



A Briefing on the Charities Act 2006

January 2007

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1. Introduction

1.1 This Briefing explains some of the main provisions of the Charities Act 2006. The Charities Act updates the legal definition of charity and provides a modern, effective regulatory environment for charities. It has considerable support both within the voluntary and community sector and beyond. NCVO has long been campaigning for this reform and we warmly welcome the Act.

1.2 Copies of the Charities Act can be downloaded from the Office of Public Sector Information at www.opsi.gov.uk/acts/acts2006/20060050.htm or ordered from The Stationery Office. The Cabinet Office has produced an implementation plan, explaining when each of the provisions of the Act will come into force; this is available at www.cabinetoffice.gov.uk/third_sector/documents/charity_reform/implementation_plan.pdf. It is also producing a Guide to the Charities Act 2006 with the Charity Commission, which will be published shortly.

1.3 For further information about the NCVO's work on charity law and regulation, including the Charities Act 2006, please contact Belinda Pratten on 020 7520 2558 or by email: belinda.pratten@ncvo-vol.org.uk.

2. Key provisions of the Act

The legal definition of charity

2.1 In order to be a charity, an organisation must have purposes that are recognised as charitable in law **and** must be able to demonstrate that it exists to benefit the public in some way.

Charitable Purposes

2.2 The Act updates the preamble to the Charitable Uses Act 1601, from which came the current four heads of charity (relief of poverty; advancement of religion; advancement of education and 'any other purpose beneficial to the community'). These will be replaced by a new list of 12 charitable purposes that more closely resembles modern-day expectations of what causes are, or should be charitable.

2.3 Like the preamble, the list illustrates the types of purposes that are charitable (it is not a definitive list). It still includes an 'any other purposes' clause, enabling an organisation to become a charity if its purposes are not named in the list, but can be shown to be 'analogous to, or within the spirit of' those that are named or to existing charities. This will ensure that there is flexibility for the law to evolve in response to changes in society and changing social and economic needs.

Public Benefit

2.4 All organisations with charitable purposes (i.e. that fall within this list) will **also** have to show that they exist to benefit the public in some way in order to gain charitable status. In the past the law presumed that charities under the three named heads (poverty, religion and education) benefited the public, but required all other

organisations to demonstrate this. The removal of this presumption will mean that under the new legislation there will be a level playing field for all charities.

2.5 The Act does not define 'public benefit': decisions about whether a particular charity meets this requirement will continue to be determined by the Charity Commission as the independent regulator, on the basis of case law, and ultimately by the courts. The Charity Commission will have to promote awareness and understanding of the public benefit requirement, and how it will test this, as one of its objectives (see below).

2.6 NCVO welcomes both the removal of the presumption of public benefit and the decision not to include a definition of public benefit on the face of the Act. By requiring all charities to demonstrate that they benefit the public in some way, the Act will make it clear why charities are special and why they deserve the tax and other benefits they receive. This will help to safeguard public confidence in the sector in the long term. Defining what public benefit means through case law will ensure that the law is flexible enough to evolve over time and to encompass the diverse range of existing and future purposes that are or will be charitable.

2.7 In taking this forward, a key issue will be how the new public benefit test will impact on charities that charge high fees for their services. A focus of debate so far has been the extent to which high fees mean that only those who can afford to pay can benefit from a charity's services. NCVO's view is that anyone able to benefit should have a more than reasonable chance of doing so, irrespective of income.

2.8 The Charity Commission has been canvassing opinion from charities, public policy experts and the public about how it should take this work forward. It will shortly be launching a consultation on the principles of public benefit; ways in which charities might demonstrate their public benefit; and how this might be assessed. Following the consultation it will start to pilot the public benefit test in the autumn and will then start undertaking formal assessment from April next year. It will report progress to Parliament in September 2008. The Government has made a commitment to review the impact of the public benefit test within three years and to strengthen the law if necessary.

The role of the Charity Commission

2.9 The Act establishes the Charity Commission as a corporate body and for the first time sets out its objectives and functions, as well as its general duties. It also requires the Commission to:

'have regard to the principles of best regulatory practice (including the principle under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).'

NCVO welcomes this clause and the assurances given in the House of Lords that the Commission already has a duty to act in a fair, reasonable and proportionate way.

2.10 The Commission shall 'perform its functions on behalf of the Crown', but it 'shall not be subject to the direction or control of any Minister of the Crown or other government department' (apart from legal obligations or expenditure controls).

Although this will help to protect the Commission's independence from Government, NCVO would like to see a Third Sector Select Committee in place to strengthen its accountability to Parliament, as well as facilitate Parliamentary scrutiny of Government policy towards the sector more generally.

2.11 NCVO remains concerned that the Act could be interpreted as widening the scope of the Commission's role over and above its regulatory function, extending its general advice-giving role. The Commission should provide advice and information to charities to enable them to comply with their legal and regulatory obligations: it is clear that this role is valued by charities and they look to the Commission for this. However, this needs to be distinguished from more general advice about good practice for the sector: as the Better Regulation Task Force (now the Better Regulation Commission) has argued, blurring the boundary between what a charity must do, and what the Commission thinks it should do is confusing for charities and increases the burden of regulation¹.

The Charity Tribunal

2.12 The Act creates a new independent Charity Tribunal which will be able to review any decision made by the Charity Commission, for example a decision not to recognise a particular cause or purpose as being charitable in law. This will be potentially valuable, enabling people to appeal against such decisions without having to argue their case in the High Court (as at present).

2.13 In theory the Tribunal should make it quicker and easier to make an appeal, yet it is not clear how this will work in practice and it may be that the cost will still be prohibitive for many. The Act states that decisions about the award of costs will be left to the Tribunal. However:

- if it considers an appeal to have been lodged 'vexatiously, frivolously or unreasonably' costs may be awarded against the person(s) bringing it; or
- if it considers that a 'decision, direction or order of the Commission' is unreasonable, costs may be awarded against the Commission.

2.14 The Government anticipates that in most cases tribunal users will be able to represent themselves. In exceptional cases where they cannot do this, for example where there are language difficulties, public funding can be granted, if the case merits it, under the Access to Justice Act 1999. Where an issue is legally complex and therefore requires legal representation, the Attorney General will be able to take a case to the Tribunal, relieving individuals (or charities) of the cost of doing so.

2.15 As argued above, the Tribunal is a potentially important mechanism, giving people a right of appeal against legal decisions made by the Charity Commission. However, controversial cases will still need to be heard by the High Court to test existing case law and create new legal precedents where necessary. The success of the Tribunal will depend on people being able to exercise their right of appeal and on this being affordable. Therefore it will be necessary to monitor and review this to

¹ Better Regulation Task Force, November 2005, *Better Regulation for Civil Society*

ensure that those with legitimate appeals are not deterred by factors such as cost and therefore the Tribunal is able to fulfil its potential.

Registration of charities

2.16 There are some changes in relation to the registration of certain types of charity:

- **small charities** with an income of less than £5,000 will not be *required* to register (and may choose to de-register if they are already registered), but
- they **must** be able to register if they so choose (the wording has been strengthened to support a small charity's right to choose);
- **excepted** charities with an income of more than £100,000 will be required to register and this threshold may be reduced over time – again, those with an income below the threshold **must** be able to register if they choose to do so;
- **exempt** charities will be expected to comply more closely with charity law and this will be enforced by a 'principal regulator' determined by the Home Secretary, if no principal regulator can be determined they will be required to register with and be regulated by the Charity Commission; and
- **Industrial and Provident Societies** that are also charities will no longer be exempt unless they are also Registered Social Landlords (in which case the Housing Corporation will be their principal regulator).

2.17 The Trustees of all other organisations with charitable purposes must apply for registration; they must supply the Charity Commission with the information required; and they must inform the Commission if the organisation ceases to exist.

Deregulation

2.18 The Act includes a number of deregulatory measures, for example, relaxing restrictions on altering memoranda etc of charitable companies and removing some of the legal obstacles to collaborative working and mergers between charities. The Act also changes the thresholds relating to the audit and examination of a charity's accounts. Under the new legislation:

- charities with an income of at least £500,000 or assets valued at £2.8 million or more will be **required** to have their accounts professionally audited;
- charities whose income is more than £10,000 but less than £500,000 must have their accounts independently examined, they do not have to be audited unless this is required by their governing document; however,
- organisations whose income is between £250,000 and £500,000 must have their accounts examined by someone who has a relevant professional qualification, as defined in the Act.

Charitable Incorporated Organisation

2.19 This provision will mean that in future an organisation that registers as a charity will be able to become incorporated (take on a legal identity as an organisation) without having to also register as a company, if the trustees choose to

do so. We hope that it will also be relatively easy for charities that are currently companies to become a Charitable Incorporated Organisation (CIO) instead. This will be very useful, particularly for new or unincorporated charities. However, new regulations governing the CIO need to be drafted, consulted upon and agreed by Parliament before this provision can be implemented. For this reason it is unlikely that the CIO will be available before 2008.

Trustees

2.20 The Act makes three key provisions for trustees:

- a trustee may be paid for professional services provided to their charity over and above their usual duties as trustee, but not under a contract of employment, subject to a duty of care by the trustee board as a whole (the Act sets out what a duty of care means in this instance);
- the Charity Commission will be given powers to remove the liability of trustees where they have acted 'reasonably and in good faith'; and
- trustees may use charitable funds to purchase indemnity insurance if they believe it is in the best interests of the charity that they should do so.

NCVO welcomes these provisions.

Fundraising and Public Collections

2.21 Professional or commercial fundraisers raising money for charitable purposes or institutions will be required to make appropriate statements about their role and how much of the money raised will benefit the charity or cause concerned. This will promote public confidence in such ventures and in charity fundraising more generally. We welcome this clause but it must be enforced.

2.22 The Institute of Fundraising has developed a self-regulatory scheme for fundraising. However, the Act gives the Secretary of State reserve powers to introduce statutory regulation if (s)he considers self-regulation to have failed.

2.23 The Act expands the definition of a 'public place' where permits are required to include any highway and any place where members of the public have access that: 'is not within a building, or if within a building, is a public area within any station, airport or shopping precinct or any other similar public area.' This will be a change from the previous position, which excluded supermarket or station forecourts.

2.24 The Act also provides for a new licensing scheme for public collections. In order to undertake a collection, a charity will have to obtain both a 'certificate of fitness' from the Charity Commission and a permit from the local authority where the collection is due to take place. The certificate of fitness demonstrates that a collection is being undertaken on behalf of a bona fide charitable, benevolent or philanthropic cause. Local, short-term collections will not have to obtain a certificate or permit, but will be required to notify the local authority of when and where they will be collecting.

2.25 NCVO broadly supports these proposals. The current legislation is fragmented and inconsistent and there is a need for a new integrated licensing scheme. There should be a clear and consistent system for checking the eligibility of organisations wishing to undertake public collections, but it is important that this does not increase the bureaucratic burden on charities, particularly those organising national collections. However, it is difficult to comment in detail on the proposals for issuing certificates of fitness and permits until regulations and guidance are published for consultation. Because of this, and because the Charity Commission needs time to prepare to take on this role, it is not envisaged that this new licensing regime will come into force before 2009.

Review

2.26 Before the end of five years the Secretary of State must instigate a review of the Act and how it has worked, particularly its effect on:

- excepted charities;
- public confidence in charities;
- the level of public donations; and
- the willingness of individuals to volunteer.

The review should also examine the status of the Charity Commission and its independence from government and anything else the Secretary of State considers appropriate. Conclusions from the review must be reported to Parliament.

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January 2007