

EXPLANATORY MEMORANDUM TO
THE CHARITIES ACT 2006 (CHANGES IN EXEMPT CHARITIES)
ORDER 2011

2011 No. 1725

1. This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

This instrument makes provision for certain classes of educational charity to be made exempt charities, and makes amendments to existing legislation in connection with that change.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Context**

4.1 Exempt charities are those institutions which, in so far as they are charities, are comprised in Schedule 2 to the Charities Act 1993 (“the 1993 Act”) or are made exempt by other legislation. These institutions do not register with the Charity Commission for England and Wales (“the Commission”) and are not directly subject to its regulatory jurisdiction (though they are required to comply with the general requirements of charity law).

4.2 The Charities Act 2006 (“the 2006 Act”) makes changes to the way in which exempt charities are regulated as charities. Section 11 enables the Minister for the Cabinet Office (“the Minister”) to, by order, make amendments to Schedule 2 to the 1993 Act so that charities, or descriptions of charities, become or cease to be exempt charities (section 11(11) of the 2006 Act).

4.3 The Minister may only make such an order if he is satisfied that it is desirable in the interests of ensuring appropriate or effective regulation of the charity or charities concerned in connection with their charity trustees’ compliance with their charity law obligations (section 11(12) of the 2006 Act).

4.4 An order made under section 11 of the 2006 Act may also make amendments or other appropriate modifications to any enactment (section 11(13) of the 2006 Act). In addition, section 74(2) of the 2006 Act allows the Minister to make consequential amendments.

4.5 The Charities Act 2006 (Commencement No.5, Transitional and Transitory Provisions and Savings) Order 2008 (S.I. 2008/3267) (“CO5”) commenced provisions of section 9 of the 2006 Act which replaced section 3 of the 1993 Act with new sections 3, 3A and 3B (relating to the register of charities, the registration of charities, and duties of trustees in connection with registration). These provisions came into force on 31 January 2009. From that date, foundation, voluntary and foundation special schools¹ ceased to be exempt. Pending a final decision as to their status, CO5 made provision to ensure that none of these charities would have to register with the Commission before 1st October 2009 and that they would continue until then to be treated, for the purposes of the 1993 Act, as if they continued to be exempt charities. This meant, for example, that they did not have to prepare charity accounts in respect of financial years beginning before 1st October 2009, and were not subject to the general regulatory jurisdiction of the Commission before that date.

4.6 These transitional provisions have since been extended twice pending finalisation of arrangements for the appointment of principal regulators for this group of charities:

4.6.1 The Charities Act 2006 (Commencement No.6 and Commencement No.5, Transitional and Transitory Provisions and Savings (Amendment)) Order 2009 (S.I. 2009/2648) extended the provisions to 1st October 2010;

4.6.2 The Charities Act 2006 (Commencement No.5, Transitional and Transitory Provisions and Savings) (Amendment) Order 2010 (S.I. 2010/1942) extended the provisions to 1st September 2011.

4.7 This instrument re-confers exempt status on foundation, voluntary and foundation special schools relieving them of the registration requirement and of the accounting and reporting requirements that flow from registration.

4.8 Sixth form college corporations² were created by the Apprenticeships, Skills, Children and Learning Act 2009 (“the ASCL Act”), which amended the Further and Higher Education Act 1992. Prior to that, institutions providing sixth form education, though referred to colloquially as sixth form colleges, were not legally distinct as a category. It was always intended that sixth form college corporations would be exempt charities as this was the status of the institutions that were already providing sixth form education. It was agreed between the Cabinet Office and the Department for Education that exempt status should be conferred by the Order, rather than through the ASCL Act

¹ References in this Explanatory Memorandum to foundation, voluntary and foundation special schools are to governing bodies of foundation, voluntary and foundation special schools, foundation bodies established under section 21 of the School Standards and Framework Act 1998, and connected institutions.

² That is, sixth form college corporations within the meaning of the Further and Higher Education Act 1992.

itself, but the making of the Order has been delayed pending a decision as to who to appoint as principal regulator (the decision had to be delayed pending the review of public bodies). The effect is that the 94 sixth form college corporations in England (there are none in Wales) are currently required to register with the Commission and meet the accounting and reporting requirements that flow from registration, although these requirements have not been enforced to date.

4.9 This Order confers exempt status on sixth form college corporations, as was intended from the outset, relieving them of the requirement to register and of the accounting and reporting requirements that flow from registration.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales. It should be noted that there are no sixth form college corporations in Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Secretary, Cabinet Office, Nick Hurd has made the following statement regarding human rights in respect of the Order:

In my view the provisions of the Order are compatible with the Convention rights.

7. Policy background

7.1 Exempt charities are those institutions which do not register with the Commission and, although required to comply with charity law, have been exempt from its regulatory jurisdiction (although they may ask the Commission for advice or for authorisation of actions that are outside the charity's powers). The institutions listed in Schedule 2 to the 1993 Act are, in so far as they are charities, exempt charities.

7.2 The 2006 Act contains provisions intended to improve the regulation of exempt charities as charities. The key provisions are to be found in sections 11 to 14 of and Schedule 5 to the 2006 Act.

7.3 As a result of the 2006 Act the regulation of charities that were formerly exempt is being improved:

- For a group of exempt charities that is already subject to regulatory oversight by a person or body, where possible that person or body is also appointed as “principal regulator” to promote charity law compliance. These charities remain exempt and so are not registered with the Commission. This approach minimises the regulatory burden for these groups of exempt charities by relying on existing regulatory or oversight relationships.

- Where it is not possible to identify a suitable person or body to become “principal regulator”, the charities lose their exempt status and become “excepted charities”. This means that they come under the Commission's full regulatory jurisdiction and are required, if their income exceeds a financial threshold specified in the 2006 Act (currently £100,000), to register with the Commission and to comply with the other regulatory requirements flowing from registration (including the preparation and external scrutiny of charity accounts, the submission of accounts, a trustees’ annual report, and an annual return).

7.4 The 2006 Act changes are being implemented in several tranches. The first tranche of changes (relating to universities, students unions, national museums and galleries and Royal Botanic Gardens, Kew, the Church Commissioners, and certain colleges) came into effect on 1 June 2010. This instrument relates to the second tranche of changes, affecting (a) foundation, voluntary and foundation special schools, and (b) sixth form college corporations.

7.5 The proposal to re-confer exempt charity status on foundation, voluntary and foundation special schools, and sixth form college corporations, and to appoint suitable principal regulators was announced in a Written Ministerial Statement on 30th March 2011. The statement is available here:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110330/wmstext/110330m0001.htm#11033059000018>

7.6 Principal regulators are appointed by the Minister by regulations made under section 13 of the 2006 Act. The Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2011 will, subject to Parliamentary approval, prescribe the principal regulators of the governing bodies of foundation, voluntary and foundation special schools, and sixth form college corporations (and academies³). Principal regulators are under a duty to promote charity law compliance by the charities they oversee.

7.7 Re-conferring exempt charity status and appointing a suitable principal regulator will achieve appropriate and effective regulation of these charities as charities, whilst minimising the burden of regulation.

7.8 Article 2 makes additions to the list of exempt charities in Schedule 2 of the 1993 Act, and article 3 gives effect to the Schedule which makes consequential amendments to primary legislation (Part 1) and secondary legislation (Part 2). The Schedule includes provision to bring to an end the transitional arrangements put in place by CO5 (paragraph 6).

8. Consultation outcome

8.1 The Cabinet Office consulted on the proposal to re-confer exempt charity status on foundation, voluntary and foundation special schools in 2010.

³ That is, qualifying academy proprietors under section 12 of the Academies Act 2010

Responses strongly supported the proposal to re-confer exempt charity status, although respondents differed over which person or body should be appointed as principal regulator.

8.2 Consultation has not taken place in relation to re-conferring exempt charity status on sixth form college corporations. It is believed that sixth form college corporations have been unaware of the loss of their exempt status and this instrument simply seeks to restore the position.

9. Guidance

9.1 The Department for Education has communicated these forthcoming changes to the groups of affected charities or their representative bodies, and publishes details on its website.

10. Impact

10.1 The impact of these Regulations is limited to foundation, voluntary and foundation special schools, and sixth form college corporations. These provisions will restore the position for these charities to that prior to the Charities Act 2006 and the Apprenticeships, Skills, Children and Learning Act 2009 and will avoid the requirement for those charities to register and report to the Commission.

10.2 The 2006 Act was the subject of a full regulatory impact assessment (including a specific chapter on the proposals relating to exempt charities). The impact assessment on exempt charities can be read by following the link below:

http://webarchive.nationalarchives.gov.uk/20100407162256/http://www.cabinetoffice.gov.uk/third_sector/law_and_regulation/charities_act_2006/background.aspx

10.3 Impact Assessments have also been prepared, and are annexed to this Memorandum, for the impact of these changes (and the appointment of principal regulators under a separate instrument) on:

10.3.1 foundation, voluntary and foundation special schools, and

10.3.2 sixth form college corporations.

11. Regulating small business

11.1 This instrument does not apply to small business.

12. Monitoring & review

12.1 Section 73 of the 2006 Act requires the Minister to appoint a person to review the operation of the 2006 Act within five years of enactment, and for the report of the review to be laid before Parliament. The review, which will commence later this year, will include evaluating the impact of changes made to the regulation of exempt and excepted charities.

12.2 However, as the 2006 Act review is expected to follow shortly after the changes are introduced by these Regulations, it is unlikely that a meaningful assessment of the changes could be made in that review. There is a policy commitment to review the impact of these changes three years after they have taken effect.

13. Contact

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