

Charitable Incorporated Organisations: The Full Reality

Timescale Confirmed

On 28 November 2012 (six years since Charitable Incorporated Organisations for England & Wales were enacted in the Charities Act 2006) Parliament finally approved the all-important secondary legislation for CIOs. See below for further details of what the regulations contain.

During the debate in Committee, the Minister for Civil Society confirmed that if the draft regulations were passed – which they were – he would lay the final Commencement Order in Parliament the following week (i.e. by 7 Dec at the latest and this will automatically take effect 28 days later). He stated that the Charity Commission will then be in a position to accept applications for registration of CIOs with effect from 10 December 2012 (though see below for the proposed phasing of different types of applications).

Applications to register a CIO, like all applications for charity registration, will have to be assessed carefully by the Charity Commission's registration team before a decision is made, and a CIO only comes into being once registration is agreed. So, this timescale will allow the Commission's registration team a few weeks to consider the initial applications, and assuming they are successful, we can thus expect the first CIOs to be formed in the week ending 4 January 2013 (i.e. as soon as the 28 day period has passed for the Commencement Order to take effect).

This *Kubernesis Bulletin* goes back to first principles to explain the rationale for CIOs, and summarises the impact of the new regulations and a number of practical issues.

Why CIOs?

It has long been a problem that charitable organisations cannot easily be established with corporate status and limited liability.

At present, anyone wishing to establish a new charity in England & Wales will normally use one of the following legal forms:

- A charitable trust (a body of trustees governed by a trust deed)
- A charitable association (a membership body governed by a constitution with charitable aims)
- A charitable company (established as a company limited by guarantee under the Companies Act 2006 and *also* registered as a charity under the Charities Act 2011).

All of these have obvious difficulties.

- Charitable trusts and associations have *no corporate status* – so, for example, if they employ staff, the staff are technically employed by the trustees as individuals and there can be complications when trustees change. Any legal action against the charity is taken against the trustees personally – with *no protection of limited liability*.
- Charitable companies have the benefit of corporate status and limited liability – but only by requiring all the administration to comply with *both company law and charity law*. So, for example, board members have to be both company directors and charity trustees, with changes notified both to Companies House *and* to the Charity Commission. Accounts have to comply with the requirements of company law *and* the Charities SORP. This means, for example, that the

provisions in the Charities Act 2011 allowing charities under £250,000 income to use the simpler receipts and payments basis are not available to charitable companies.

Charitable companies are fine for large charities, but the complexities create a huge additional burden for small and medium sized charities.

Charitable Incorporated Organisations (CIOs) are the perfect solution to these issues. A CIO is a corporate body with limited liability, registered and regulated solely by the Charity Commission.

The Legislation

CIOs were enacted in the Charities Act 2006 – though the 2006 Act was drafted in terms of numerous amendments to the Charities Act 1993 which made it very hard to follow. Since it was passed, all the main provisions of charity law for England and Wales have been consolidated in the Charities Act 2011. So the primary legislation for CIOs is now in Part 11 (sections 204-250) of the Charities Act 2011. The new Regulations are thus made under the 2011 Act.

CIOs received strong all-party support when debated in the Charities Bill which became the Charities Act 2006, and this cross-party support was evident again when the draft Regulations were debated in the relevant Committees of the House of Lords (on 27 Nov 2012) and House of Commons (on 28 Nov 2012).

The Urgency

The Government has long had an aim of “making it easier for people to set up and run a charity”. On that basis, we would argue that CIOs were *the single most important provision in the Charities Act 2006*.

CIOs were first promised under Tony Blair’s Government in the 2002 Cabinet Office Report *Private Action, Public Benefit*. After a four year delay they were enacted in the Charities Act 2006, but it has now taken a further six years for regulations to be presented to Parliament for their implementation.

The enormous delays in implementing CIOs have been very disappointing to the sector – new charitable initiatives have been delayed because CIOs were constantly expected shortly. So advisers have suggested waiting so a new charity could be formed as a CIO. Important changes to governing documents have been put on hold. Charities which have taken on public sector contracts have sometimes held on as trusts and associations with all the inherent liabilities because they wanted to re-establish as CIOs but could not do so until now.

The Charity Commission has had procedures and model constitutions in place to facilitate registration of CIOs since early 2011 – the delay has been mainly due to the time taken (under both the current and previous Governments) to finalise the Regulations.

There has been a profound desire across the charity sector – particularly amongst smaller service-providing charities – *to get CIOs implemented as soon as possible*. Now that CIOs can be at last be registered, the potential administrative saving to the charity sector is enormous (as compared to working with the structure of a charitable company).

Implementation of the Regulations

Although CIOs became law under the Charities Act 2006 – now re-enacted in the Charities Act 2011 – the provisions only take effect when commenced by the Minister for the Cabinet Office.

However, secondary legislation is needed to give effect to detailed provisions in the 2011 Act. Three sets of Regulations are needed:

- The Charitable Incorporated Organisations (General) Regulations 2012
- The Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012
- The Charitable Incorporated Organisations (Consequential Amendments) Order 2012.

The CIO General Regulations simply have to be laid by the Minister – they do not require a Parliamentary vote, and the same applies to the Commencement Order which brings these provisions of the Charities

Act 2011 into effect. But the Insolvency & Dissolution Regulations, and the Consequential Amendments Order required an affirmative vote in each House of Parliament – these votes took place in Committees on 27 and 28 November 2012.

The final regulations as approved will soon appear on www.legislation.gov.uk but in the meantime the drafts are available at www.cabinetoffice.gov.uk/resource-library/charitable-incorporated-organisation-cio-secondary-legislation-parliament.

Comments on the Regulations

We consider that all three sets of regulations are now clear, fit for purpose, and well drafted.

They take a proportionate approach to the key issues such as requirements for a CIO's Constitution, and the processes to be applied in the event that a CIO becomes insolvent. The insolvency regulations apply appropriate provisions of the Insolvency Act 1986 (with changes as necessary) – so banks and lenders will generally have the same protections when dealing with a CIO as if there were dealing with a charitable company.

The Consequential Amendments Order deals with a few necessary changes under other legislation so that CIOs are properly included.

All the Regulations now tabled are a vast improvement on the Draft CIO Regulations published for consultation by the Cabinet Office in 2008. (Similarly, the model Constitutions for CIOs issued by the Charity Commission in 2011 are a considerable improvement on the 2008 drafts.)

Governance

Like other charities, a CIO is governed by its trustees – or, to use the full title “the charity trustees of the CIO”. Although the CIO is a corporate body, its trustees are *not* directors, because a CIO is not a company. Some CIOs may wish to describe the CIO trustees as the “board” of the CIO – by analogy with other corporate entities – but this term is not defined in law.

Like charitable companies and charitable associations, a CIO can have a wider membership if desired – in which case the members of the CIO will come together at the AGM to elect the trustees. So a CIO is very suitable for a large membership body with charitable aims. However, technically *every* CIO has to have members, so where there is no wider membership the same people will be members and trustees.

The Charity Commission has published two different models of CIO Constitutions to allow for CIOs with and without a wider membership.

The Principal Office of a CIO

A CIO must have a “Principal Office” – i.e. an address where anyone can send official correspondence, and under the Charities Act 2011 it must be specifically *either* in England *or* in Wales (the CIO's Constitution must specify one country or the other, as slightly different provisions apply to Welsh CIOs – in particular their Constitutions can be in Welsh).

The Constitution does not have to give the *actual* address which – as with other organisations – can be changed from time to time if the charity moves offices or a different trustee becomes the point of contact (if the address is a trustee's home). There is nothing in the Regulations to say it must be a physical address, so we believe that for a charity involved in confidential work, a PO Box address will be acceptable.

Converting Existing Charities

Many existing charities will wish to convert to CIOs, but two different processes will be involved.

- For an *unincorporated charity* (e.g. a charitable trust or charitable association) to become a CIO, a new CIO charity must first be formed. The old charity then agrees to wind up and transfer all its assets to the CIO. It is simplest if the transfer of assets from the old charity takes place at the normal accounting year end, so the application to register the CIO needs to start well beforehand.

In general we suggest the process of drawing up the new CIO Constitution needs to start at least 4-5 months before the proposed transfer date, so the CIO can be registered at least 2-3 months ahead, leaving ample time for the practicalities of the transfer.

- For a *charitable company*, the Charities Act 2011 contains very clear provisions allowing a direct conversion without a wind-up – but regulations for this have *not* yet been finalised. The Minister said they will be laid in Parliament in 2013 to take effect from some time in 2014. However, because there is no wind-up when a charitable company converts to a CIO, the conversion can be done at any suitable time. It does not have to be linked to the charity's financial year and in general we suggest a conversion mid-year will be easiest.

Staged Registration Process

In order to help the Charity Commission cope with the volume of CIO registrations, a phased approach was announced by the Minister as follows (see below regarding existing charities seeking to convert).

<i>Start date</i>	<i>Types of CIO applications considered by Charity Commission</i>
From 10 December 2012	Applications to set up CIOs from "brand new" charities with anticipated annual income of over £5,000.
From 1 March 2013	Applications from existing unincorporated charities with annual income over £250,000 to set up a CIO and transfer assets into it.
From 1 May 2013	Applications from existing unincorporated charities with incomes over £100,000 to set up a CIO and transfer assets into it.
From 1 July 2013	Applications from existing unincorporated charities with incomes between £25,000 and £100,000 annual income to set up a CIO and transfer assets into it.
From 1 Oct 2013	Applications from existing unincorporated charities with incomes of between £5,000 and £25,000 annual income to set up a CIO and transfer assets into it.
From 1 Jan 2014	Applications from existing unincorporated charities with annual incomes of less than £5,000 to set up a CIO and transfer assets into it, and for brand new charities with anticipated annual incomes of less than £5,000 to set up a CIO.
During 2014	Window opens for company conversions into CIOs (subject to Parliamentary approval of separate conversion regulations to be made during 2013). This may also need to be phased by income bracket.

There is nothing in the Regulations to *prevent* applications earlier than the dates shown here, but unless there are special reasons the Charity Commission will presumably put applications on hold if they are submitted before the window indicated.

Rest of the UK

CIOs under the Charities Act 2011 will only be applicable to England & Wales.

However, a similar concept, the Scottish Charitable Incorporated Organisation (SCIO) was established under the Charities and Trustee Investment (Scotland) Act 2005, and implemented *from 1 April 2011*.

Since then, SCIOs have become increasingly popular for Scottish charities, and OSCR (Office of the Scottish Charity Regulator) recently reported that already a third of new charity registrations are now using the legal structure of the SCIO.

It is likely that CIOs in England & Wales will soon become equally popular. Because of the simplicity of the CIO concept, there will be many advantages for the Charity Commission in registering new charities as CIOs (although the existing forms will remain available where preferred).

A CIO form for Northern Ireland has been enacted under the Charities Act (Northern Ireland) 2008 and will be implemented once other provisions in that Act have come into effect – probably around 2015.

CIOs vs CICs

There is sometimes confusion between Charitable Incorporated Organisations (CIOs) and Community Interest Companies (CICs).

CIOs and CICs are completely different concepts – even though both are legal structures for third sector organisations which were first supported by Government in the 2002 report *Private Action Public Benefit*.

CICs provide a structure for non-charitable social enterprises. They were enacted under the Companies (Audit, Investigations and Community Enterprise) Act 2004, and registration of CICs began in 2005. CICs have proven popular and effective as a legal structure for social enterprises which are *not* charities. However, since a CIC *cannot* be a charity, CICs not affected in any way by the CIO Regulations.

Because CICs are a special type of company they are registered at Companies House and subject to most provisions of the Companies Act 2006. However, they are not charities so they do not benefit from any charity tax reliefs.

CIOs are *not* companies – they are registered solely with the Charity Commission (for CIOs in England & Wales) or with OSCR (for SCIOs). Because they are not companies, they are not subject to company law. However, as charities, CIOs are entitled to the same tax reliefs as other charities.

Once CIOs take effect, we predict that in a few years most new third sector organisations will be formed *either* as CIOs (if they meet the requirements of charitable purposes and public benefit) *or* as CICs (if they are simply trading for the community interest).

FURTHER HELP: *The Kubernesis Partnership LLP are specialists in the field of charity regulation and constitutions and Prof Gareth Morgan (senior partner) has taken a particular interest in CIOs. He has served on a number of working parties contributing to the regulations and has briefed professional advisers and politicians on the details.*

He is authoring a book: "Charitable Incorporated Organisations" which is now confirmed for publication by Directory of Social Change in spring 2013 (ISBN 978 1 906294 26 7) at just £16.95 plus postage – we will soon be in a position to take advance orders.

We have now presented Kubernesis seminars on CIOs and SCIOs for a wide range of participants, and Gareth Morgan has been invited to run external training events on CIOs at conferences and at seminars run by voluntary sector infrastructure bodies for their members. He is happy to receive further invitations to speak, and we will be pleased to run further Kubernesis seminars on CIOs if requested.

We are also advising a range of charities looking to convert to the CIO form, and new charities seeking to register as CIOs. In some cases, we already have constitutions fully prepared, with documentation signed and ready to submit. We have already been taken a Scottish charity through the process of conversion to a SCIO. We will be pleased to work with others looking to set up CIOs or SCIOs or convert existing charities – please get in touch if we can assist using the contact details below.



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- If you are not currently in KCAS it is possible to register online (see www.kubernesis.co.uk/advice-service) and then queries can be raised immediately subject to the terms of the scheme. For other enquires, please e-mail info@kubernesis.co.uk.

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