Benefit must be to the public, or a section of the public

3. *Who do your organisation's aims intend to benefit?*
4. *If the benefit is to a section of the public, how are the beneficiaries defined or what restrictions are there on who can have the opportunity to benefit?*
 - **For geographical restrictions:** *what is the geographical area that defines who can benefit?*
 - **For restrictions based on charitable need:** *what is the charitable need shared by the beneficiaries that is being relieved or addressed?*
 - **For restrictions based on personal characteristics:** *what defining characteristics are used to decide who benefits? How do those characteristics relate to the charitable aims?*
 - **For restrictions based on access to facilities:** *are there restrictions on what is available for access, or on who can have access, or limited opening times?*
 - **For restrictions based on eligibility for membership:** *does someone have to be a member to benefit? If so, is it open to anyone interested to join? If not, who can join and how?*
 - **For restrictions based on trustees' discretion:** *what criteria will the trustees use to decide who can benefit? What is the justification for that restriction?*
 - **For restrictions based on ability to pay any fees charged:** *what does your organisation charge for its services or facilities? How are charges set? Is everyone charged the full rate? What opportunities do people who cannot afford to pay those fees have to benefit from your organisation's aims? How do people in poverty have the opportunity to benefit?*
5. *Does anyone receive any private benefits from your organisation, other than as a beneficiary? If so, what benefits do they receive? Are those benefits incidental?*

The full text of the Charity Commission's Public Benefit Guidance (including the Supplementary Guidance on Charities for the Relief of Poverty, the Advancement of Education, and the Advancement of Religion) can be found on the Charity Commission's website at <http://www.charity-commission.gov.uk/publicbenefit/default.asp>