What Is a CIO?

A "CIO" is a Charitable Incorporated Organisation. It is a new legal form of incorporated charity which was heralded in the Strategy Unit Report, "Private Action, Public Benefit" . The reasons for establishing this new form arise from the fact that Charitable companies which are usually limited by guarantee face the burden of dual regulation by both the Charity Commission and Companies House.

During the second reading of the Bill in the House of Lords, Baroness Barker said;

"Up until now in the charity world we have had unincorporated associations which are rather like battered old slippers: they are very comfortable but not quite what we want. We have had companies limited by guarantees, which are rather like clogs; they are very hard working and durable but they do not fit exactly with what we need them to do. Now we have CIOs, which some of us are led to believe will be the high performance all terrain shoe that we need to do business."

There are therefore high hopes for the successful introduction of this new form.

It was recommended that charities could adopt either a Foundation model or an Association model.

The administration powers are designed to be flexible to reflect the diversity of the charity sector.

The CIO constitution is meant to be in plain English and simple to use. CIO constitutions should also include an explicit statement of the Trustees duties under the Trustee Act 2000.

What are the rules which govern a CIO

The statutory framework for CIOs was introduced in Section 34 and Schedule 7 of the Charities Act 2006 and are now in the Charities Act 2011.

The Act adopts the use of CIO throughout its provisions.

A CIO shall

- Be a body corporate
- Have a constitution
- Have a principal office in England or Wales
- Have one or more members
- The members may be either NOT liable to contribute to the assets of the CIO if it is wound up, or liable to contribute up to a maximum amount each.

It can be seen therefore that it is not necessary to have any guarantee given by members and this feature distinguishes the CIO from companies limited by guarantee.

Statutory provisions also prescribe the minimum contents of the constitution:

A CIOs constitution shall state

- Its name
- Its purposes
- Whether the principal office is in England or Wales
- Whether or not its members are liable to contribute on a winding up and if so to what amount

Further the constitution shall also make provision for

- Who is eligible for membership and how a person becomes a member

- About the appointment of one or more persons who are to be the charity trustees and any conditions of eligibility for appointment

- Directions as to the application of property of the CIO on its dissolution

- The constitution shall also provide for such other matters as are contained in regulations made by the Minister

- The constitution must be in English if its principal office is in England but if it is a Welsh CIO the constitution may be in English or Welsh

- The constitution shall be in the form prescribed by regulations made by the Charity Commission or as near to that form as circumstances permit.

- Subject to anything in its own constitution a charity trustee may be a member of the CIO but need not be, members may be charity trustees but do not need to be, members and trustees may be identical but don't have to be

This last provision is consistent with the two different types of CIO. It is more likely that the Foundation model will have members who are all charity trustees and no wider membership. The Association model may have a wider membership with a board of charity trustees responsible for running the CIO.

Name and Status- It is a statutory requirement that a CIOs name shall appear in legible characters

- On all business letters of the CIO
- On all its notices and official publications
- On all bills of exchange, promissory notes, cheques, and orders for money or goods purporting to be signed on behalf of the CIO, and on all invoices, bills and letters of receipt
- All conveyances of land shall be executed in the name of the CIO

If the name of a CIO does not include an indication that it is a CIO- i.e. if the name does not bear any suffix such as CIO or Charitable incorporated organisation then on all the above documents there must be statement declaring that the charity is a CIO. Such a statement must be in English or Welsh as appropriate.

Failure to comply with these requirements concerning the CIOs name and status may result in a criminal conviction for the trustees. Similarly holding out an organisation as a CIO when it is not one is also a criminal offence. The statutory provisions also provide that if a person had reasonable grounds to believe that an organisation was a CIO but it turns out not to be then they may have a defence.

Additionally, there are three sets of regulations

- the Charitable Incorporated Organisations (General) Regulations 2012 (General Regulations)
- the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 (Dissolution Regulations)
- The Charity Tribunal (Amendment) Order 2012

The General Regulations

The Regulations now in force are extensive – there are 63 different regulations and four schedules. The provisions are detailed and include items such as the service of documents in hard copy or by electronic means.

The Regulations were made on the 5th December 2012 and came into force on the 2nd January 2013.

There are further clarifications of the trustees duties with respect to applying for registration and a general power for the Charity Commission to specify the documents required for registration and the form that those documents are in.

Generally, the regulations concentrate on an efficient and electronic process of application for registration which should be as standardised as possible.

Regulations 8-11 concern the transfer of records such as accounting records after the amalgamation of two CIOs into a third one.

Further detailed regulations about the constitution of a CIO are to be found in Part 3 of the regulations and matters such as the procedure for trustees to retire from office, the quorum of meetings and the procedures for calling meetings must all be included as "standard charity trustee provisions"

Similarly if a CIO has a membership there are "standard member provisions" which must also be in the constitution to govern matters such as holding general meetings, voting rights, classes of membership and the rights to demand a poll.

There is a general prohibition on including anything in the constitution which would restrict the ability of a CIO to dispose of its property. The concept of entrenchment is also expressed in the regulations. The members of a CIO may want to restrict the amendment of some provisions and provide e.g. that 75% of members must agree to change certain provisions. This can be done

however the regulations contain an overriding power that the Commission or the Court can require amendments by order.

Further regulations 19- 25 concern the execution of documents, entering contracts, execution of deeds and the use of a common seal. A CIO may have a seal but is not required to have one.

Mandatory regulations as to the keeping of a register of members are also contained in these regulations as are powers of the Court and Commission to order rectification of the register if necessary.

Which Charities Can Use the New Form?

New charities which meet the registration threshold of having an income over £5,000 can apply to establish as CIOs.

The original proposals were that charitable companies could also convert into a CIO but this is currently not possible. There is a statutory framework for conversion but the relevant regulations have not yet been made.

What are the benefits of becoming a CIO?

The chief benefit is that the CIO has its own legal personality- just like a company does. The risk and liabilities of the charity are taken on by the charity itself rather than the Trustees personally.

It is also possible to include an indemnity for the Trustees from the other members of the CIO if the debts and liabilities of the CIO exceed its assets. This will have to be in the constitution though from the outset.

The charity can hold its own property, enter into contracts with third parties and employ staff in its own right. Having a formalised constitution is also useful in maintaining the focus of an organisation.

Other benefits include:

Single registration with the Charity Commission and therefore only one return is required rather than two.

There are less onerous accounting requirements

There are less onerous reporting requirements e.g. only one annual report is required and there are no “Directors” reports either.

- There are no fees for establishing a CIO – there are for companies

- Simpler provisions for mergers and reconstructions
- Codified trustees duties which ought to aid clarity
- Constitutional flexibility.

Types of CIO

There are two distinct types of CIO. The Foundation model is used where the Trustees are the only members of the CIO. This form is most like a traditional trust.

The Association form of CIO can be used where a charity has Trustees but also wishes to attract a membership. This is a more democratic form and the members rights and duties can be stated in the CIO constitution. This form resembles a company.

Both forms of CIO are the subject of the detailed regulations mentioned above.

When can a charity apply for registration?

New charities can now apply to be in the form of a CIO. Existing unincorporated charities can also apply to establish a CIO. The usual requirements with regard to registration of any charity apply to CIOs. The current threshold for applying for registration is £5,000 income however charities with less income than this can still apply for voluntary registration. Recent proposals in Lord Hodgson's report on the review of the Charities Act have suggested that the threshold for registration should be raised to £10,000 but this has not yet been acted on.

Additionally, the Charity Commission have set out an implementation plan for applications to become a CIO. The time at which a charity can become a CIO is dependent on the income it enjoys with the largest charities being entitled to apply first. The plan began in December 2012 and at the time of writing all charities with an income of over £100,000 can now apply. Smaller charities may still have to wait.

Can existing charities convert to a CIO?

An existing unincorporated charity can convert into a CIO following the recommended procedure set out in Charity Commission guidance

Despite the fact that there is a framework in the Charities Act 2011 for charitable companies to convert to a CIO the regulatory provisions remain incomplete and further legislation in the form of regulations is required to allow this to take place.

Similarly Community Interest Companies are also unable to convert to a CIO at the moment.

Industrial and Provident Societies are also currently unable to convert to a CIO without further legislation in the form of regulations.

Charities which are currently exempt from registration are prohibited by the Charities Act 2011 from converting to a CIO. This is reinforced in Regulation 5 of the General Regulations referred to above.

Procedure for registering and conversion.

The procedure for both initial registration and conversion of an unincorporated charity is the same. The Trustees or prospective Trustees should apply to the Charity Commission for registration of a new CIO. If there is an existing charity the assets of the existing charity are then transferred to the new CIO and the original charity is then wound up or dissolved in accordance with governing constitution. The new CIO now has all the assets of the previous charity and the previous charity is then removed from the register.

The Charity Commission have provided model documents for a CIO in both the Foundation model and the Association model. The use of model documents is not compulsory but documents which are not in a standard form may create delays in registration.

Being a Trustee of a CIO

A CIO will have charity Trustees who must sign a declaration of willingness to act and who are not prohibited from being a charity trustee under the general law. These prohibitions are contained in section 178-180 of the Charities Act 2011. Trustees should be over 16. This last provision is unique to CIOs. It is repeated in regulation 31 of the General regulations. A failure to comply with the regulations on appointing trustees results in the appointment being deemed void. (Reg 31 (6))

Regulation 33 of the general regulations specifies how trustees may delegate their power and incorporates provisions from the Trustee Act 2000. Trustees may wish to delegate their power of investment to professionals and this regulation allows such delegation and provides for it.

Regulation 34 prohibits charity trustees from gaining private benefits by virtue of holding the office of trustee. The regulation is expressed as a duty on the trustee not to accept such benefits.

There are detailed regulations concerning the trustees duties to keep a record of meetings, decisions and minutes. The minutes are expressly stated to be evidence of the proceedings at meetings if they are authenticated by the Chair.

The Commission or the Court may order that a meeting shall be held and can specify the procedure for that meeting. This provision may help in cases where there is a dispute and factions may be claiming that a meeting is invalid and any decision made is invalid.

Trustees of a CIO ought to be aware that various company law offences also apply to a CIO. In particular regulation 60 incorporates offences related to fraudulent trading.

Membership records

The Trustees must keep a register of its members including each member's name, address and the type of membership they have. The date on which they became a member must be recorded or the date on which they ceased to be a member must be recorded. If there is only one member there must be a statement to that effect.

The general regulations state that a former member of a CIO may be removed from the Register after a period of 10 years.

Amalgamations and closing down

Two CIOs can merge by forming a third CIO and each transferring its assets to that third CIO. Decisions to merge or close may need to have the approval of 75% of the membership if the CIO is an Association model CIO. Winding up and closing down a CIO is governed by regulations.

The Charitable Incorporated Organisations – Dissolution.

As stated earlier there are detailed regulations concerning insolvency and dissolution of CIOs. Generally, the provisions from the Insolvency Act 1986 have been imported by the Regulations but there are also provisions for where there is a dissolution other than under that Act.

A CIO may apply to the Charity Commission to have the CIO removed from the register.

Application for Dissolution

Any application for dissolution should be made by the Trustees or a majority of them. Such an application should also contain a declaration made by the Trustees that any debts and liabilities of the CIO have been settled. Additionally there must be a statement as to the disposal of the property of the CIO.

If the CIO is in the Foundation model there should be a resolution made by 75% of the membership at a general meeting. The meeting itself can only be held after 14 days notice has been given. All members at such a meeting are entitled to vote.

The Charity Commission also has a role play in dissolution. The Commission must not dissolve a CIO until 3 months after publication by the Charity Commission of a notice warning of dissolution. Importantly the Commission must not dissolve a CIO if any person wishes to show cause why the CIO should not be dissolved.

Trustees cannot apply for dissolution of their CIO if the CIO has remaining debts and liabilities or there has NOT been a decision taken in accordance with the constitution. No application can therefore be made if the CIOs own procedures are incomplete.

There are other circumstances where a dissolution cannot be applied for. Broadly these relate to pre-existing procedures concerning insolvency.

No application to be made if:

- There is a voluntary arrangement in place in relation to the CIO under the Insolvency Act 1986
- If the CIO is in administration
- If the CIO is in interim moratorium under insolvency procedures or
- If there is a petition to the Court for winding up that has not yet been dealt with

Restrictions

If there has been an application for dissolution of a CIO then certain restrictions will apply. These are similar to company law in that the Trustees of the CIO, like directors in this situation, must not engage in any activity except those relating to the application to dissolve or to give effect to constitutional provisions. This latter provision is designed to allow the Trustees to decide the destination of any assets or property of the CIO to another charity or CIO. Trustees may act to comply with any statutory duties but must not otherwise incur any further debts or liabilities of the CIO.

If property is received after the application to dissolve has been made then two options apply. This situation may arise in the case of circumstances such as when a legacy is received. The Trustees may either withdraw their application to dissolve or send a statement to the Charity Commission setting out the way in which the new property has been or will be applied on dissolution.

Trustees duty on dissolution

If the Trustees of a CIO decide to dissolve and then make an application to that effect, they then have 7 days from the date of the dissolution to give notice of that fact to

- Members of the CIO
- Employees of the CIO
- Any charity trustee of the CIO who is not a party to the application.

This last scenario might happen where there are factions in the trustees board and some do not agree with the application to dissolve, or where due to lack of interest only a portion of the Trustees have been active in running the CIO. It is to be remembered that the decision to dissolve only needs to be made by a majority of the trustees.

Further detailed regulations apply regarding the service of the notice and where such notices should be served.

Withdrawal of an Application to dissolve a CIO

In some circumstances an application to dissolve MUST be withdrawn. These are

- If an administration order has been made
- If an administrator has been appointed
- If a receiver or manager has been appointed

If any of these events occur then the Trustees are under a duty to inform the Charity Commission and withdraw the application to dissolve. Consistent with the general scheme of the regulations various Companies Act offences are imported for failure to comply with the regulations.

Therefore if a CIO is subject to an insolvent dissolution the regulations here are very similar to company law. However, there may be circumstances where the CIO simply stops operating. How is a dissolution done in those circumstances? The Charity Commission has a role to play here too.

If the Charity Commission has reason to think that the CIO has stopped operating (perhaps if annual returns have not been made) they must send a letter to the CIO inquiring if this is the case. The CIO has a month to reply and if at the end of two months there still has been no reply then the Commission will send another letter in similar terms. This second letter must refer to the first and state that it is the second letter.

If there is still no reply then the Charity commission will publish its intent to dissolve the CIO. If it is shown that the CIO does still operate then this procedure will halt.

Loss of charitable status

If it is shown that a CIO is no longer a charity then it must dissolve after a three month lapse. This might happen where there is a change in the law which removes charitable status. This rarely happens but has happened in the case of e.g. gun clubs.

There are detailed regulations concerning winding up and the role of the Charity Commission where a liquidator is appointed and regulations concerning the service of letters and documents.

Regulation 19 states that a CIO is deemed to be dissolved on the date it is removed from the register. The liabilities of every charity trustee and member of a CIO continues after the date of dissolution as if the CIO had not been dissolved. The Court retains the power to wind up the CIO.

Where CIOs differ from companies and other corporate entities

It cam be seen that many of the principles and concepts which apply to CIOs have been directly imported from other areas of law but the application of a CIOs property after dissolution most resembles concepts only found in charity law.

Regulation 23 provides that on dissolution under Part 3, i.e. a solvent dissolution, the assets of the CIO vest in the Official Custodian for Charities. This is an officer of the Charity Commission and is exactly what it says- the custodian of charitable funds on behalf of the public. Many charities choose to vest some of their property in the Official Custodian in any event.

If there is a dissolution of a CIO and the property is vested in the Official Custodian, then the Charity Commission may then direct the purposes for which that property is held. This power is contained in Regulation 25 and is an expression of the Charity Commission's jurisdiction, which is concurrent with

that of the High Court, to direct schemes for the application of charity property either cy-pres or general administrative shchemes.

If property does become vested in the Official Custodian there are provisions concerning disclaiming property. The Official Custodian may generally disclaim any property but there are specific provisions for the disclaimer of leases in Regulation 29. This power may be used to terminate the liabilities of a dissolved CIO so that obligations such as paying rent or other contractual charges cease.

Summary

CIOs are statutory creations which currently only apply to existing unincorporated charities and new charities.

Professionals should remain aware that many of the statutory provisions on converting other bodies into a CIO are not yet applicable as further legislation is required.

There is no case law as such as the concept of a CIO is so new. However it will be interesting to see which cases will be followed in any one circumstance as the CIO legislation either wholly imports other areas of law or is expressed in a way consistent with other areas of law. It seems likely that parts of company law, insolvency law and existing charity law will be applied as and when necessary.