

CHARITIES ACT 1992: AN OVERVIEW

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Introduction

The Charities Act 1960 was enacted in a mood of triumphalism. It was indeed introduced very belatedly. There had been an unseemly wait for legislation to follow the report of the Nathan Committee. The 1960 Act eventually reached the statute book on 29 July 1960 some nine months after the Conservatives had won a stunning electoral victory at the polls in October 1959.

One of the individuals responsible for piloting the Bill through the House of Commons was Mr David Renton MP, then a Minister at the Home Office, who as Lord Renton QC was one of the Members of the House of Lords Select Committee who debated the Charities Act 1992 when it was in Committee.

Some people at the time thought that the legislation would be unlikely to need amendment for many years. Social changes had however already prompted Lord Goodman's Committee to report for the National Council of Voluntary Organisations in the mid-seventies. By the late 1980s the charitable sector was flourishing under Thatcherism and the need for checks and balances to control the abuses inevitably attendant on success was very pressing indeed.

Nature of the Act

The Charities Act 1992 is not a consolidating Act, although it was made clear in its passage through the Select Committee in the House of Lords that in due course consolidation with previous legislation in a new consolidated Act is intended.

For the time being the 1992 Act contains some provisions which amend or supplement provisions of previous legislation and some provisions which are entirely new; in other words there are (a) amending provisions and (b) innovatory provisions. Structurally this means that some sections simply engraft wording on to or excise wording from other Acts, while other sections stand on their own, with a life of their own and are in no way parasitic on, for example, the Charities Act 1960.

Aims of the New Act

The objectives of the new legislation are to be gathered from the Woodfield Report and the White Paper endorsing particular recommendations of the Woodfield Report. Basically, the main aims of the Charities Act 1992 are (1) to strengthen the supervision and control exercised by the Commissioners (2) to modernise the law relating to the administration of charities (3) to enlarge the Commissioners' powers (4) to tighten up on charity accounts (5) to modernise the law relating to charity property (6) to widen trustees' powers of investment (7) to bring charitable companies into the mainstream of charity law (8) to rationalise the law relating to small charities (9) to prevent sharks from acting or continuing to act as charity trustees and (10) to modernise superficialities of the law on charities generally. In two areas going

beyond just charity law further aims can be identified: these are (a) the control of fund-raising as far as it affects charitable institutions and other benevolent and philanthropic institutions and (b) the organisation of a coherent code to govern public charitable collections on behalf of charities and "benevolent and philanthropic institutions".

Structure of the Act

The structure of the Act is simple. The Act is divided into four Parts comprising a total of 79 sections. In addition there are seven Schedules. And in due course there may be as many as 11 sets of regulations made under the Act, although it is possible that each set of regulations may be made to cover matters arising under several different sections.

Four Parts

Part I consists of 57 sections and is concerned with the main reforms in the statute law governing charities. For this reason it is entitled "Charities". The 13 subdivisions of Part I give a fair idea of the comprehensive nature of the innovations. The first subdivision in this baker's dozen is entitled "Preliminary" and is concerned with the interpretation of Part I as a whole. (One notes parenthetically that both Part II and Part III, but not Part IV, have a Preliminary subdivision). The other 12 subdivisions of Part I break down as follows:

- (i) registration of charities
- (ii) charity names
- (iii) supervision and control by Commissioners
- (iv) powers with respect to the administration of charities
- (v) charity accounts
- (vi) charity proceedings
- (vii) charity property
- (viii) powers of investment
- (ix) charitable companies
- (x) small charities
- (xi) disqualification for acting as a charity trustee
- (xii) miscellaneous and supplementary provisions.

Part II is directed to the control of fund-raising for charitable institutions, an enlarged term which includes not only charities but also institutions for charitable, benevolent or philanthropic purposes. Part III also strays outside pure charity law in reforming the law relating to "public charitable collections", which term includes provisions governing appeals directed to charitable, benevolent or philanthropic purposes.

Part IV headed "General" takes up the least space. It is concerned with only five matters: (i) offences by bodies corporate (ii) service of documents (iii) regulations and orders made by the Secretary of State under the Act (iv) minor and consequential amendments and repeals and (v) the short title, commencement and extent of the Act.

The Seven Schedules

The seven Schedules, like seven maids, mop up a variety of things. Schedule 1 contains two sections from the Charities Act 1960 conveniently rewritten with all the

relevant amendments. The two sections are section 4, which deals with the register of charities, and section 20, which contains enlarged powers for the Commissioners to act for the protection of charities. Schedule 2 defines the term "connected person" for the provision dealing with sales of land requiring the consent of the Commissioners, while Schedule 3 contains a host of minor amendments to the Charities Act 1960. Schedule 4 contains substantial amendments to be read into the Charitable Trustees Incorporation Act 1872 which is expected to gain a new lease of life with the disappearance of the Official Custodian from trusteeship of property other than land. Amendments of the Redundant Charities and Other Religious Buildings Act 1969 are the subject of Schedule 5. Schedule 6 carries out many minor and consequential amendments of other legislation, while Schedule 7 lists various repeals.

The Regulations

The Act also envisages no less than eleven sets of regulations to be put in place to complement particular statutory provisions. Regulations are, in short, to be made under sections 9, 15, 20, 22, 23, 26, 32, 39, 51, 64 and 73 of the 1992 Act. In effect what this means is that regulations will be made to govern the following eleven areas:

- (1) the appointment, removal, remuneration and reporting duties of receivers and managers appointed under section 20 of the Charities Act 1960 as amended by CA 1992, s.8(2)
- (2) the application *cy-près* of gifts of donors unknown or disclaiming: s.15 (amending CA 1960, s.14)
- (3) the provision of annual statements of accounts: s.20
- (4) the provision of audits and independent examinations: s.22
- (5) the provision of annual reports: s.23
- (6) the preparation of annual returns: s.25
- (7) the requirements of a qualified surveyor reporting on dispositions of charity land and for the contents of any such report: s.32
- (8) investment powers of trustees: s.39
- (9) fees and other amounts payable to the Commissioners: s.51
- (10) fund raising: s.64
- (11) public charitable collections: s.73

Registration of Charities and Control Over Names

The matters required to be contained in the register of charities kept by the

Commissioners are in future to contain the name of every registered charity and such other particulars or information relevant to it as the Commissioners think fit.¹ A charity with no permanent endowment or use or occupation of any land and less than £1000 income per annum does not have to register.

Every registered charity with a gross income in excess of £5000 in the previous year will in future have to ensure that its status as a registered charity appears in various specified documents.² The documents concerned are defined in section 3(2) and include what may be called solicitational documents and various commercial documents. The Commissioners have been armed with a power to require a registered charity to change its name.³ This will in the case of a company necessitate a resolution of the board of directors and subsequent action by the registrar of companies.⁴

Supervision and Control by Commissioners

The thrust of the provisions contained in sections 6 to 12 of the 1992 Act is the "beefing up" of the Commissioners' powers. This has been achieved in three conspicuous ways.

First, their power to institute inquiries has been widened; the powers may be exercised by means of an inquirer duly authorised for that purpose: s.6. Furthermore, more central publicity (see CA 1992, s.6(5)) is envisaged and the Commissioners are for that purpose to be armed with increased powers to obtain any relevant information and documents required for any inquiry.

Secondly, the criteria for acting for the protection of charities have been liberalised; and, so far as remedies are concerned, the Commissioners now have powers *inter alia* to appoint a receiver and manager much as the court could do: s.7 (amending section 20 of the Charities Act 1960). The powers are supplemented by section 9 (introducing a new section 20A of the Charities Act 1960).

Thirdly, the Commissioners are given enlarged powers over charitable companies in relation to their winding up, dissolution and restoration to the register: CA 1992, s.10(1)-(4).

The report of any relevant inquiry can be certified by the Commissioners and when so certified will be admissible in evidence as evidence of fact or, as may be the case, of opinion.

Powers Concerning Administration of Charities

Various procedural changes are made in those cases where the Commissioners have concurrent jurisdiction with the High Court for scheme-making and other

¹ CA 1992, s.2(4) inserting in CA 1960, s.4 a new (2A).

² CA 1992, s.3

³ CA 1992, s.4.

⁴ CA 1992, s.5.

interventionist purposes covered by section 18 of the 1960 Act: see CA 1992, s.13(1) amending CA 1960, s.18. The term "trust corporation" contained in earlier legislation is extended to cover corporations as trustees under the Act: CA 1992, s.14. And amendments are made in the operation of the *cy-près* doctrine so that gifts of unknown or disclaiming donors are subjected to *cy-près*: s.15. The Court and the Commissioners are now empowered to establish common deposit schemes: s.16 (inserting a new s.22A in the 1960 Act). And the Commissioners are now able to authorise *ex gratia* payments on the *Re Snowden* principle: s.17 (adding a s.23A to the 1960 Act). Finally, the Commissioners are given powers to deal with dormant bank accounts.

Charity Accounts

The Woodfield Report highlighted accounts as a key area of weakness and the Government accepted that the regular provision of good quality financial information by charities was an essential element in their public accountability and an important means for their supervision: *Charities: A Framework for the Future* (Com 694) 18.

The clutch of provisions contained in sections 19 to 27 of the new Act accordingly provides for the keeping of accounting records by charity trustees and the preparation by them and submission to the Commissioners of annual reports accompanied by statements of accounts which must comply with requirements to be prescribed by regulations.

The width of the statutory duty of charity trustees to keep accounting records is spelled out in section 19 which specifies the test to be satisfied as well as the required contents and length of time such records must be preserved. The duty to submit annual statements of account is dealt with in section 20 which provides also for regulations to be made as to the form and contents of such statements. A lesser form of return may be made when the charity's gross income in any year does not exceed £25,000: s.20(3). An annual audit of accounts is now made necessary where in any one of a specified number of financial years the charity's gross income or expenditure exceeds £100,000: s.21(1). Otherwise an independent examination may at the election of the charity trustees replace a full-blown audit. Provision is made for the matter of audit and examination to be the subject of regulations: s.22(1). And the Commissioners' are empowered to give appropriate directions in the case of any default: s.22(2).

Section 23 of the new Act obliges charity trustees to prepare annual reports in accordance with regulations to be made by the Secretary of State. The report will have to be transmitted to the Commissioners within 10 months of the end of the financial year to which it relates or within such longer period as the Commissioners may exceptionally allow. Attached to the report will be a statement of accounts for the year in question, or in the case of a company, the annual accounts.

Special provisions in relation to all the foregoing matters are made for exempt and excepted charities in section 24, while section 25 makes provision for public inspection of annual reports or other documents kept by the Commissioners under section 23(6). Every registered charity is bound to prepare and transmit to the Commissioners annual returns in a form prescribed by regulations: s.26. The Commissioners may dispense with the preparation of such returns by charities to which they grant dispensation.

Finally, any person who without reasonable excuse is persistently in default with

certain of the prescribed requirements will be guilty of an offence: s.27.

Charity Proceedings

A new section 26A is introduced into the Charities Act 1960 by section 28 of the new Act enabling the Commissioners to take proceedings with respect to charities and to compromise such proceedings in those cases when the Attorney General already has such power.

Charity Property

The Woodfield Committee made a number of proposals designed to place the responsibility for managing charities' affairs more squarely on the shoulders of trustees. These included responsibility for property at present held on their behalf by the Official Custodian for Charities and land transactions.

Sections 29 and 30 accordingly require the Official Custodian for Charities to divest himself of property held by him in trust for charities and for such property to be returned to the trustees of the charity in question or their nominees. This requirement does not apply to land or to property vested in him by virtue of an order made under section 20 of the Charities Act 1960. A separate provision contained in section 31 provides for the divestment of property held by the Official Custodian where such property is likely to be or becomes vested in him on a trust for sale arising under the Reverter of Sites Act 1987.

The next four sections are concerned with dispositions of land held in trust for a charity and with the charging of charity land. So far as dispositions of charity land are concerned, the current restrictions in section 29 of the Charities Act 1960 are replaced by a new régime laid down in sections 32 and 33 of the new Act. This abolishes the distinction between permanent endowment land and "functional land" on the one hand and other land on the other hand. In future all land held by or in trust for a charity is governed by the new régime. The primary rule is that no such land may be sold leased or otherwise disposed of without an order of the court or of the Commissioners: s.32(1). But if a statutory procedure set out more fully in subsections (3) or (5) is followed and the disposition is not made to a connected person (as defined in Schedule 2) or a trustee or nominee of such a person, consent is not needed. In other words the restrictions go or are dispensed with where the statutory procedure has been followed and the disposition is not to a connected person.

The régime contains various other provisions preventing abuse: those entering into land transactions with charities will be alerted by information which has to be included in any contract and certificates must be issued to the effect that consent has been given or that the trustees have the relevant power: see s.33. These and other refinements are dealt with elsewhere in this Review.⁵

So far as charging charity land is concerned, consent will be required under section 34 but not where previously the trustees have obtained and considered proper advice as defined in section 34. Various supplementary provisions relating to the mortgaging of charity land are contained in section 35.

⁵ See Jean Warburton's article at p.27 of this Review.

The Act overrides any provision in an Act of Parliament governing a charity or in a trust requiring consent: s.36.

Special provision is made for rentcharges and their release: s.37.

Powers of Investment

Two provisions which were not originally in the Bill appear in sections 38 and 39. The first of these in section 38 empowers the Secretary of State by order to relax the restrictions on wider range investments. Section 39 empowers the Secretary of State by regulations to extend trustees' powers of investment in any manner specified in the regulations, being a manner of investment not for the time being included in any Part of Schedule 1 to the Trustee Investments Act 1961. Various indications are given as to what may legitimately be included in any resulting regulations.

Charitable Companies

The next three sections, sections 40-42 apply where a charity is a company. Section 40 renders an alteration by the company of the objects clause in its memorandum of association or an alteration of provisions directing or restricting the manner in which property of the company may be used or applied ineffective without the prior written consent of the Commissioners. The next section, section 41 renders ineffective without such consent any approval or affirmation for the purposes of certain provisions of the Companies Act 1985 relating to directors. Finally, section 42 has the effect of requiring the name, etc., of the company to appear on its correspondence.

Small Charities

Sections 43 and 44 replace provisions in the Charities Act 1985 relating to small charities. Such charities are empowered to modify their objects, transfer all their property to another charity or spend capital, subject to satisfying certain conditions including obtaining the concurrence of the Commissioners. The Charities Act 1985 is wholly repealed: the new code on small charities is in the 1992 Act.

Disqualification From Acting as a Trustee

Section 45 provides for certain persons, including those convicted of an offence of dishonesty and undischarged bankrupts, to be disqualified from being a trustee of a charity; section 46 makes it an offence to act as such a trustee whilst disqualified. The Commissioners have power to waive the disqualification except in certain cases, and provision is made for it to be exercisable in the case of a trustee holding office at the commencement of the Act.

Miscellaneous and Supplemental

Various minor amendments to the 1960 Act or amendments consequential on Part I of the Act are set out in Schedule 3 which is introduced by section 47 of the Act.

Section 48 introduces Schedule 4 which amends the Charitable Trustees Incorporation Act 1872. The amendments are intended to simplify the provisions

under which charity trustees may apply to the Commissioners to become incorporated: paragraphs 1 to 3 of the Schedule. But they also provide the Commissioners with a power to amend the certificate of incorporation (paragraph 6) and to dissolve an incorporated body of trustees (paragraph 9).

The Redundant Churches and Other Religious Buildings Act 1969 is amended by Schedule 5 introduced by section 49. The amendments extend the power for the Commissioners or the court to authorise the transfer of redundant non-Anglican places of worship from charities for less than full consideration so that they may also be transferred to charities prescribed by the Secretary of State.

Any provision in the trusts of an almshouse charity which requires approval by the Commissioners of the amount or maximum amount to be paid by almshouse residents towards the cost of maintaining the almshouses or essential services in them is abrogated by section 50.

The Secretary of State is enabled by section 51 by regulations to require the payment of fees in respect of prescribed functions of the Commissioners and in respect of the inspection of the register of charities and the supply of extracts from it. In addition, the Commissioners will have power (under subsection (4)) to impose such charges as they consider reasonable for the supply of any publications produced by them.

There is also a new provision in section 52 for the disclosure of information between the Commissioners and other bodies, including government departments and local authorities.

Section 53 enables an order under section 30 of the Data Protection Act 1984 to be made exempting from the subject-access provisions of that Act (i.e., the provisions giving the subject of any data access to the data) any data held in respect of functions of the Commissioners falling within paragraphs (a) and (b) of the section.

The last two provisions are concerned with offences and enforcement. It becomes an offence knowingly or recklessly to provide the Commissioners with false or misleading information in purported compliance with a statutory requirement or for the purposes of the discharge of the Commissioners' functions: s.54. Subsection (2) of section 54 makes it an offence to destroy or suppress documents which are liable to be required for production to the Commissioners.

It is also provided that proceedings for offences under Part I of the Act and under certain provisions of the 1960 Act may only be taken by or with the consent of the Director of Public Prosecutions: s.55.

Section 56 provides for the enforcement of requirements imposed under Part I of the Act, the 1960 Act or the Charitable Trustees Incorporation Act 1872 by authorising the Commissioners to make an order requiring a person in default to make good the default.

Lastly, section 57 provides for the enforcement of directions of the Commissioners under Part I of the Act or the 1960 Act.

Control of Fund-raising for Charitable Institutions

Section 59 makes it unlawful for professional fund-raisers and commercial participators (as defined in section 58) to solicit money or property on behalf of a

charity, or to represent that a charity will benefit from the proceeds of a campaign or promotional venture, otherwise than in accordance with an agreement with that charity which satisfies requirements to be prescribed by regulations. These regulations will be made pursuant to section 64. Contravention of these provisions may be dealt with by an injunction granted by the court on the application of the charity.

Professional fund-raisers and commercial participators are required by section 60 to give details of the charitable institutions for which they are soliciting money or which they are purporting to benefit, details of their remuneration and the proportion in which the money or other proceeds of a campaign or promotional venture are to be distributed. Breach of this requirement is to be an offence: s.60(7).

In certain circumstances donors are empowered to cancel agreements to pay and claim refunds: s.61. Conditions which apply to such cancellations or refunds include a time limit of 14 days from the date when the donor is given a statement of the details required under section 60 or from the date of the broadcasting of the appeal where the payment is by means of a credit or debit card and is in response to a television or radio broadcast.

Section 62 empowers the court, on the application of a charitable institution, to grant an injunction to prevent unauthorised fund-raising on its behalf; the institution is required first to have served notice on the person whose actions are complained of requesting him to cease those activities.

Under section 63 there is created a new offence of soliciting money or other property for an institution which is not a registered charity where it is represented that the institution is such a charity.

Lastly, section 64 enables the Secretary of State to make regulations for the purposes of Part II, including provision for any breach of such regulations to be an offence.

Public Charitable Collections

New offences are created by section 66 in respect of persons who are promoters or collectors in the case of a public charitable collection (which expressions are defined in section 65) if the collection is not conducted in accordance with a permit under section 67 or an order under section 72.

Sections 66 to 70 make provision in connection with permits to be issued under section 67 by a local authority (as defined in section 65(4) and (5)). Section 66 provides for the making of applications for such permits and (in subsection (4)) for consultations by a local authority in connection with them. Section 68 concerns the issue of permits and the conditions that may be contained in them. Section 69 specifies the grounds on which a local authority may refuse to issue a permit. Section 70 sets out the circumstances in which a permit which has been issued may be withdrawn or the conditions therein varied. Section 71 provides a right of appeal to a magistrates' court (or from that court to the Crown Court) in respect of the refusal by a local authority to issue a permit or in respect of any condition contained in a permit or of a decision to vary a condition or withdraw a permit.

Section 72 enables the Commissioners, in the case of any charity which pursues charitable purposes (as defined by the 1960 Act) throughout the whole or a substantial part of England and Wales, to make an order authorising public charitable

collections by or on behalf of that charity in pursuit of such purposes to be conducted in such area or areas as may be specified in the order.

Section 73 enables regulations made by the Secretary of State to prescribe the information to be contained in applications under section 66, and to regulate the conduct of public charitable collections authorised under section 67 or section 72.

Various offences in connection with the conduct of public charitable collections are created by section 73.

General

Section 75 makes provision for the liability of directors, etc., of a body corporate where an offence under the Act or the 1960 Act has been committed by such a body.

Section 76 makes provision for the service of orders or directions under Part I of the Act, notices or documents under Part II and notices under Part III.

Section 77 concerns the procedure for orders and regulations to be made by the Secretary of State under the Act.

Section 78 introduces Schedule 6 which makes minor amendments to various Acts or amendments consequential on the Act's provisions. It also introduces Schedule 7 which repeals various enactments, including some that are already spent or no longer of any practical utility.

Lastly, the short title, commencement and extent are dealt with in section 79. The Act is coming into force on varying dates.