



# The Companies Act 2006

If you are a director of a charity established as a company registered with Companies House, you need to be aware of the Companies Act 2006 ('the Act').

## Background

The Companies Act has been brought into effect in several stages, the last of which was implemented on 1 October 2009. There are a number of changes which affect charitable companies.

In this summary, we have:

- Listed the [main changes for charitable companies](#) (annotated with references to relevant sections of the Act)
- Detailed [how these changes are reflected in the Charity Commission's model memorandum and articles of association \(GD1\)](#) which can be used to set up new charitable companies
- Suggested [what steps directors of charitable companies might take to comply with these requirements](#).

More detailed information about the Act can be found on the [Companies House](#) website.

## 1. Main changes for charitable companies with effective dates

### (a) 20 January 2007

**Electronic communications.** Formal correspondence between a company and its members can be conducted by email or other forms of e-communication defined by the Act, subject to certain conditions (ss.1143 - 1148 and schedules 4 and 5).

### (b) 1 October 2007

**Directors' duties.** The Act identifies new duties for directors, including the duty to act in the way s/he considers, in good faith, would be most likely to achieve the purposes of the company (s.172).

**Casting vote.** A Chairperson under articles adopted after 1 October 2007 cannot have a casting vote at a general meeting (but can at a meeting of the directors where permitted by the articles of association).

**Annual general meetings.** There is no requirement for a company to hold an AGM (although it continues to be good practice for the articles of charities to make provision for them).

**Extraordinary general meetings.** The category of "extraordinary" general meetings has been discontinued. Meetings of the company are now simply "general meetings". Although only 14 days' notice is required for a general meeting, the articles can make provision for longer notice and directors may wish to do so for certain types of general meeting such as AGMs or general meetings at which special resolutions are being considered.

**Short notice meetings.** Where members wish to call a company general meeting at short notice, the Companies Act 2006 requires this to be supported by members who represent not less than 90% of the total voting rights, or such higher percentage (not exceeding 95%) as may be specified in the articles) (s.307).

**Members' right to appoint proxies.** Members of charitable companies have the right to appoint proxies and notices of general meetings must refer to this right (ss.324 and 325).

**Written resolutions.** Members may agree in writing to resolutions - there is no longer a requirement for unanimity. Instead, a simple majority is needed for ordinary written resolutions and a 75% majority for special written resolutions (ss.282 and 283, 288 to 300).

### (c) 6 April 2008

**Accounting.** The requirements for preparation and scrutiny of the accounts of charitable companies (Part 16, Chapter 1) have been brought into line with those for non-company charities. Our guidance Charity Reporting and Accounting: The essentials April 2009 provides further information on these requirements.

**Company Secretary.** It is no longer necessary to have a company secretary (s.270).

### (d) 1 October 2008

#### Conflicts of interest and the Companies Act 2006

As from 1 October 2008 directors have been under a specific statutory duty to avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (s.175(1) of the Companies Act 2006).

The Commission considers that directors of charitable companies were already under a duty to avoid conflicts of interest prior to the implementation of this section. Conflicts of interest include those arising from:

- any personal financial interest in a transaction with the charity - for example, where a director receives payment from the charity for services or goods
- conflicts of duty which do not involve any material benefit to a director, for example, where a director is also a charity trustee of another charity which might be in competition with the charity ("conflicts of loyalty")

In the case of a charitable company the Companies Act duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company if this is permitted by the company's articles of association (s.175(3) of the Companies Act 2006 as modified for charitable companies by s.181).

Where a benefit or a transaction which may give rise to a conflict of interest is authorised by an order of the Charity Commission, the duty to avoid a conflict of interest does not apply (s.105(A) of the Charities Act 2011).

In addition, authorisation may be given by the unconflicted directors to a conflict of interests where the company's constitution includes provision enabling them to provide such authorisation (s.175(5) as modified by s.181). Such authorisation is not necessary where the conflict arises from a transaction or arrangement with the company which is authorised by the memorandum or articles of the company. The Charity Commission considers that it is reasonable for unconflicted directors to have a power to authorise conflicts arising from a duty of loyalty owed to a third party where there is no direct or indirect benefit to a director or a connected person. Proposals to include a wider power than this will be considered carefully. Where existing charitable companies wish to adopt such a power, they will require the consent of the Charity Commission under s.198 of the Charities Act 2011 unless there is no direct or indirect benefit of any kind to a director or a connected person.

The relevant definition of a "connected person" is that set out in s.188 of the Charities Act 2011.

See [questions and answers](#) relating to conflicts of interest.

- **Minimum age of directors.** The minimum age for directors will be 16 years - a director who has not attained this age when the provision is introduced will cease to be a director (s.157 and s.159).
- **At least one director to be a natural person.** It will be a requirement that a company must have at least one director who is a natural person (ie a human being as opposed, for example, to a corporate body) (s.155).

### (e) From October 2009

- **Single document.** Companies have a single main document - the articles of association - to set out their powers and to regulate their administration. Companies set up before this date with a memorandum and articles of association do not need to make any changes - all operative clauses in the memorandum, including the objects, are deemed to be part of the articles (s.28). Companies still need a memorandum of association, but it will be a very short document stating that the subscribers wish to form a company under the Companies Act 2006 and that they agree to become its members (s.8).
- **Changes to s.198 consent requirements - alteration of objects.** Our prior consent under s.198 of the Charities Act 2011 in respect of the alteration of a company's objects clause is only needed where the alteration will specifically add, remove or alter the statement of the objects themselves (or where the alteration will authorise a benefit to the directors or direct an application of property on dissolution). This consent requirement includes the amendment of any provision which cross-references with the statement of the objects, or of any defined terminology which forms part of the statement of the objects. Therefore the alteration of any provision within the objects clause other than the statement of objects itself (such as a 'power') will not require our consent. (Previously our consent was needed to alter any part of the objects clause, irrespective of whether or not the actual objects were being altered.)

NB: The renumbering of the objects clause or the reclassification of the objects clause where it is moved from a memorandum of association to a new articles of association document will not require our consent.

- **Effective date for alteration of objects.** Any change to the objects does not take effect until registered by Companies House (s.31(2)). It is the directors' responsibility to let the Charity Commission know the date on which Companies House registered their amended objects.
- **Indemnity payments: contradictory memorandum and articles provisions.** Some charitable companies have provisions in their pre-October 2009 memorandum of association documents which allow them to make indemnity payments to the directors, members or persons connected with them, but which are contradicted by their articles of association. Previously, the provisions of the memorandum took precedence over provisions in the articles. Since they are now treated as forming part of the articles under s.28(1) of the Companies Act 2006, we cannot assume that the provisions formerly in the memorandum take precedence over those which continue to be articles. We therefore recommend that where this situation arises charitable companies may wish to amend their articles by seeking our prior consent under s.198 of the Charities Act 2011 to amendments which make the position clear.
- **Interim managers.** The Charity Commission is required to give notice to the registrar of companies when it appoints an interim manager to a charitable company (s.1154).
- **Registration with Companies House.** A court order is no longer required in every case to restore a company to the Companies Register (ss.1024 to 1028).
- **Company names.** Any company which is a charity is automatically exempt from the requirement to have the word 'limited' in its name (s.60(1)(a)).

## 2. How do the Companies Act changes affect the Charity Commission's model memorandum and articles of association (GD1)?

We have amended [GD1](#) to reflect all the changes brought in up to and including October 2009. The specific changes are:

### Revisions to GD1 (model memorandum and articles for a charitable company)

With effect from 1 October 2009 GD1 is an articles-based document: The objects and all operative provisions are in the articles of association. The memorandum of association is now a document of purely historical significance; it merely provides evidence of the subscribers' wishes to form a company and their agreement to become its members (s.8). The memorandum of association needs to be authenticated by the subscribers stating their names and adding their signatures or an electronic authentication.

## Article 4 - Objects

This article opens with words to the effect that the objects are specifically restricted to those stated in the clause, to ensure that the company will only have charitable purposes. We have included this wording since s.31(1) of the Companies Act 2006 (effective from 1 October 2009) states that, unless a company's objects are specifically restricted by its articles, they are unlimited. We can only register a company as a charity, however, if its objects are specifically restricted to purposes which are wholly charitable. The charitable objects will need to be stated in the articles of association, in the same way as presently set out in a memorandum of association. Companies existing prior to 1 October 2009 with charitable objects are considered to have the necessary specific restriction and their objects are deemed to be part of the articles from 1 October 2009.

## Articles 6 and 7 - Application of income and property and benefits and payments to directors and connected persons

Articles 6 and 7 - These authorise certain benefits arising from a transaction or arrangement with the company, including the statutory powers with regard to payments to trustees for services and to take out trustee indemnity insurance (s.189 of the Charities Act 2011). These are all accommodated within the terms of s.175(3) of the Companies Act 2006 or are to be authorised by the Commission so that the duty in s.175(1) does not apply.

Article 7 additionally allows directors to be paid for supplying goods to the charity, other than in connection with a service, subject to the controls of article 7(3). (This therefore differs from the statutory power in s.185 of the Charities Act 2011, which relates to the provision of goods in connection with providing a service.) As far as is reasonable the controls attached to this goods-only provision mirror those of the statutory terms in s.185.

If existing charitable companies wish or need to adopt additional provisions and to amend their articles accordingly, the consent of the Commission is required where the alteration changes the statement of the objects or authorises or would permit the directors to authorise a benefit to the directors or a connected person (s.198 of the Charities Act 2011). We consider that inserting a clause permitting the unconflicted directors to authorise a conflict of interest on the part of the directors is likely to be a regulated alteration unless it makes clear it does not apply where there is a direct or indirect benefit of any kind to the director concerned or a connected person.

## Article 9 - Directors' authority to authorise conflicts of loyalty: clarification

We clarify that directors' power to authorise conflicts of loyalty arising from a duty of loyalty owed by a director to another organisation or person are restricted to situations where there is no direct or indirect benefit of any nature received by a director or a connected person. Such a procedure is permitted by s.175(4) and (5) of the Companies Act 2006 (as modified for charitable companies by s.181) where provision is made for it in the articles.

In other circumstances involving a situation leading to a conflict of interests on the part of a director, the Commission is able to authorise the director to act, notwithstanding the conflict, where it is satisfied that this would be expedient in the interests of the charity (s.105 of the Charities Act 2011).

For further information on conflicts of interest and the need to make changes to memorandum and articles of association please refer to [section 3c](#).

(Note that Article 8 of the model articles of association imposes a duty on the directors to declare an interest in any transaction of the charity and to absent themselves from any discussion where there may be a conflict between their personal interests and those of the charity. This would include, for example, discussions about the need for the provision of a particular service which one of the directors might have an interest in supplying (although in this example the terms of s.186 of the Charities Act 2011 would disqualify the director from participating in decisions related to their supply of services). Statutory duties to declare any interests came into force on 1 October 2008 (ss.177 and 182 of the Companies Act 2006).

### **Article 15 - Notice of general meetings**

We have adjusted the requirements for calling short notice meetings; we've also included a note that it is optional to hold an annual general meeting, and we have removed references to extraordinary general meetings.

### **Article 23 - Written resolutions**

We have modified the voting requirements for written resolutions.

### **Articles 24 - 26 - Votes of members**

We have removed the provision preventing members from voting if they owe money.

### **Articles 41 - 45 - Proceedings of directors**

We have added an optional provision for the person chairing a meeting of the directors to have a casting vote. While the person chairing cannot have a casting vote at general meetings, he or she may have a casting vote at directors' meetings if the articles provide for this.

We have updated the articles concerned with electronic communications (for example, articles 2, 52 and 53) and have linked these updates to the terms of s.1168 of the Companies Act 2006.

### 3. What must directors do to comply with these requirements?

#### (a) Changes applicable to all charitable companies

Some of the changes listed at section 1 above apply to all charitable companies, new and existing, and directors will need to be aware of how they affect their company. Changes which fall into this category include:

- directors' duties
- the requirements for directors to be at least 16 years old and for there to be at least one director who is a natural person
- members' rights to appoint proxies and the requirement for notices of general meetings to refer to this right
- minimum of 14 days' notice for general meetings (longer if specified in the company's articles), unless the short notice provisions are used
- written members' resolutions
- electronic communications
- the exemption for charitable companies from the requirement to include "limited" in their names

#### (b) Changes applicable to some charitable companies

In other cases, the changes do not automatically apply to all companies and directors may wish to review their memorandum and articles of association and consider what changes to make. Examples of provisions in this category include:

- Casting vote of the chairperson. Companies established since 1st October 2007 cannot include a provision giving the chairperson the casting vote at a general meeting. Where the articles of a company established before then provide for a chairperson's casting vote, the provision will remain effective unless and until it is removed.
- AGMs. Although the Act allows companies not to include (or remove) provisions for company secretaries and for AGMs, it is up to individual companies to decide whether to include or remove any such provision.
- Conflicts of interest. The duty to avoid conflicts of interest applies to all directors of charitable companies but it is possible for the articles (i) to authorise a conflict of interests arising from a transaction or arrangement with the company and (ii) to include provisions for the non-conflicted trustees to authorise departures from the duty. We consider it is appropriate for unconflicted directors to have the power to authorise a conflict of interests arising from a duty of loyalty owed to a third party where there is no direct or indirect benefit of any kind to a director or a connected person. We consider that articles 8 and 9 of GD1 meet the legislative requirements.
- New companies. All new applications for company registration must use the new style memorandum and articles of association.

Note: A company set up before 1 October 2009 with a separate memorandum of association does not need to adopt the current articles of association as the provisions in its memorandum will automatically be treated as forming part of its articles (s.28 of the Companies Act 2006). As a matter of good practice, however, companies may wish to review their articles to ensure that the provisions in what was the memorandum are integrated and consistent with the other articles.

### **(c) Further information on conflict of interests and the need to make changes**

Concern has been expressed about authorising conflicts arising from directors being trustees of other charities whose interests may conflict with those of the charitable company. Many sets of articles will contain a provision similar to that recommended in GD1 (article 9) requiring conflicted trustees to withdraw from trustees' discussions and take no part in decisions in which they have an interest. This is likely to be sufficient to avoid a conflict of loyalty arising in such situations.

Such a provision does not authorise any benefit to the trustee but it does permit a conflict arising from, for instance, another trusteeship to be avoided.

Circumstances may arise where the existing provisions of the memorandum and articles are not sufficient to permit a director to avoid a conflict of interests. In such cases it is possible for the Commission to authorise a director or directors to do something which would otherwise breach the duty to avoid a conflict by an order under s.105 of the Charities Act 2011 where the Commission is satisfied that would be expedient in the interests of the charity.

Accordingly, it is the view of the Commission that it may not be necessary for charitable companies to amend their memorandum and articles in order to comply with the new duties. However, we appreciate that some charities may wish to do so. We have included in GD1 a power for unconflicted directors to authorise a conflict of interests arising from a duty of loyalty owed to a third party provided there is no direct or indirect benefit of any kind to a director or a connected person.

The model articles published by the Charity Law Association include at 6.5(3) an article that a conflicted trustee may be authorised to "take any other action not otherwise authorised which does not involve the receipt ... of any payment or material benefit from the Charity". This would allow authority to be provided for the receipt of benefits from third parties. The adoption of a power in these terms by an existing charitable company would require our prior written consent.

### **(d) Note on amendment of a pre-1 October 2009 memorandum of association**

- Companies House has specific requirements about the form of documents which companies may file when they amend a pre-1 October 2009 memorandum of association. Our understanding of these requirements is as set out below.
- A company set up before 1 October 2009 may wish to review its articles to update them and to ensure that the provisions of its old style memorandum which are deemed to be part of the articles are fully integrated and consistent with the other articles. This is discretionary but is good practice.

- A resolution to amend provisions which pre-1 October 2009 were part of the memorandum of association should refer to the amendment of the articles of association. If the amended memorandum clauses are not integrated into the articles then they may be placed in a separate document, which should be attached to the pre-existing articles. If directors choose this method then they need to ensure that this document of memorandum amendments clearly states that those amended provisions are now treated as part of the articles.
- Companies House filing requirements where a resolution has been passed to amend provisions which prior to 1 October 2009 were contained in a memorandum of association: The directors may choose to attach such provisions which are now treated as articles as an appendix to the articles. If they do so, the required documents for filing are:
  - i. the resolution effecting the amendment;
  - ii. the appendix of amended provisions formerly in the memorandum of association and now deemed to be in the articles (which may, if the directors wish, identify those clauses amended by the resolution); and
  - iii. the pre-existing articles of association. document (ii) should be attached to the pre-existing articles of association.

We would recommend that directors refer to the [Companies House website](#) and seek guidance from someone qualified to advise on company law where they are unclear about what is required or what action to take.