Charities: Impact of Companies Act 2014

Cormac Brennan *Partner, O'Connell Brennan*
Carol Hogan *Senior Associate, O'Connell Brennan*

Introduction

The commencement of the Charities Act 2009 ("the Charities Act") and the establishment under that Act of the Charities Regulatory Authority (CRA) on 16 October 2014 introduced regulation of charities with a view to achieving full transparency and accountability in the sector. Boards of many charities have spent the early part of 2015 dealing with the CRA's new registration process and information-sharing requirements. However, also on the agenda for boards of corporate charitable organisations should be a review of the impact of the new Companies Act 2014 ("the 2014 Act") on their organisations.

The 2014 Act is the most significant change in Irish corporate law in two generations, and given the large number of Irish charities that are companies limited by guarantee without a share capital, the boards of those charities will need to become conversant with the main issues arising. The 2014 Act is a state-of-the-art law applicable to companies from their formation, administration and management to their winding-up and dissolution, incorporating the rights and duties of their officers, members and creditors.

From the perspective of directors of charitable companies limited by guarantee, the actions that will need to be taken during the transition period after the commencement date of the 2014 Act should be manageable, and it is expected that existing charitable companies limited by guarantee will continue their existence within that statutory form. However, there are a number of changes and issues that directors of Irish corporate charities will need to be aware of, which are summarised below. The 2014 Act is confined to company law and does not address the taxation or residence of companies or their directors, or the administration and regulation of charities. The date of commencement of the 2014 Act is 1 June 2015, which will be followed by an 18-month transition period to allow directors to ensure compliance with the new legislation.

Corporate Form

Companies limited by guarantee without a share capital (CLGs) are likely to continue to be the legal form of choice for charities. The corporate name of a CLG must end in "Company Limited by Guarantee" or "CLG", and this name change must be completed before the end of the transition period. However, many charities will have liberty to dispense with having "Limited" in their name, and this dispensation may be carried forward.

Governing Document

All CLGs will now be governed by a "constitution", which to all intents and purposes will resemble a memorandum and articles of association, save that it will be a single document and the word "constitution" will appear before the start of the memorandum of association. The memorandum of association of a CLG will contain much of the same information as that of an existing CLG. In particular, it must contain an objects clause. Although the 2014 Act sets out a series of statutory default provisions for the constitutions of all companies, many CLGs are likely to disapply the standard provisions and write their bespoke articles in long form, as is the current practice for many charities.

Members, Directors and Officers

Under the 2014 Act, CLGs can now have a single member (in contrast to the previous requirement to have seven), although we understand that the Revenue Commissioners have commented that charitable tax exemption would be granted to charitable companies having a single member provided that there are at least three independent directors. There are no changes to the obligations of multi-member CLGs to hold an annual general meeting.

CLGs must, under the 2014 Act, have at least two directors. However, it is expected that the Revenue Commissioners will continue to apply their condition that, for charitable tax exemption to be granted, a charity must have at least three independent directors. Directors will retire by rotation unless the constitutional documentation provides otherwise.

Similarly to the other types of company under the 2014 Act, CLGs will have a duty to ensure that the person who is appointed as company secretary "has the skills or resources necessary to discharge his or her statutory or other duties".

Directors' Duties

One of the most significant changes introduced by the 2014 Act is the codification for the first time of directors' common law and equitable duties into a statement of eight principal fiduciary duties. These duties are stated in the 2014 Act as being owed by the director "to the company (and the company alone)" and applying to legally appointed directors who are registered in the Companies Registration Office (CRO) as such but also to shadow directors[1] and *de facto* directors.[2] Directors of corporate charitable organisations should be aware of these now-statutory duties and should also take the opportunity to remind themselves of their duties as charitable trustees. The statutory duties of directors as set out in the 2014 Act are that a director should:

› act in good faith and in the interests of the company;

› act honestly and responsibly in relation to the conduct of the affairs of the company;

› act in accordance with the constitution and exercise his or her powers only for the purposes allowed by law;

› not use the company's property, information or opportunities for his or her own or anyone else's benefit unless this is expressly permitted by the company's constitution or the use has been approved by resolution of the company in general meeting;

› not agree to restrict the director's power to exercise an independent judgement unless this is expressly

1 Defined in s221(1) of the 2014 Act as "a person in accordance with whose directions or instructions the directors of a company are accustomed to act".
2 Defined in s222(3) of the 2014 Act to include the person occupying the position of director.

permitted by the company's constitution or the director's agreeing to such has been agreed by a resolution of the company in general meeting or the particular case falls within limited circumstances set out in the legislation;

› avoid any conflict between the director's duty to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;

› exercise the skill, care and diligence that would be exercised in the same circumstances by a reasonable person having both the knowledge and the experience that may reasonably be expected of a person in the same position as the director and the knowledge and the experience that the director has; and

› have regard to the interests of the company's members and employees.

Accounting, Audit and Reporting Obligations

All charitable organisations are required to keep proper books of account, and there are detailed provisions in the Charities Act setting out the obligations of such charitable organisations to prepare statements of accounts and to have their accounts audited. However, those provisions do not apply to corporate charitable organisations.

The obligations of corporate charitable organisations in relation to the keeping of accounting records, the preparation of financial statements and the audit of financial statements, as well as filing of annual returns, will be governed by the 2014 Act, and the Registrar of Companies will provide a copy of the annual returns of incorporated charities to the CRA, together with all documents annexed to the annual return. The intention here is to avoid dual reporting for corporate charities. However, all charitable organisations established as companies will have the same obligation as non-corporate charitable organisations to prepare and submit to the CRA an annual report in respect of their activities in that financial year no later than 10 months, or such longer period as the CRA may specify, after the end of each financial year. The content of the annual reports will be determined by Regulations to be issued by the CRA in due course although there are likely to be distinctions made in terms of the obligations of different classes of charitable organisations, which may depend on the level of annual turnover. The content of the annual report will be made available to the public, and all charities will be required to provide the CRA with any other information that it may reasonably require to enable it to perform its functions.

Subject to the Regulations, charitable organisations should also be aware that, in relation to accounting periods ending on or after 1 January 2015, they will generally be required to apply the new FRS 102, the Financial Reporting Standard applicable in the UK and Ireland, and also the Charities Statement of Recognised Practice (SORP), which has been updated to reflect the provisions of FRS 102.

The 2014 Act provides that CLGs can now avail of audit exemption. However, this will not change the condition imposed by the Revenue Commissioners, in the context of granting charitable tax exemption, that the accounts of charitable organisations must be audited where the annual income exceeds €100,000. This is a lacuna in the legislation governing charitable companies, given that the new audit requirements of charities under the Charities Act do not apply to companies.

Finally, it would appear that foreign charities constituted as companies and granted charitable tax exemption (DCHY numbers) whose presence constitutes a "place of business" in Ireland but not a branch will no longer be required to file accounts with the CRA and indications are that the CRO will no longer require registration of a "place of business" in such cases.

Conclusion

The increased administrative burden for organisations in the charity sector of dealing with the introduction of the CRA, with its registration and reporting obligations, and simultaneously a modernised company law, with updated compliance obligations, might seem particularly onerous. However, the driver for these legislative changes—increasing public trust and confidence in the charitable sector—makes it a necessary burden, and the changes will be supported by most charitable organisations.