



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

Our ref: ICAEW Rep 141/08

Your ref:

Ben Harrison

By email: cioconsultation@cabinet-office.x.gsi.gov.uk

Dear Mr Harrison

**CHARITIES ACT 2006 - CHARITABLE INCORPORATED ORGANISATION (CIO)
CONSULTATION**

The Institute of Chartered Accountants in England and Wales (the Institute) is pleased to respond to your request for comments on the *Charities Act 2006- Charitable Incorporated Organisation (CIO) consultation*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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**THE INSTITUTE
OF CHARTERED
ACCOUNTANTS**
IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 141/08

CHARITIES ACT 2006 - CHARITABLE INCORPORATED ORGANISATION (CIO) CONSULTATION

Memorandum of comment submitted in December 2008 by The Institute of Chartered Accountants in England and Wales, in response to the Office of the Third Sector and Charity Commission's consultation paper Charities Act 2006 – Charitable Incorporated Organisation (CIO) consultation published in September 2008.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper *Charities Act 2006 – Charitable Incorporated Organisation (CIO) consultation* published by The Office of the Third Sector and the Charity Commission.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
4. The Institute's Charities Sub-Committee is responsible for co-ordinating the technical considerations of the charity sector with respect to Chartered Accountants working in or for charities. Its membership represents the interests of practitioners, their clients and Chartered Accountants employed in financial roles within charities.

GENERAL POINTS

Support for the initiative

5. The Institute welcomes the proposed introduction of the first charity specific incorporated entity. This is a positive step for the sector.
6. As a general principle, in our view it is imperative that where a lesser regulatory barrier applies for current vehicles it should equally be applied to CIOs. The exception to this principle is where there is evidence such a lower barrier would be cause detriment, remove an appropriate safeguard or there are other special considerations for the sector which need to be reflected. Unless there is a compelling reason to the contrary there should be consistency between the CIO requirements and those of company law. To diverge from company law requirements unnecessarily builds in complexity, inconsistency (for example mirroring Section 871 of the Companies Act 2006 but not incorporating Section 872 into the regulations) and cost which will impact adversely, particularly on smaller charities. .
7. Within the body of the consultation some of the detailed areas are not very clear from a practical perspective. For example, it is unclear what the legal process will be from the Companies House perspective on conversion of a charitable company to a CIO. There are a number of areas where the detail of regulations are yet to be published and will need careful tailoring to accommodate sector specific considerations rather than simply applying the lowest of the regulatory

requirements currently applying to differing forms of entity. The benefits should be clear to entities adopting CIO status, especially in relation to a reduction in the administrative burden.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1: Should the minimum age for the appointment as a charity trustee of a CIO be set at 16? If not, what age should it be and why? Do respondents agree that the proposed guidance will be helpful?

8. Whilst some reservations have been expressed that 16 may be too young and that 18 is a preferable age to hold a trusteeship, we can see no reason why the age limit for a director of a CIO should differ from a company limited by guarantee. As the Companies Act 2006 sets the minimum age at 16 it is logical that a CIO has the same minimum age.

Q2. Should those setting up CIOs be able to disapply the general duty of care which would apply under the 1993 Act to the charity trustees of CIOs, subject to a minimum alternative duty?

If so, are the minimum standards proposed in the General Regulations sufficient?

9. In our view, CIOs will have custody over monies, which are not for the benefit of shareholders, as such limiting liability should not have the consequence of reducing the duty of care. We would expect to see standards of care which are comparable to a company limited by guarantee.

Q3. Should a charity trustee of a CIO automatically be prohibited from participating in any decision from which he or she may benefit personally, unless either authorised to do so by the Charity Commission, or where a conflict of interest is extremely unlikely?

10. In our view the management of conflicts of interest is fundamental to the proper exercise of fiduciary responsibilities. The requirements placed on trustees of CIOs for the management of conflict situations, including withdrawing from discussions and decision making where a personal benefit may arise, should reflect the position of the Companies Act 2006.

Q4. Do you agree that the Regulations should (as set out in section 4.5) follow the Companies Act 2006 on the maintenance by the CIO of a register of members and charity trustees?

11. We agree that a register of names of trustees and members should be retained and the requirements should reflect company law. However for entities with large numbers of members retaining an accurate list at all times may present some administrative difficulties. The legislative provisions restricting the publication of individual information, which are in place for companies, to protect individuals from abuse should also be applied to CIOs.

Q5. Do you agree with the suggested approach to the publication of information about charges over property which CIOs own?

If not, what regime should apply to CIOs?

12. In our view there is no reason to vary the position from that of companies.

Q6. Do you agree that the Regulations should follow the public information obligations about debentures in the Companies Act 2006, as outlined in section 4.7?

Q7. Are the proposals (outlined in section 4.8) to make public information about CIOs available on request acceptable? If not, in what ways would they not meet your needs?

13. In response to Q6 & Q7 we agree provisions should follow the Companies Act provisions. However it is not clear what is meant by “public information”, what information will be obtained or how it will be acquired and maintained. The regulations do not contain any provisions relating to satisfaction and release of charges. Regulation 111 mirrors section 871 of the Companies Act 2006. We recommend that a new regulation be included mirroring section 872, permitting but not requiring CIOs to deliver a statement to the Charity Commission regarding satisfaction of the debt for which the charge was given or release from that charge. This would not create a new burden for a CIO as notification would be voluntary, but if the CIO wishes the public record to flag the fact that a charge no longer exists they can. The consultation documents appear only to deal with information on dissolution. In our view this area requires greater clarity.

Q8. Do you agree with our proposal to extend the special requirements to cover any decision which might lead to the dissolution of a CIO, and to generally require members of a CIO to be given 14 days’ notice of such decisions?

14. We agree the requirements should mirror the Companies Act.

Q9a. Should the special procedural requirements apply to any other decisions which might be made in the course of the administration of a CIO? If so, when should they apply?

15. We are not aware of other decisions to which these special requirements might apply.

Q9b. Should there be any additional special procedural requirements? If so, what should they be?

16. Practical issues around winding up, for example, regarding quorum provisions, proxy voting or addressing inquorate meetings need to be addressed or clarified. Flexibility should be built in to enable the Charity Commission to address difficulties and enable any assets to be distributed.

Q10. Do you agree with the approach outlined in section 4.10 regarding members’ right, or should there be a greater guarantee of members’ rights for CIOs, along the lines of those in company law or otherwise?

17. We can see no reason why members should not be given the right to requisition a meeting as would be the case in company law. We recognise that sometimes members can act without due regard to the good of the charity. On the other hand members may have concerns and interest of a non-financial nature which are valid.

Q11. Do you think that the approach outlined in section 4.11 with regard to the ability of members to remove a charity trustee of a CIO is right?

18. In our view if a right exists to insert a provision for members to remove a trustee this should be included in the model document together with appropriate guidance notes referring to governance considerations. If the right is not considered appropriate to CIOs then we question why it is being permitted. It is unsatisfactory to permit a right but then to exclude it from model documentation in the hope that it is overlooked and not used. A view needs to be taken and the model documents should then reflect the legal position.

Q12. Do you think that a body without legal personality should be able to become a member of a CIO? If so, how could the obligations of such a member be enforced?

19. In our view the rights and duties of members and trustees appear to be somewhat confused and mixed. It is a duty of trusteeship to act in good faith in the furtherance of the charitable purposes. We are of the view that there is no reason why members of the CIO should not be unincorporated entities, as can be the case in company law. An example might be a charitable trust. The obligations for members to contribute could follow the general provisions that exist for liabilities undertaken by such bodies as outlined in para 9 of the Charity Commission guidance CC12. We agree that trustees should not be unincorporated entities.

Q13. Do you agree that a CIO should have the option to add restrictions to the power to amend its constitution contained in the 1993 Act?

20. In our view the option to add restrictions to the power to amend a constitution should reflect the Companies Act. We question whether the amendment should only follow affirmation of *all* the members (as stated in para 4.13 of the consultation document) as opposed to the majority of members.

Q14. Do you agree that the disqualification provisions in the Company Directors Disqualification Act and the 'prohibited names' provisions in the Insolvency Act should apply to people who have administered insolvent CIOs?

21. We agree.

Q15. Do you think all CIOs should have to produce accruals accounts, or do you think it should depend on their level of income be the same as for non-company charities?

22. In our view all CIOs should account on an accruals basis. We do not consider the lower barrier of unincorporated charities should apply because the trustees will benefit from limited liability. Therefore in return for that benefit, the higher standard of transparency and accountability should apply. However we recognise that such an approach could act as a disincentive for some charities from becoming CIOs. We are of the view that publicity and education, to address the apparent anxiety towards accruals accounting, for smaller charities should be undertaken.

Q16. Do you agree with the policy objective of accounting and reporting continuity for companies converting into CIOs? If so, do you consider the approach we are proposing is reasonable, or would you suggest an alternative

approach? In particular, is the proposal to require a financial statement of the CIOs assets and liabilities on conversion sufficient?

23. We support the principle of continuity of reporting and accounting but we are cautious of giving unreserved support for the proposals in the absence of detailed regulations stating the legal form of reporting. We support the content of 4.17a). The accounts should 'flow' and reflect the continuation of an organisation, with an appropriate note to the accounts stating the legal vehicles used and the basis of operation. However, in our view 'lodging' a statement providing the assets and liabilities should not be a legal requirement. The Charity Commission should encourage trustees to retain a statement as necessary for understanding the performance and activities of the organisation pre and post conversion, if for no other reason than to protect the trustees' position.
24. There are matters which do not appear to have been considered, such as the impact of conversion on the crystallisation (or not) of a defined benefits pension scheme. There is insufficient reference to external review of CIO accounts in the consultation papers. We assume these will follow the current requirements but recommend that the proposed requirements are clearly set out.

Q17. Do you think that the model constitutions are workable and provide good governance arrangements and sufficient flexibility for CIOs? If not, what improvements are needed?

25. We support the issuing of model documents. In our view such models often become the default position for charities and therefore they should be as flexible as possible and accommodate as many variables as possible. We note that there is no reference to the ability to require an audit where one is not required by underlying legislation.

Q18. Do you consider it useful for the charity trustees of a CIO to have a number of default delegations powers by including them in the draft General Regulations?

26. We agree, but we are of the view that there should be a differentiation between compulsory and optional elements.

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