

**Quakers in Britain Trustees' and
Treasurers' Conference 2022**

**A guide to the Charities
Act 2022**

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Saturday 15th October 2022



How did we get to the Charities Act 2022?



Consultation

- Law Commission Eleventh Programme of Law Reform 2011
- Technical Issues in Charity Law - consultations in 2015 and 2016

Consideration

- [Final recommendations in Law Commission report Technical Issues in Charity Law in 2017](#)
- [Government response in March 2021](#) accepted most of the recommendations
- Parliamentary process

The new law

- Charities Act 2022 received Royal Assent on 24th February 2022
- Implementation timetable published by DCMS on 13th April 2022
- **Phased implementation of provisions over 18 months**

What we plan to cover

- Amending governing documents
- Restricted funds and endowments (*then break for questions*)
- Charity land (*then break for questions*)
- Failed fundraising appeals
- Ex gratia payments
- Charity names (*then break for questions*)
- Other technical provisions

Amending governing documents



Area Meetings; legal form and governing documents

- Charitable incorporated organisations (CIOs) – CIO constitution (template agreed with Charity Commission)
- Unincorporated associations – constitution (template agreed with Charity Commission)
- Associated trusts e.g. trust to maintain meeting house or burial ground within their area – trust deed, scheme, indenture, Will,

Snapshot of key Charities Act 2022 changes for amending governing documents

Charity type	Main changes
Charitable companies	New test for changing objects
Charitable Incorporated Organisations (CIOs)	New test for changing objects and change to rules on when changes to CIO constitution come into effect
Trusts and unincorporated associations	New broad statutory power of amendment
Royal Charter bodies	New statutory power to amend Charter where there is no express power of amendment in the Charter
Charities governed by Act of Parliament	Change to process for amending statutes by s73 scheme when amending public general Act
Companies/CIOs/Trusts and unincorp assns	New power for Charity Commission to require public notice when its consent is required to certain amendments
Companies/CIOs/Trusts and unincorp assns	New/modified rights of appeal to Tribunal where CC withholds (or, for companies and CIOs, where CC gives) consent

When are the changes happening?

Charity type	When are the new provisions likely to come into force?
Charitable companies	Autumn 2023
Charitable Incorporated Organisations (CIOs)	Autumn 2023
Trusts and unincorporated associations	Autumn 2023
Royal Charter bodies	Autumn 2022
Charities governed by Act of Parliament	Autumn 2022

Amending governing documents

CIOs and companies limited by guarantee

CIOs and CLGs

‘Regulated alterations regime’

S.226(2) Charities Act 2011 (for CIOs) and S198 (for CLGs):

- the following are regulated alterations requiring prior CC consent (broadly):
 - Changing purposes;
 - Changing dissolution provisions; and
 - Changing provisions where the alteration would provide authorisation for any benefit to be obtained by charity trustees or members of the CIO/CLG or persons connected with them.
- CC guidance on consent for CLGs in operational guidance [OG 518](#)
- No specific guidance for CIOs.

What is changing? New test for CC consent to change objects of CIOs and CLGs

Current non-statutory test

In deciding whether to give consent, the CC applies the following test:

The new purposes are exclusively charitable;

The trustees' decision to make the change is a rational one in the circumstances of the charity; and

The new purposes do not undermine or work against the previous purposes.

AND CC considers the probable impact of the change on the charity's current and future beneficiaries:

“if the impact is low or non-existent we are likely be able to approve the change without difficulty, even when the changes are material. If the impact will be significant, we need to be satisfied that the trustees' decision is consistent with their duty to act in the best interests of the charity”

New statutory test

In deciding whether to give consent, the CC must consider:

The purposes of the CIO/CLG when it was established, if and so far as they are reasonably ascertainable;

The desirability of securing that the purposes of the CIO/CLG are, so far as reasonably practicable, similar to the purposes being altered; and

The need for the CIO/CLG to have purposes which are suitable and effective in light of current social and economic circumstances.

CIOs – other changes to align with companies regime

- Currently no amendments to CIO constitution take effect until registered by the Commission which can cause uncertainty/hinder planning.
- Conditional resolutions will be possible for CIOs under amended s.226(1) i.e. resolution passed subject to CC consent.
- New sections s.227(1A to 1C):
 - (1A) – amendments to purposes to take effect when registered by the Commission (or a later date specified in the resolution);
 - (1B) – other amendments to take effect on the date the resolution is passed (or a later date specified in the resolution);

Public notice and appeals (CIOs and CLGs)

New provision - Public notice - s337(3ZA) and (3A) Charities Act 2011

- Where the Commission's written consent is sought under s198/226 (regulated alterations):
 - CC may give public notice of the contents of the consent sought; or
 - May require public notice to be given by the charity.
- Where the Commission gives consent under s198/226 (regulated alterations):
 - CC may give public notice of the giving or contents of the consent; or
 - May require public notice to be given by the charity.

New right of appeal to Tribunal in relation to CIOs

- for companies - currently right for trustees/company itself/any other person affected (beneficiaries) to appeal a CC decision to give or withhold consent under s198 (regulated alterations) to Tribunal.
- currently, for CIOs this only applies to a decision to refuse to register an amendment to the CIO's constitution under s227.
- new provision – revokes current provision and adds a right for trustees/CIO itself/any other person affected (beneficiaries) to appeal a CC decision to give or withhold consent under s226 (regulated alterations) to Tribunal.

Amending governing documents

Trusts and unincorporated associations

Trusts and unincorporated associations

Main mechanisms to amend governing document now	Main mechanisms to amend governing document following CA 2022
Express power in governing document	Express power
Statutory power for smaller charities with income of £10,000 or less to amend objects (s275) or merge (s268 CA 2011) subject to CC consent	No longer available - s268 and s275 repealed
Statutory power to amend administrative powers and procedures - s280 Charities Act 2011	Replaced with new broad power to amend any provisions – new s280A Charities Act
Cy-pres scheme to amend objects	As now, but schemes likely to be required in limited circs only
Scheme to amend other provisions e.g. trustee benefits, amending permanent endowment restrictions	As now, but schemes likely to be required in limited circs only

Trusts and unincorporated associations – new amendment power

- S280A - new broad statutory power to amend any provisions of governing document including purposes
- can be used as alternative to express power (**NB express power in Quaker template constitution requires agreement of Area Meeting in session**)
- either
 - resolution passed by at least 75% of trustees; or
 - if the charity has members, the resolution passed by a majority of trustees and must also be approved (a) at a general meeting by not less than 75% of the members who attend and vote, (b) at a GM, by a decision taken without a vote and without any expression of dissent in response to the question put to the meeting or (c) by agreement of all members outside GM (e.g. written resolution)
- takes effect on the later of (a) passing of the resolution, (b) the date the resolution is specified to take effect, (c) when member approval is given or (d) if Charity Commission consent is required, when consent is given (s.280B).

'Regulated alterations'

- Commission's prior consent will be required to:
 - amendment of objects
 - altering dissolution provisions;
 - authorising benefits to trustees or members or connected persons;
 - “which would alter a restriction making property permanent endowment”;
 - amendments changing third party powers/rights (unless the person consents or is no longer in existence):
 - amendments which would require consent of a person (other than a trustee or member) or
 - affect any right directly conferred on a person named in the trusts or who holds an office or position specified in the trusts (other than as member or trustee)
 - amendments which would confer power on any person or persons to make any of the amendments referred to above.

Changing objects under new s.280A power

Test aligned with CIOs and CLGs.

In considering whether to give consent, the Charity Commission must have regard, under s280A(10) to the following:

- *the purposes of the charity when it was established, if and so far as they are reasonably ascertainable;*
- *the desirability of securing that the purposes of the charity are, so far as reasonably practicable, similar to the purposes being altered, and*
- *the need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances.*

This also applies if the amendment confers power on someone to amend the purposes.

Public notice and appeals

Public notice - s337 Charities Act (as amended by the Charities Bill) mirrors provision for CIOs/CLGs:

- Where the Commission's consent is sought under s280A :
 - CC may give public notice of the contents of the consent sought; or
 - May require public notice to be given by the charity.
- Where the Commission gives consent under s280A:
 - CC may give public notice of the giving or contents of the consent; or
 - May require public notice to be given by the charity.

Appeal:

- for CIOs/CLGs - right for trustees, CIO/CLG itself or any other person affected (beneficiaries) to appeal a CC decision to give or withhold consent under s198/226 (regulated alterations) to Tribunal.
- trusts and unincorporated assns - right for trustees and any other person affected (beneficiaries) to appeal a CC decision to withhold consent to amendment of trust under s280A(7) (regulated alterations) to Tribunal.

Things to think about – trusts and unincorporated associations

New power can be used as an alternative to an express power

- Can potentially be used to override restrictions in express power.
- No beneficiary right of appeal against CC decision to give consent (contrast schemes).
- How will CC apply the consent and public notice requirements?

Some grey areas to new power e.g.

- Not clear how the requirement to seek 3rd party consent to amendment applies to removal of rights of ex officio trustees or a named trustee is given particular rights – as the requirement to seek consent to only applies to the rights of a person who holds office “other than that of charity trustee or member”.
- Requirement to seek 3rd party consent does not seem to apply where particular rights or powers are conferred on particular individual trustees/members or groups of trustees/members.
- Not clear if still need a scheme to transfer permanent endowment

Practical issues – new Commission guidance and online forms required

If considering changing objects and would currently need scheme, consider postponing until new power comes in?

Restricted and endowment funds



What are restricted and endowment funds?

Unrestricted funds

- Charity can spend in their entirety
- Can be spent on any charitable purposes
- Also known as 'general funds'
- Can be designated for a particular purpose

Restricted (income) funds

- Charity can spend in their entirety
- Can only be spent on prescribed purpose or purpose

Permanent endowment

- Capital fund which must be invested to generate income
- Charity can only spend income (unless invested on a total return basis)
- Can have general or restricted purposes

Making changes to funds

Main mechanisms to amend terms of funds	Main mechanisms to amend terms of funds following CA 2022
Express power in governing document	Express power
Statutory power for smaller funds with income of £10,000 or less to amend objects (s275) or merge (s268 CA 2011) subject to CC consent	No longer available - s268 and s275 repealed
Statutory power to amend administrative powers and procedures - s280 Charities Act 2011	Replaced with new broad power to amend any provisions – new s280A Charities Act
Cy-près scheme to amend objects	No longer required
Scheme to amend other provisions	No longer required

Implementation: Autumn 2023

Spending permanent endowment

Mechanism	Details	Changes under Charities Act 2022 – expected to come in Spring 2023
<p>Power in s281 Charities Act 2011 to spend capital where income of fund £1000 or less OR capital £10,000 or less</p>	<ul style="list-style-type: none"> • No need for Charity Commission consent • Trustees must be satisfied that the purposes of the fund could be carried out more effectively if the capital/portion of capital could be spent 	<p>Amended so applies to funds of up to £25,000 (the income test is removed)</p>
<p>Power in s282 Charities Act 2011 to spend capital where income over £1,000 AND capital over £10,000</p>	<ul style="list-style-type: none"> • Must seek Charity Commission consent • Trustees must be satisfied that the purposes of the fund could be carried out more effectively if the capital/portion of capital could be spent • CC has 90 days to give or refuse consent otherwise it automatically takes effect 	<p>Amended so applies to funds of over £25,000 Time for CC to respond is reduced to 60 days</p>
<p>CC Order/scheme</p>	<p>Make case to CC</p>	<p>No change</p>

New power to borrow from permanent endowment

- **New power to borrow** – new sections 284A-D Charities Act 2011
 - borrowing limit of 25% of the value of a charity's permanent endowment
 - charity trustees must be satisfied that borrowing would be expedient
 - arrangements are in place for the amount to be repaid within 20 years of being borrowed
 - directions from the Charity Commission if unable to repay amount borrowed

Expected to come in Spring 2023



New power to make certain social investments

- **New power to make social investments with a negative return** – section 104AA Charities Act 2011 and Regulation 5A of The Charities (Total Return) Regulations 2013
 - can be used to make social investments which the trustees ‘could not otherwise make’
 - limited to charities that have already opted in to investing on a total return basis under section 104A(2)
 - detail will be subject to CC regulations

Expected to come in Spring 2023



Practical takeaways and things to think about now

- Review your restricted and endowment funds so that you can decide whether to take action now or put changes on hold
- If you have smaller funds (i.e. income under £10,000), it will be more straightforward to make changes to their purposes and merge them before the s268 and 275 powers are repealed in Autumn 2023
- If you have larger funds (i.e. income over £10,000) and can wait to make these changes, it will be more straightforward to do so when the new amendment power becomes available in Autumn 2023 (to avoid the need to apply for a scheme)
- If you would like to spend the capital of a PE fund, consider taking steps to release PE restrictions before Spring 2023, particularly if you have funds valued over £25,000 with an annual income under £1,000
- If you would like to borrow from PE or make social investments with a negative return, consider waiting for the new powers to become available in Spring 2023

Charity Land

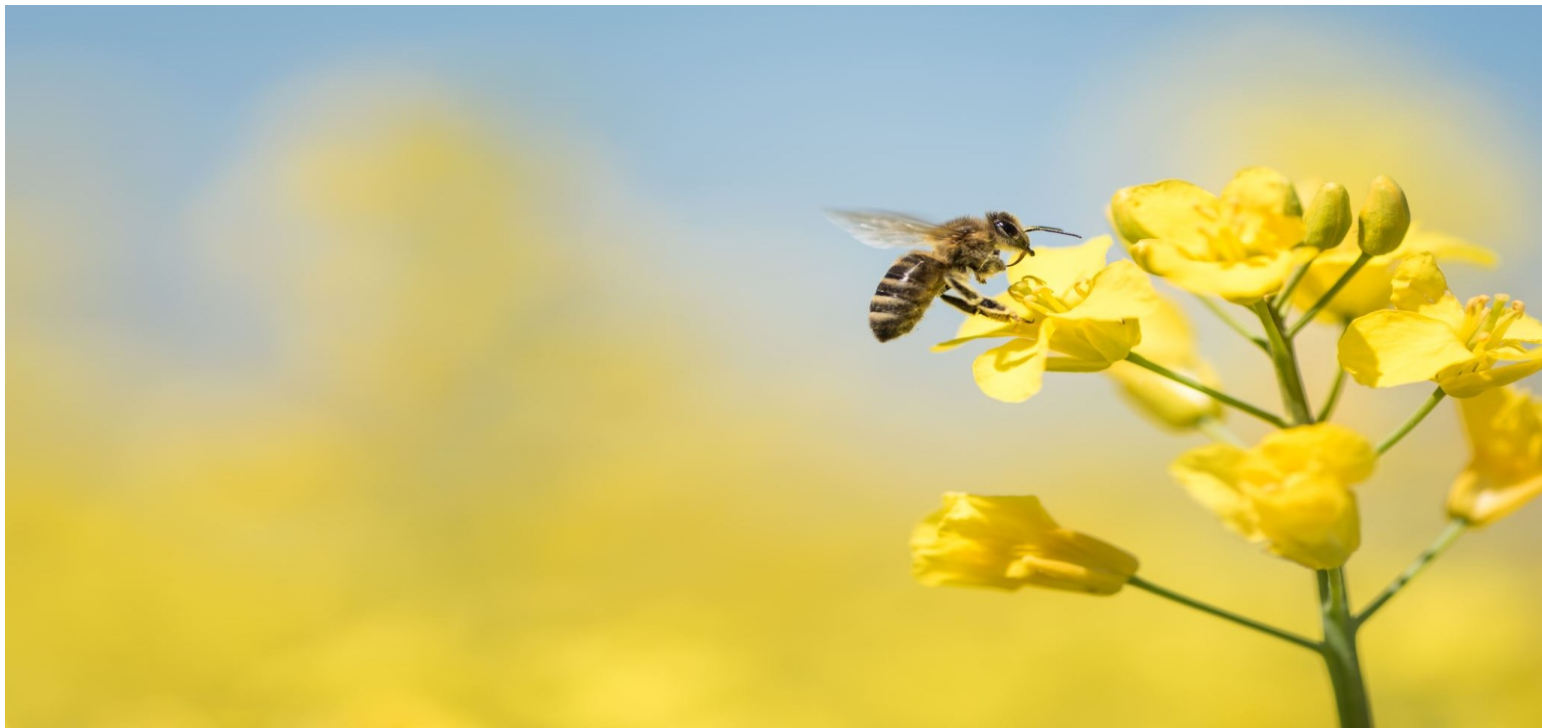


Charity land and restrictions on disposals

Current law/ area	Main changes
Type of trust land included	Property held on trust for more than one charity not restricted
Exceptions to compliance	Clarification on liquidator/ receiver disposals and disposals to other charities.
Surveyor to provide qualified surveyors' report	Definition of adviser extended to cover additional professionals and trustees/employees and officers
Type of advice to be provided	Areas of advice to be covered simplified and advertising removed as an express requirement
Definition of "connected person"	Exclusion of the grant of residential tenancies to employees.
Statements and certificates in disposal documents	Removal of need for trustee certificate, but statements on compliance extended to sale contracts/ agreements

When are the changes happening?

Charity type	When are the new provisions likely to come into force?
Charity land	Spring 2023



Summary and property covered by the Act

- Restrictions in Charities Act 2011 cover disposals of charity-owned property.
- Order of the Charity Commission required unless advice requirements can be met, the disposal is exempt or an exclusion applies.
- Previously property covered included all land:
“Held by or in trust for a charity”.
- Grey areas and challenges where property held in trust for more than one charity (examples, legacies and co-owned property).

Summary and property covered by the Act

- New section added to clarify this:

“(1A) For the purposes of this Part, land is held by or in trust for a charity only if the whole of the land which forms the subject matter of the disposition is held—

(a) by the charity solely for its own benefit (and, accordingly, is not being held as nominee or in trust for another person), or

(b) in trust solely for the charity.”

Practical implications/ take aways

Advice still recommended as best practice – but only one set of advice needed.

What is changing? Exceptions to compliance

- Clarity on exceptions
 - No report needed for charity trustees on sale of a property by a receiver/ liquidator.
 - Charity to charity disposal does not require a specific authorisation in the trusts of the charity
- **Practical take aways**
 - Social investments are not excepted
 - Exception still only applies where objects of receiving charity are the same or narrower than the disposing charity

What is changing? Identity of adviser

Current requirements

Advice on all disposals other than leases of seven years or less to be provided by:

a qualified surveyor who

Section 119 (3) – *“is a fellow or professional associate of the Royal Institution of Chartered Surveyors or satisfies such other requirements or requirements as may be prescribed by the Minister.”*

New requirement

Advice to be provided by a designated adviser.

Identity of the adviser is proposed to be extended by the Law Commission’s proposed Charities (Designated Adviser) Regulations 2017 to include a person who:

- “(a) a fellow of the Central Association of Agricultural Valuers; or*
- (b) a fellow of the National Association of Estate Agents”.*

Charity may be advised by an employee trustee or officer of the charity.

Note must also be:

“reasonably believed by the charity trustees to have ability in, and experience of, the valuation of land of the particular kind, and in the particular area, in question.”

Comparison of advisers

RICS qualified surveyors

- Professional & ethical standards (no bias, no conflicts, integrity, trustworthy, etc.)
- Standards of conduct (PII required, liability caps encouraged)
- Bye laws
- Complaints process and regulatory tribunal
- Established experience of reports for charities

Comparison of advisers

National Association of Estate Agents (part of Propertymark umbrella)

- Low proportion - 25% of estate agents nationally. E.g. only 15 firms in SW England, 2 in Wales.
- Various grades of membership. “Fellow” is highest.
- Qualifications: 5 years’ experience and Level 4 Certificate. Own curriculum/syllabus. Commercial and residential have different exams.
- Register of firms – on individual basis, but firm has certificate presumably particular person appointed.
- Conduct & membership rulebook.
- PII required (minimum amount seems low).
- Disciplinary process and hearing/tribunal (limited powers? £5k fine)

Comparison of advisers

Central Association of Agricultural Valuers

- Various grades of membership. “Fellow” is highest.
- Qualifications: passing written, practical and oral exams (focus on agricultural/farming land and remaining so – not much mention of development)
- Register – lists individuals, their membership type and firm.
- No rules or regulatory powers(?). Stamp of quality, but no guidelines or repercussions.
- No PII required?

Practical implications/ take aways

- Ensure advice provided by appropriate professional for the property to be disposed (fellow of RICS surveyor, fellow of National Association of Estate Agents, or fellow of Central Association of Agricultural Valuers).
- Check professional qualifications and experience of proposed adviser and checked they hold professional indemnity insurance.
- Professional code of conduct – RICS holds this. Does this matter to you?
- It may be necessary to monitor the transaction and if complexity arises, check if still appropriate adviser (e.g. simple sale of a residential property which may change to a sale with development elements/ overage).

What is changing? Type of advice to be provided

Current requirements

Advice on all disposals other than leases of seven years or less to cover all points set out in the Charities Act (Qualified Surveyors Report) Regulations 1992.

This is a prescriptive document (the report:

“must contain such information... as may be prescribed by regulations”

Section 119 (4).

The Regulations include various points that are not relevant to many disposals, such as the surrender of a lease, for example should the property be divided for the purposes of the disposal.

The charity must advertise the Property for the period the surveyor recommends in their report (section 119 (1) (b)).

New requirement

Advice to be provided by a designated adviser to be less prescriptive and must “deal with such matters as prescribed by regulations”.

The Law Commission has issued new draft regulations listing areas as follows:

- (a) the value of the relevant land;*
- (b) any steps which could be taken to enhance that value;*
- (c) whether and, if so, how the relevant land should be marketed;*
- (d) anything else which could be done to ensure that the terms on which the disposition is made are the best that can reasonably be obtained for the charity; and*
- (e) any other matters which the adviser believes should be drawn to the attention of the charity trustees.*

Practical implications/ take aways

- Changes are not so much wholesale changes as providing more flexibility for the adviser
- Changes would not seem to justify delaying a transaction
- Some are concerned regarding the relaxing of the prescriptive elements of the 1992 Regulations. It may be worth preparing a checklist of areas to cover for trustees to be comfortable, for example:
 - Any delay recommended?
 - Any alterations of divisions recommended?
 - Should any repairs be carried out prior to sale?
 - Has the advertising/ marketing been for the appropriate period?



Definition of “Connected Person”

- Where a charity disposes of property to a “connected person”, and Order is required from the Charity Commission.
- Changes were proposed to the definition to exclude wholly-owned subsidiaries and tenancies to employees.
- First rejected by the Government, second accepted.
- Residential tenancies granted to employees do not need a Charity Commission Order provided:
 - For a fixed term of one year or less a period tenancy and period is one year or less
 - It is granted for the right to occupy as a home.

Practical take away

- Charity still needs advice on terms/ rent from designated adviser to ensure is on the best terms reasonably obtainable for the charity.

What is changing? Statements and certificates in disposal documents

Current requirements

Currently charity trustees were required to certify compliance with the Charities Act 2011 provisions (whether by advice or Order of the Charity Commission or Court) in the transfer deed/ document effecting the disposal

No certificate required in contract/ agreement leading to confusion and potentially void/ voidable contract where no compliance carried out pre-exchange of contracts:

(Bayoumi v Women's Total Abstinence Union Ltd and Another but note The David Roberts Art Foundation Limited v Nicole Marlene Riedweg)

New requirement

No certificate from trustees required. Statement confirming compliance with the Charities Act 2011 is to be included instead with the document signed by whoever is to execute the disposal document.

The statement on compliance is also to be required in the contract/ agreement committing to the disposal, so providing certainty to buyers a contract cannot be declared void.

Practical take aways



Compliance and review of advice is still a trustee requirement, but removal of trustee certificates allows for a simplified process for execution of documents.

Inclusion of statement in contracts will flag up more clearly the need to have complied prior to exchange of contracts.

Opportunity to delegate signing of documents in scheme of delegation or power of attorney to officers of the charity for disposals as well as acquisitions

- start planning new scheme of delegation/ power of attorney.

Failed fundraising appeals



What is a failed appeal?

A hospice is looking to buy an expensive hoist. They launch a fundraising appeal

- Subsequent failures/surplus cases: it is very successful! They raise too much. What should the charity do with the surplus funds?
- Initial failures/failed appeals: it is not very successful! They do not raise enough to buy the hoist. What should the charity do with the funds raised?



Current law: Part 6 of Charities Act 2011

Part 6 Cy-près powers and assistance and supervision of charities by court and Commission

Cy-près powers and variation of charters

61. Duty of trustees in relation to application of property cy-près
62. Occasions for applying property cy-près
63. Application cy-près: donor unknown or disclaiming
64. Donors treated as unidentifiable
65. Donors treated as disclaiming
66. Unknown and disclaiming donors: supplementary
67. Cy-près schemes
68. Charities governed by charter, or by or under statute



Failed appeals: current law

Initial failure	Surplus cases
Law does not assume general charitable intention	The funds cannot be returned to the donors
Starting point: funds belong to donor and need to be returned	The charity applies to the Charity Commission for a cy-près scheme. Sections 62 (has a cy-près occasion arisen?) and 67 (matters the Charity Commission/court must consider) apply
The Charity Commission can make a cy-près scheme in certain circumstances set out in s63	Current rules simpler for small funds (income is £10,000 or less) where s275 Charities Act 2011 can be used to amend purposes of the funds without the need for a cy-près scheme
Administratively burdensome and complicated: <ul style="list-style-type: none"> • trustees can be required to contact donors and place adverts and make inquiries – to give other donors the chance to come forward • in some circumstances, donors must agree that the charity does not need to return their donation by disclaimer 	
Even where the Charity Commission makes a scheme, in certain cases, donors have six months from the date of the scheme to ask for their money back. Creates uncertainty for the charity	

What are the changes and when are they happening?

Change	Implementation
Current rules for initial failures relaxed – current provisions replaced by new simplified rules	Autumn 2022
New power for initial failures and surplus cases – new power introduced to enable funds of a failed appeal to be applied for new purposes by trustee resolution (rather than requiring a cy-près scheme) with Charity Commission consent in the case of larger funds	Autumn 2022

New law for initial failures: relaxing the rules

- S63 to 65 replaced by new s.63A: to allow funds to be applied cy-près (rather than returned to donors) in four circumstances:
 - (i) The Charity Commission/court decides it would be unreasonable for trustees to take steps to contact the donors – because cost would be disproportionate to amounts returned, or it would be unreasonable for donors to expect donation to be returned (new 63A(1)(a) and (2), restating 64(2) i.e. this is the same as the current position).
 - (ii) Donations are small – where trustees reasonably believe that donor has given £120 or less in a year (one-off or cumulative), unless the donor made a written declaration at the time of donation stating it must be returned if the appeal fails (new section 63A(3) and (7));
 - (iii) Trustees take reasonable steps (agreed in advance with the Charity Commission) to contact donors to offer to return their donation and the donors are not identified/ found (i.e. current complicated advertising and inquiry requirements are scrapped and there is no longer a need for donors to sign a formal disclaimer) (new section 63A(4) and (5)).
 - (iv) Donations are raised through a cash collection or from a lottery, competition or similar (new s.63A(6) restates s.64(1) i.e. this is the same as the current position)
- Donors will no longer have the six-month period to re-reclaim their donation which currently applies after a scheme is made

New power for initial failures and surplus cases

- New s67A – gives a new power for both surplus cases and initial failures.
- Trustees will be able to apply the fund for new purposes by trustee resolution, rather than having to ask Charity Commission for a cy-près scheme.
- Trustees when making that resolution must have regard to both:
 - The desirability of securing that the purposes are, so far as reasonably practicable, similar to the specific charitable purposes for which the money or other property was given.
 - The need for the purposes to be suitable and effective in the light of current social and economic circumstances.
- A majority of the trustees must pass this resolution.
- Where the proceeds exceed £1000 the resolution will not take effect until the Charity Commission has given its written consent (s.67A(3) and (4)).

Practical takeaways and things to think about now

- Avoid failed appeals altogether – think about the wording on the fundraising literature:
 - Appeal for funds for the charity’s general purposes and give examples as to how the funds might be used
 - Make it clear on the literature that whilst the funds are being raised for a particular purpose, if the target is not met, or too much is raised, the funds which cannot be used for the specified purpose will be used for the charity’s general purposes
- If an appeal has failed, particularly where there is:
 - an initial failure or
 - a large fund (so current s275 cannot be used to amend purposes)

wait until the new power is in force to re-purposes funds

Ex gratia payments



What is an ex gratia payment?

Trustees have duty to use charity funds only for the charity's purposes

An ex gratia payment is:

- a payment (or transfer of other property) or
- the waiver of entitlement to a payment (or other property)

which

- the charity does not have a legal obligation to make and
- cannot be justified as being in the interests of the charity

but which

- (under the current law) the charity's trustees regard themselves as being under a moral obligation to make
- Most often seen in legacy cases

Current law: ex gratia payments



Set out in s106 Charities Act 2011



Must obtain CC consent to ex gratia payment by s106 Order



Trustees themselves decide to make an-ex-gratia payment (i.e. decision cannot be delegated)



S106 is drafted so that trustees must:

'regard themselves as being under a moral obligation to take it [a particular action]'

Current law: ex gratia payments

- S106 extends principle established in Re Snowden [1969]
“...not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment.”
- In practice:
 - trustees must convince CC that there are reasonable grounds for them to believe they would be acting immorally by refusing to make payment
 - online form accompanied by clear and impartial evidence to support trustees’ view
 - no de-minimis but CC has said that it won’t challenge small ex-gratia payments (£1,000 or less) made without its authority
- Operational guidance on ex-gratia payments set out in OG-539

What are the changes and when are they happening?

Change	Implementation
Power to authorise ex gratia payments – existing power amended to allow decisions to make ex gratia payments to be delegated by trustees	Autumn 2022
New power to make ex gratia payments without Charity Commission consent – new power to make ex gratia payments without Charity Commission consent introduced subject to relevant thresholds	Autumn 2022

New law: ex gratia payments

- Amends s106 power for Charity Commission to give consent to ex gratia payments:
 - Reformulates test to be applied by CC
 - Allows trustees to delegate the decision to make an ex gratia payments e.g. to legacy officers
 - Allows statutory charities to make ex gratia payments

Current law – s.106 Charities Act 2011 (subjective test)

“..the charity trustees....in all the circumstances regard themselves as being under a moral obligation to take [the action]”

New law – amended s.106 Charities Act 2011 (objective test)

“....the charity trustees.... in all the circumstances could reasonably be regarded as being under a moral obligation to take [the action]...”

New law: small ex gratia payments

- New statutory power at s331A for charities to make small ex gratia payments without CC consent:
 - Amount of each permissible ex gratia payment defined by reference to a charity's gross income in the last financial year
 - Power can be expressly restricted/excluded by a charity's governing document
 - Max thresholds apply per payment, but no limit on number of payments

Income	Threshold
£25,000 or less	£1,000
>£25,000 - £250,000	£2,500
>£250,000 - £1m	£10,000
More than £1m	£20,000

Practical takeaways and things to think about now

Charities should ensure that they understand the new power and trustees should consider:

- if they want to amend governing documents to exclude statutory power to make small ex gratia payments
- if and how they want to delegate decision making for ex gratia payments (as for other delegations, they should take risk based and proportionate approach)
- if schemes of delegation re legacies will need to be amended
- how they will evaluate and assess potential small ex gratia payments

Ensure that they note the relevant thresholds, especially where a charity's income fluctuates around the limits of bands

Keep the total number of ex gratia payments made under review (the cumulative total could be quite significant even where each payment is within the threshold)

Charity names



The current law – s42 Charities Act 2011

Legal name of all registered charities is entered on the Register of Charities.

These charities must notify the Charity Commission of any change of name.

No requirement to register working names, but can choose to.

Working name is not defined.

The current law (continued)

CC has power to direct a charity to change its legal name in a range of circumstances; the CC will not register a new charity and has power to direct a registered charity to change its legal name where it:

- is 'too like' or the 'same as' the name of another charity (registered or not),
- is likely to mislead the public about the purposes of the charity's trusts or the activities it carries on in pursuit of them;
- includes word or expression specified in regulations and that inclusion is likely to mislead the public about the charity's status;
- is likely to give the impression that the charity is connected with government department, local authority or other body of persons or individual when it is not;
- is offensive.

A 'too like' name change direction can currently only be given within 12 months of the objectionable name being registered.

What is changing?

Current position

Working names have no official status in law, but charities can add them to their entry on the Register of Charities

The current CC power only relates to charities registered on the Register of Charities

The CC can only direct a charity to change its name within 12 months of their adoption

The new position (Spring 2023)

A working name is being given equivalent status to a legal name, including a power for the Commission *to require that a working name of the charity no longer be used as a working name.*

A working name is defined:

*... a name that is not the [legal] name of the charity but which is **used** to designate the charity and under which activities of the charity are carried out.*

The new rules will apply to all charities not just registered charities.

The 12-month deadline for CC to make a direction is removed.

But there is still **no requirement to register a working name**

Practical take aways



It's difficult to know before we know what the practical application of the new provisions will look like. However:

-You should bear the changes in mind, in particular, if you are considering a change of name. You should always conduct thorough searches of prior rights, which now must include working names.

-Consider registering working names while you can – we don't know what will happen to the existing working names on the Register of Charities.

Other technical provisions



Register of mergers and legacies



Register of Mergers – current law

Register of Mergers maintained by the Charity Commission

can register a “*relevant charity merger*”

“*relevant charity merger*” – s306 Charities Act 2011

1. Merger where charity A transfers all property to charity B and ceases to exist
2. Merger where charity A and charity B transfer all property to new charity C and charities A and B cease to exist
3. Where a transferring charity holds permanent endowment, the requirement for the transferring charity to cease to exist is modified - the permanent endowment trust can remain in existence post-merger

Effect of registering merger on Register of Mergers is that legacies and gifts are treated as gifts to the “transferee” charity

Problem with current provisions

- Under s311 Charities Act 2011
s311(2): *“Any gift which
(a) is expressed as a gift to the transferor; and
(b) takes effect on or after the date of
registration of the merger,
takes effect as a gift to the transferee”*
- BUT - Berry v IBS-STL (UK) Ltd (2012):
 - legacy *“to such of the following charities
as shall to the satisfaction of my trustees
be in existence at the date of my death...”*
 - one of the named charities had merged
and the merger was entered on Register
of Mergers
 - Held – wording of Will overrode Register
of Mergers – the transferor charity had
ceased to exist
- Shell charities



What are the changes and when are they happening?

Change	Implementation
Gifts to merged charities – existing provisions relating to the Register of Mergers amended to avoid failure of gifts due to the particular wording of a Will	Autumn 2023

New Register of Merger provisions

- New provisions in place of current s311(2):
 - (2) Subsection (2A) applies to a gift.....if-*
 - (a) the gift would have taken effect as a gift to the transferor if the transferor had been in existence, and*
 - (b) the date on which the gift would have taken effect is a date on or after the date of the registration of the merger.*
 - (2A) The gift takes effect as a gift to the transferee.*
- Overcomes current problems with Register of Mergers
- Separate provisions to provide for gifts on the amalgamation of CIOs at s239(3) in a similar way

Other changes in the Charities Act 2022

Other main changes in the Charities Act 2022

- Remuneration of charity trustees (Autumn 2023)
- Trust corporation status (Autumn 2022)
- Charity Commission power to confirm trustee appointments (Autumn 2023)
- Charity Tribunal's power to make an authorised costs order (Autumn 2022)





Any final
questions?



We use the word ‘partner’ to refer to a member of the LLP or an employee or consultant with equivalent standing and qualifications.

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