



23 April 2012

Our ref: ICAEW Rep 58/12

Charities Act 2006 Review
C/O Office for Civil Society
4/16, HM Treasury
1 Horse Guards Road
London SW1A 2HQ

By email charitiesactreview@cabinet-office.gsi.gov.uk

Dear Sirs

Charities Act 2006 Review – Call for Evidence: The effective of organisational form available to charities

ICAEW welcomes the opportunity to comment on the *Charities Act 2006 Review – Call for evidence: The effective of organisational form available to charities* published by the Cabinet Office in February, a copy of which is attached as an Appendix.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW has a Charities Technical Sub-Committee and a Charities & Voluntary Sector Group with over 3,000 members. Many ICAEW members are active in charities and the voluntary sector; approximately 30,000 are charity trustees, treasurers, school governor and in other voluntary roles.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

Yours sincerely

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APPENDIX

Charities Act 2006 Review – Call for Evidence

The effectiveness of organisational forms available to charities

Issue

The Charities Act 2006 Review is considering whether further changes could be made to improve the legal framework for charities. In particular, it is considering the effectiveness of the organisational forms available to charities, including the charitable incorporated organisation.

Background

There are currently three main legal forms that charities may take. They are:

- Charitable trust.
- Charitable unincorporated association.
- Charitable company limited by guarantee.

None of these is designed specifically for charities, but the Charities Act 2006 introduced a new legal form designed to be used exclusively by charities: the charitable incorporated organisation (although it has yet to be implemented).

Each of these legal forms is suitable for a different kind of charity.

Charitable trust

A charitable trust is created by a formal legal document (it might be a declaration or deed of trust, deed of settlement, or a trust created by a bequest in somebody's will). It will be managed by trustees. It has no legal personality so cannot own land or sign documents in its own name. It can hold property through the trustees, or can appoint holding trustee(s) or a custodian trustee. It does not (unlike a company) have limited liability, so the trustees may be liable for the repayment of any debts they have incurred on behalf of the charity: such debts can be met from the charity's own funds (if they are sufficient) unless the charity trustees have not acted prudently, lawfully, and in accordance with the charity's trust deed).

It may be appropriate to establish a trust where some or all of the following apply:

- the organisation is run by a fairly small group of people.
- there is no time limit on how long the charity trustees will be in office.
- new trustees are appointed by the continuing trustees.
- the organisation does not rely on a membership for any part of its administration.
- the administration of the organisation is simple.
- the organisation is to be a grant-making body only.
- land and buildings are held on trust for permanent use for the purposes of the charity.
- there is a restriction on spending capital.

Charitable unincorporated association

Unincorporated associations are created and governed by constitutions or 'rules' (the terms are interchangeable). The members of the governing body (which could be called a management committee, council, etc) are charity trustees as defined by the Charities Act 1993. An unincorporated association has no legal personality so cannot own land (or usually investments) in its own name. It will need to appoint a custodian trustee or holding trustee(s) to do this. It does not have limited liability so members of the governing body may be liable for the repayment of any debts they incur on behalf of the charity: such debts can be met from the charity's own funds (if they are sufficient) unless the members of the governing body have not acted prudently, lawfully, and in accordance with the charity's constitution;

This structure may be appropriate where any one or more of the following applies:

- the organisation is relatively small in terms of assets.
- the organisation is a local branch of a national charity, and an approved constitution exists for branches.
- it has a membership.
- the charity trustees are elected or appointed to hold office for a fixed period of time - usually one year.
- the charity trustees are elected by members.
- the views of local residents, local councils, and other bodies are represented through membership, or as users of the facilities.
- the purposes of the organisation are carried out wholly or partly by, or through, the members (ie where the members undertake office or voluntary work on behalf of the organisation).

Charitable company limited by guarantee

A company is created by a memorandum and articles of association. It has legal personality so, like an individual, can own land and enter into contracts in its own name. The directors are agents of the company and as such are not normally liable personally for its debts; they are charity trustees as defined by the Charities Act 1993. A director may be liable to make payments to the company if he or she acts in breach of trust or duty to the company; or if he or she is responsible for fraudulent or wrongful trading by the company (sections 213/214 Insolvency Act 1986). The company will have 'limited liability' which means that its members are normally only liable for the debts of the company to the extent which they have undertaken to guarantee them (usually the limit of liability stated in the articles of association is a nominal amount, eg £5).

A charitable company is subject to company law, as well as charity law, so must comply with statutory requirements such as the annual filing of accounts with the Registrar of Companies.

Unlike a commercial company, (whose main purpose is to make profits for distribution to its members), the constitution of a charitable company prevents the distribution of profits to members. All the property of a charitable company is applicable for charitable purposes. This structure may be appropriate where some or all of the following apply:

- the organisation is to be quite large.
- it will have employees.
- it will deliver charitable services under contractual agreements.
- it will regularly enter into commercial contracts.
- it will be a substantial owner of freehold or leasehold land or other property.

Charitable incorporated organisation

This is a new legal form that should be introduced in 2012, after considerable delay. The charitable incorporated organisation (CIO) will be the first legal structure created specifically and exclusively for charities. A CIO will have the benefits of incorporation: 'legal personality' for the charity, enabling it as a corporate body to enter contracts and act under its own powers; and limited liability for the CIO's trustees and members

However, a CIO will not be registered with Companies House or regulated under company law. A CIO will have a constitution, and will be registered with and regulated by the Charity Commission. Unlike any of the other forms of charity it will not have a legal existence until it is registered with the Commission.

In addition to new charities, an existing unincorporated charity will, in effect, be able to “convert” to be a CIO (in due course there will also be a statutory process for charitable companies to convert to be a CIO).

We anticipate that this will be a popular choice of legal form for small to medium-sized charities. We know there is considerable frustration in the sector at delays in its implementation and that large numbers of small to medium sized unincorporated charities are already awaiting the CIO form in order to obtain the benefits of limited liability.

Limited liability should make it easier for CIOs to recruit and retain trustees by enabling them to obtain the benefits of incorporation without having to undergo dual company and charity registration and regulation. The differences to being a charitable company will be:

- Single registration. The CIO will only have to register with the Charity Commission.
- Unlike companies there will be no provision for either a CIO or the Charity Commission to keep a register of charges over CIO property. This may limit the usefulness of the CIO structure for larger charities with significant assets as there will not be public access to information about assets being used as security, and this may discourage potential lenders. Public information about charges over land and interests in land will still be available from the Land Registry.
- Less onerous requirements when preparing accounts. Small CIOs will be able to prepare straightforward receipts and payments accounts. All charitable companies, regardless of size, have to prepare more complicated accruals accounts that meet the general requirements of company law.
- Less onerous reporting requirements. CIOs will only have to prepare an annual report under the Charities Act. Charitable companies have to prepare a report to meet the requirements of company law as well as charity law.
- Only one annual return. Charitable companies have to prepare an annual return under company law, and most must also submit a separate annual return under charity law.
- Less onerous filing requirements. CIOs will only have to send accounts, reports and returns to the Charity Commission; charitable companies have to send them to Companies House as well.
- Less onerous requirements relating to the reporting of constitutional and governance changes. CIOs will be subject to fewer reporting requirements than charitable companies, and will only have to report to the Charity Commission, rather than to both the Commission and Companies House.
- Lower costs. Unlike Companies House, the Charity Commission has no plans to charge CIOs for registration or for filing of information.
- Simpler and more flexible constitutional forms. Because CIOs will not be sharing a framework with commercial bodies, it will be possible to create simpler and more flexible governing documents that specifically meet charities’ needs.

The CIO may not be an attractive option for larger charities that wish to borrow against charges over their property, or wish to issue debentures.

The original CIO proposal envisaged both the CIO and Charity Commission maintaining and making publicly available information about charges over the CIO’s property. Companies House operates a web-based searchable register of charges over companies’ property. This enables lenders and others proposing to do business with companies the ability to quickly and easily ascertain the financial risks of doing so. However the costs to the Charity

Commission of establishing and operating a similar electronic searchable register of charges for CIOs were considered to be unrealistically prohibitive.

In effect this means that CIOs would register charges over land/property with the Land Registry (as do unincorporated charities), but that other types of secured charges would not be recorded (other than with the CIO itself (in its annual report and accounts) and the lender). All charities' annual reports and accounts, are public documents that can be viewed by anyone. However, in practice, the lack of a Companies House type of register of charges means that the CIO may not be as attractive as the company model for large charities, those that seek to raise funds through issuing debentures, or those that routinely seek to borrow money against the security of the charity's property.

Statutory charities and Royal Charter Charities

A relatively small number of charities are constituted as corporations by legislation (statutory corporations) or by Royal Charter. Where these charities want to make constitutional changes there can be complex, lengthy and bureaucratic processes involved. The Law Commission will be considering issues that affect charities established by statute or Royal Charter as part of its Eleventh Programme of Law Reform, but it would be helpful if, as part of this Review, respondents pass on any comments they have on what they consider to be disproportionately burdensome requirements that affect such charities.

Who should respond?

Anyone can respond, and all responses will be considered. However, we are particularly interested to hear from charities and their staff who are involved in the recruitment and support of trustees, as well as trustees themselves.

Deadline for responses:

The deadline for receiving responses to this call for evidence is 16 April 2012.

How to submit your response:

Please send your response by e-mail to charitiesactreview@cabinet-office.gsi.gov.uk

Alternatively you can write to:

Charities Act 2006 Review
c/o Office for Civil Society
4/16, HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Question 1: Did the Charities Act 2006 consider the different legal forms that charities might use sufficiently? What are your views on the advantages and disadvantages of the forms that are already available?

There needs to be a rationalisation of the legal forms and regulatory frameworks for charities. The variety of legal forms, regulators and regulatory frameworks may hamper mergers, collaborations/ restructures as well as other initiatives such as public sector delivery.

There are many types of legal forms. These include:

- Companies limited by shares
- Companies limited by guarantee
- Industrial and Provident Society – for the benefit of the community
- Industrial and Provident Society – Co-operative
- Charitable Incorporated Organisation (if introduced)
- Limited Liability partnership

Most charities are either charitable trusts, charitable companies limited by guarantees or unincorporated (not a legal form). None of the current legal forms are specifically designed for charities (please see comments on Charitable Incorporated Organisation).

All the above legal forms have different regulatory frameworks and characteristics relating to:

- Membership
- Retained surpluses
- Asset/fund constraints
- Share Ownership
- Access to donations and funding
- Tax exemptions
- Winding up

Question 2: Is an organisation you are involved with considering becoming a charitable incorporated organisation? If so has the delay in introducing this form caused any difficulties? If so, what were they?

We note that the new form of “Charitable Incorporated Organisation”, which was intended to alleviate some of the burden of duplicate filing of annual accounts with the Registrar of Companies and the Charity Commission, is still not available for use in England and Wales but is very popular in Scotland where it has been available for a year.

We strongly believe that the Government must commit without delay to a firm implementation date for CIOs (or alternatively announce that they are to be abandoned in England and Wales). The uncertainty is extremely damaging and many small to medium organisations have put crucial governance changes on hold. Whilst we accept CIOs will not be widely used by large charities, they offer major advantages for small/medium charities needing a corporate form.

Further delays are expected once it becomes available, as we understand that it will have a phased introduction.

In the meantime, the filing requirements for charitable companies with Companies House and the Charity Commission should therefore be reviewed/streamlined to alleviate the burden of duplicate filing of annual accounts, different deadlines and regulatory requirements.

Question 3: Will the charitable incorporated organisation have any advantages or disadvantages that are not referred to in the call for evidence?

No additional comments.

Question 4: Does the lack of a Register of Charges discourage you from using the charitable incorporated organisation as the form for a new charity? Please explain why?

No, we do not believe that the lack of a Register of Charges would discourage our members from using the charitable incorporated organisation as a form for a new charity because this information on charges should be available in the annual accounts of the charitable incorporated organisation which will be filed with the Charity Commission and be publicly available.

Question 5: Do you have any suggestions about how we could reduce the regulatory burden on statutory corporations or Royal Charter charities that wish to make changes to their governance arrangements?

The steps necessary to obtaining charter and byelaw changes are protracted and expensive, partly because there is a need to consult with other bodies to obtain approval from members in general meeting etc that incurs delay and cost. The Privy Council respond pretty quickly to approving or rejecting proposed changes. However, there may be some scope in reducing the regulatory burden by eliminating consultation on non-contentious issues.

Respondent details:

Name:	Anne Davis	
Position:	Head of Charity and Voluntary Sector	
Organisation Name:	ICAEW	
Organisation size (income) – charities only	Not applicable	
Is your organisation a charity?	No	

What happens next?

- We will acknowledge receipt of all responses, although we cannot provide a detailed response to each individual submission.
- All responses will be considered in forming the report of the review.
- The aim is for the report of the review to be laid in Parliament and published in July 2012.

The small print:

All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer by your IT system will not, of itself, be regarded as binding on the department. Contributions to the review report will be anonymised if they are quoted, unless we contact you and you give us your permission to use a particular quote.

Individual contributions will not be acknowledged unless specifically requested.