

The Almshouse Association

The Charities Act 2022 explained

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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
- **Phased implementation of provisions over 18 months – most (but not all) provisions are now in force**

What we plan to cover

- Amending governing documents
- Restricted funds and endowments
- Charity land
- Failed fundraising appeals
- Ex gratia payments
- Charity names
- Other technical provisions

Amending governing documents



Setting the scene – almshouses' legal form and governing documents



Most almshouse charities are charitable trusts – the charity's governing document may be a Will, deed of gift, but most commonly is a Charity Commission scheme



Almshouse charities can take other legal forms e.g. a charitable incorporated organisation (CIO) governed by a CIO constitution or company limited by guarantee governed by Articles of Association



Occasionally have more complex governance including Acts of Parliament or Royal Charters

Key Charities Act 2022 changes for amending governing documents

Charity type	Main changes
Trusts and unincorporated associations	New broad statutory power of amendment
Charitable Incorporated Organisations (CIOs)	New test for changing objects and change to rules on when changes to CIO constitution come into effect
Charitable companies	New test for changing objects
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 unincorporated associations	New power for Charity Commission to require public notice when its consent is required to certain amendments
Companies/CIOs/Trusts and unincorporated associations	New/modified rights of appeal to Tribunal where CC withholds (or, for companies and CIOs, where CC gives) consent

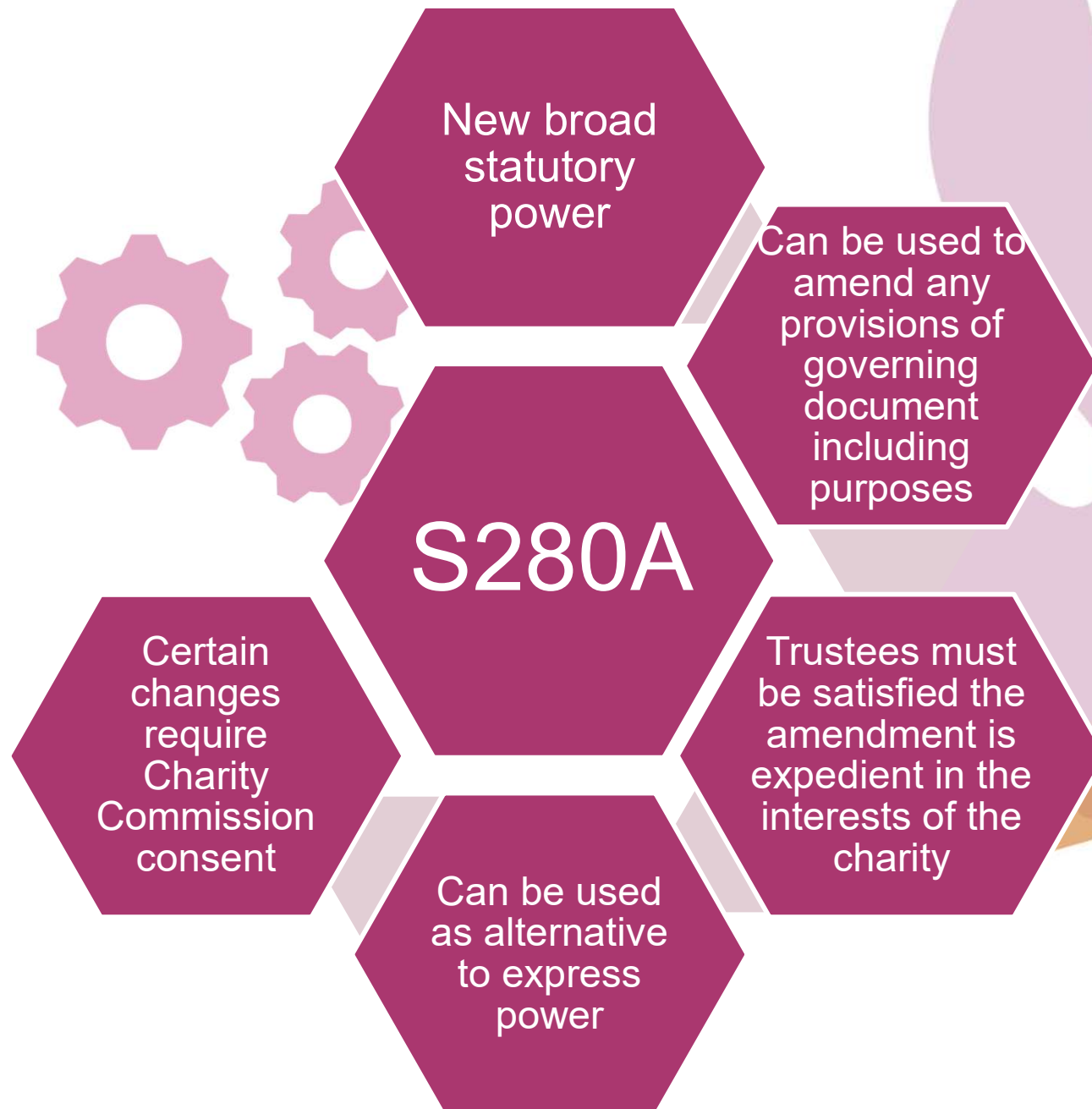
Amending governing documents:

Trusts (and unincorporated associations)

Mechanisms for amending governing documents- effect of Charities Act 2022

Mechanism	Effect of Charities Act 2022
Trustees use express power in governing document	Still available
Trustees use 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	Powers repealed
Trustees use statutory power to amend administrative powers and procedures - s280 Charities Act 2011	Power repealed and replaced by new broad s280A power of amendment
Charity Commission makes cy-pres scheme to amend objects	Likely to be used rarely
Charity Commission makes scheme to amend other provisions e.g. trustee benefits, amending permanent endowment restrictions	Likely to be used rarely

New statutory power of amendment – s280A



How to use s280A



If the charity does not have members, the resolution making the amendments must be passed by at least 75% of trustees



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)



The amendments take 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).

Changes requiring Commission consent

Charity Commission's prior consent will be required to:

- amend objects
- alter dissolution provisions;
- authorise benefits to trustees or members or connected persons;
- change permanent endowment restrictions;
- change 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) e.g. third party right to appoint trustees
- confer power on any person or persons to make any of the amendments referred to above

Changing objects of charity using s280A

The legal test the Charity Commission must look at when deciding whether to give consent requires the CC to have regard to:

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

the need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances



How will the Charity Commission apply this test?

New Charity Commission guidance



- You will need to explain:
- what your **charity's original purposes** were when it was set up (if you know them)
- **how the new purposes are similar to the current purposes** of your charity, and if not, why
- **how the new purposes are suitable and effective** in current social and economic circumstances
- the **factors you considered** when you made your decision
- how the change to purposes is in the best interests of your charity
- how the change will affect your charity's current beneficiaries
- how you will further the new purposes, including activities your charity will carry out or funding that you have secured
- whether the change may be controversial or of public interest
- **how you have consulted** (for example, with your beneficiaries) about the change, and taken into account the feedback you received
- how you have managed conflicts of interest

Public notice and appeals

Public notice - s337 Charities Act

- 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:

- trusts and unincorporated associations - right for trustees and any other person affected (beneficiaries) to appeal a CC decision to withhold consent to amendment of trust under s280A(7) to Tribunal.
- contrast 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 to Tribunal.

Amending governing documents:

**CIOs and companies
limited by guarantee**

CIOs and CLGs

Certain changes to governing documents require Charity Commission consent (called regulated alterations)

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;
 - 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.

Changing a CIO/CLGs objects

The legal test for changing a CIO or CLG's objects aligns with the test for s280A amendments, so the Charity Commission must look at the following when deciding whether to give consent:

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

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



CIOs – other changes to align with companies regime

Pre-Charities Act 2022

- No amendments to a CIO's constitution took effect until registered by the Charity Commission, which caused uncertainty and hindered planning

Now

- Conditional resolutions are now possible for CIOs under amended s.226(1) i.e. CIOs can now pass a resolution to take effect when CC consent is given

Amendments to purposes now take effect when registered by the CC (or later if specified in the resolution)

Other amendments take effect on the date the resolution is passed (or later if specified)

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 - 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 – NO CHANGE
- previously, for CIOs this only applies to a decision to refuse to register an amendment to the CIO's constitution under s227. Now new provision 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.

Restricted and endowment funds



What are restricted and endowment funds?

Unrestricted funds	Restricted (income) funds	Permanent endowment
<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• Charity can spend in their entirety• Can only be spent on prescribed purpose or purpose	<ul style="list-style-type: none">• 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 e.g. to maintain almshouse

Changing terms of funds post-Charities Act 2022

- Express power
- New s280A statutory power of amendment
- Reminder that changing purposes or permanent endowment restrictions of fund requires Charity Commission consent
- Charity Commission scheme (will be used rarely)

Spending permanent endowment

Mechanism	Details	Charities Act 2022 changes
Trustees power to spend small endowments (s281)	<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 	Now applies to funds of up to £25,000 (increased from £10,000 and income test of up to £1,000 removed)
Trustees power to spend larger endowments (s282)	<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 must give or refuse consent within fixed time period otherwise it automatically takes effect 	Amended so now applies to funds of over £25,000 Time for CC to respond is reduced to 60 days (from 90 days)
CC Order/scheme	Make case to CC	No change (but likely to be used rarely post CA 2022)

New powers in relation to 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

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'

only applies where charities that have opted in to investing their permanent endowment on a total return basis under section 104A(2)

detail will be subject to CC regulations

Charity Land



Charity land and restrictions on disposals

Main changes

Property held on trust for more than one charity not restricted - 14 June 2023

Clarification on liquidator/receiver disposals and disposals to other charities - 7 March 2024

Definition of adviser extended to cover additional professionals and trustees /employees and officers 14 June 2023

Areas of advice to be covered simplified and advertising removed as an express requirement 14 June 2023

Exclusion of the grant of residential tenancies to employees 14 June 2023

Removal of need for trustee certificate, but statements on compliance extended to sale contracts/ agreements - 7 March 2024

Summary and property covered by the Act

Restrictions in Charities Act 2011 cover disposals of charity-owned property.

Licences of property are not considered disposals of charity 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”*.

Now: *“(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.”*

What has not changed? Section 121 and designated land

Often applies to almshouse-charity owned property – land is held *“to be used for the purposes, or any particular purposes, of the charity”*

Need to give at least one month’s public notice of disposal – no prescribed form or method of notice but should aim to reach as many beneficiaries and others who may have an interest in the charity as is possible to reach at a reasonable cost

e.g. local/national paper, notice at property, specialist publication

The charity’s trustees must give proper consideration to any representations received in the time period

No absolute requirement to change terms of disposal

What has changed? Identity of adviser



Advice must be provided by a designated adviser.
Previously was only “a qualified surveyor” who is a fellow or professional associate of the Royal Institution of Charter Surveyors”



Now: adviser is also a person who is :

*“(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 a suitable qualified 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.”*

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)



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)



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?

What has changed? Type of advice to be provided

Advice to be provided by a designated adviser is less prescriptive than before.

Now: The new Designated Adviser Report regulations list the following areas:

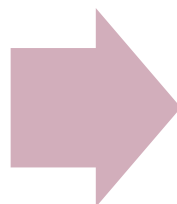
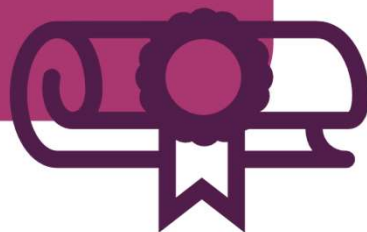
- (a) the value of the relevant land;*
- (b) any steps which could be taken to enhance that value;*
- (c) whether and, if so, how the relevant land should be marketed;*
- (d) anything else which could be done to ensure that the terms on which the disposition is made are the best that can reasonably be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

What has changed? Statements and certificates in disposal documents

Previously:

A certificate confirming compliance was provided by two trustees in the deed disposing of the property.

Certificate of compliance not in contract of sale / agreement for lease.



Now:

No certificate from trustees required. Statement confirming compliance with Charities Act 2011 included and document signed in the usual manner for execution.

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



What has changed: definition of “Connected Person”

Where a charity disposes of property to a “connected person” an Order is required from the Charity Commission.

Now: 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.

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

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 is flagging up more clearly the need to have complied with Charities Act requirements prior to exchange of contracts.



New requirements do seem to be saving costs for charities, but some lack of awareness among advisers as to the new requirements.



New wider discretion on the form of advice is also seeing more bespoke and appropriate advice on disposals

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?



Both problems can be avoided by well written fundraising material

Failed appeals – surplus cases

Trustees will be able to change purposes of funds:

By using new s67A (with Charity Commission consent if value exceeds £1000) – we will come on to that!

By using new s280A (with Charity Commission consent) – though use of this power for failed appeals is not yet clear

Seeking Charity Commission Scheme (likely to be used rarely post Charities Act 2022)

Failed appeals – initial failure

Starting point is that the donations should be returned to the donor unless certain hoops are jumped through by the charity.

The regime prior to the Charities Act 2022 was very cumbersome including advertising requirements etc. There is a new regime under Charities Act 2022 which provides that charities don't need to return donations if:

- **Disproportionate effort** - Where it appears to the court, or to the Charity Commission, that:
 - (i) (having regard to the amounts likely to be returned to donors) it would be unreasonable to incur the expense of returning the property; or
 - (ii) (ii) (having regard to the nature, circumstances and amounts of the gifts, and the lapse of time since the gifts were made), for the donors to expect the property to be returned.
- **Small donations** - Where the property is a single gift of £120 or less, and the charity trustees “reasonably believe” that the donor has only provided a maximum of £120 in the financial year to the charity for those specific purposes. This condition is overridden if the donor has stated, when providing the gift, that it must be returned to them if the specific purposes fail.
- **Donors cannot be found** - Where the charity trustees and the Charity Commission have “agreed in writing” on steps that are reasonable in all the circumstances to identify and find the donors, and those steps have been taken without success.
- **Collection boxes, lotteries etc.** – Donations made up of cash collected by “collecting boxes” or other means by which the donations are indistinguishable; or are the proceeds of “any lottery, competition, entertainment, sale or similar money-raising activity”.

New power for initial failures and surplus cases

New s67A – gives a new power (which we think can be used for both surplus cases and initial failures but awaiting CC guidance).

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)).

Ex gratia payments



What is an ex gratia payment?

The general rule is that trustees have a duty to use charity funds only for the charity's purposes, but in certain circumstances they can make an ex gratia payment which is:

A payment (or transfer of other property) or the waiver of an 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 the charity's trustees regard themselves as being under a moral obligation to make – often in a legacy scenario

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?

Originally expected in Autumn 2022, now “later in 2024”

- **Power to authorise ex gratia payments**
– existing power amended to allow decisions to make ex gratia payments to be delegated by trustees

Originally expected in Autumn 2022, now “later in 2024”

- **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

New law: ex gratia payments

Will amend 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

Why the delay?



The government's intention is to commence these sections subject to an exclusion for relevant national museums and galleries. DCMS is in contact with those organisations falling within scope of this exclusion. There will be a further exclusion to ensure that Charity Commission approval will continue to be required for decisions made by charities concerning ex gratia payments to recipients outside the UK.

Letter from DCMS to Chair of the Charity Commission 31 January 2024



The Charities Act 2022 includes provisions which would enable national museums and galleries to apply to the Charity Commission for permission to make an *ex gratia* payment involving the restitution of an object – which was not clear at the time the legislation was drafted. The government intends to exclude national museums and galleries from the scope of these provisions.

Charity names



Main change – extension of Charity Commission powers to working names

- Charities must have legal name on Register of Charities and notify Charity Commission of change of legal name
- s42 Charities Act 2011 gives powers to Charity Commission to give directions to a charity requiring it to change its name if it is the same or too like the name of another charity or is misleading etc.
- Power now extended to working names, defined as: *“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 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

Other technical provisions



Register of mergers and legacies



Register of Mergers prior to Charities Act 2022

A Register of Mergers is maintained by the Charity Commission and charities can use this to 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 old 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:

- 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



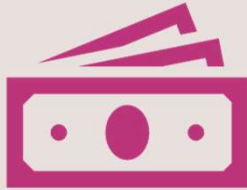
Leading many charities to keep
“shell” charities to protect future
legacies

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



Trust corporation status



Charity Tribunal's
power to make an
authorised costs order



Charity Commission
power to confirm
trustee appointments



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.

Contact details



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