Law Commission
Reforming the law

Technical Issues in Charity Law

Supplementary Consultation

(1) Changing a charity's purpose
(2) Trust corporation status

1 September 2016

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Bean, *Chairman,* Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phil Golding.

Topic of this consultation: Changing a charity's purposes and trust corporation status.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: This supplementary consultation paper is available on our website at http://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/.

Duration of the consultation: We invite responses from 1 September to 31 October 2016.

Comments may be sent:

By email: propertyandtrust@lawcommission.gsi.gov.uk

By post: Daniel Robinson, Law Commission, Post Point 1.53, 1st Floor Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

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If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

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THE LAW COMMISSION

TECHNICAL ISSUES IN CHARITY LAW: SUPPLEMENTARY CONSULTATION

CONTENTS

CHAPTER 1
INTRODUCTION

1.1 We seek views from consultees on the questions raised in this supplementary consultation paper by 31 October 2016. Replies should be sent to the address on page ii.

Technical Issues in Charity Law

1.2 Our consultation on Technical Issues in Charity Law ran from March to July 2015. The Consultation Paper is available on our website.[1] We are grateful to the many individuals and organisations who submitted written responses, many of which were very detailed, and to those who attended various consultation events.

1.3 Since the close of our consultation, we have analysed responses, developed policy in respect of most issues in the project, and started preparing a draft Bill.

1.4 Two issues arose from our consultation on which we did not expressly invite consultees' views, but on which we would like to hear from consultees before deciding on our final recommendations. The first relates to cy-près, the second to trust corporation status.

1.5 In the interests of brevity, we do not repeat the content of the Consultation Paper; please refer to that paper for the background to the issues discussed in this supplementary consultation.

[1] http://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/.

CHAPTER 2
CHANGING A CHARITY'S PURPOSES

INTRODUCTION

2.1 Part 2 of the Consultation Paper examined the ways in which charities can change their purposes and amend their governing documents. The majority of consultees suggested that the powers of amendment should be aligned as between (a) charitable companies and CIOs[1] ("corporate charities") and (b) unincorporated charities. In this supplementary consultation, we ask how closely the powers should be aligned in the case of a change of purposes, as well as the consequences for the law of cy-près.

THE CURRENT LAW: CHANGING PURPOSES AND AMENDING GOVERNING DOCUMENTS

2.2 We explained charities' powers to effect constitutional change in the Consultation Paper.[2] What follows is a summary.

Unincorporated charities

2.3 The trust deeds of charitable trusts, and the constitutions of unincorporated associations, can be amended in one of four ways.

(1) Express power: Trust deeds and the constitutions of unincorporated associations often include express powers of amendment.[3]

(2) Statutory power for small unincorporated charities: The purposes of certain small unincorporated charities can be changed by a resolution of the charity trustees under section 275 of the Charities Act 2011. The power applies to charities that both (a) have an annual income of up to £10,000 and (b) do not hold "designated land".[4] To exercise the power, the charity trustees must be satisfied (1) that it is expedient in the interests of the charity for the purposes in question to be replaced, and (2) that, so far as is reasonably practicable, the new purposes consist of or include purposes that are similar in character to those that are to be replaced. The resolution must be submitted to the Charity Commission and takes effect 60 days later, unless the Charity Commission objects to the resolution.

[1] Charitable incorporated organisations; see Consultation Paper, para 1.15.

[2] Consultation Paper, paras 3.2 to 3.40.

[3] See, for example, cl 31 of the Charity Commission's model trust deed, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269509/gd2text.pdf, and cl 7 of the Charity Commission's model constitution for a charitable unincorporated association, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278200/gd3text.pdf. Historic schemes often include express amendment powers.

[4] Namely land held on trusts stipulating that it must be used for the purposes of the charity, such as a village hall.

(3) Statutory power for administrative provisions: Under section 280 of the Charities Act 2011, the charity trustees of an unincorporated charity (regardless of its size or of whether it holds designated land) may pass a resolution to modify any provision in its governing document "(a) relating to any of the powers exercisable by the charity trustees in the administration of the charity, or (b) regulating the procedure to be followed in any respect in connection with its administration". Consultation revealed uncertainty about the types of amendment that can be made under section 280.

(4) Cy-près or administrative scheme: If an unincorporated charity wishes to amend its governing document but the powers outlined above are not available, then it can apply to the Charity Commission for a scheme to make the amendment sought. Schemes are legal arrangements that change or supplement the provisions that would otherwise apply in respect of a charity or a gift to charity. There are two categories of scheme:

(a) "Cy-près schemes" alter the purposes of a charity. "Cy-près" means "as near as possible". A cy-près scheme allows funds to be applied for charitable purposes which are similar to the original purposes.

(b) "Administrative schemes" alter any other provisions of a charity's governing document.

How does the Charity Commission decide whether to make a cy-près scheme?

2.4 Cy-près schemes are closely regulated; there are limitations on (1) the circumstances in which a cy-près scheme can be made, and (2) the changes that can be made by a cy-près scheme. Both are explained below.

(1) CY-PRÈS SCHEMES: THE GATEWAYS

2.5 The circumstances in which the Charity Commission can make a cy-près scheme (known as the "cy-près occasions") are set out in section 62 of the Charities Act 2011: see Figure 1. We refer to them as "the section 62 cy-près occasions".

Figure 1: the section 62 cy-près occasions – gateways to a cy-près scheme

Property may be applied cy-près in any of the following situations:

(1) where the original purposes, in whole or in part, have been fulfilled;

(2) where the original purposes, in whole or in part, cannot be carried out (or not according to the directions given and to the spirit of the gift);

(3) where the original purposes provide a use for only part of the property;

(4) where (i) the property, and (ii) other property applicable for similar purposes, can be more effectively used together and, regard being had to the "appropriate considerations", can suitably be used for common purposes. The "appropriate considerations" are:

(a) (on the one hand) the spirit of the gift concerned, and

(b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes;

(5) where the original purposes were laid down by reference to an area that has ceased to be readily identifiable;

(6) where the original purposes were laid down by reference to a class of persons or an area which has ceased to be suitable, regard being had to the appropriate considerations (see above), or to be practical in administering the gift;

(7) where the original purposes, in whole or in part, have been adequately provided for by other means;

(8) where the original purposes, in whole or in part, have ceased to be charitable; and

(9) where the original purposes, in whole or in part, have ceased in any other way to provide a suitable and effective method of using the property, regard being had to the appropriate considerations (see above).

2.6 In the absence of a section 62 cy-près occasion, the Charity Commission cannot make a cy-près scheme to change a charity's purposes.

2.7 Some consultees thought the cy-près occasions were too restrictive or that they should be reviewed. Bircham Dyson Bell said the cy-près occasions require trustees "to wait until the situation has become almost unrescuable" so they "do not encourage trustees to think ahead and plan to make their charity more effective before such a situation arises".[5]

(2) CY-PRÈS SCHEMES: PERMITTED CHANGES

2.8 If a section 62 cy-près occasion has arisen, the court or Charity Commission can make a cy-près scheme. Section 67 of the Charities Act 2011 requires the Commission to have regard to certain matters when making a scheme, which we refer to as "the section 67 similarity considerations": see Figure 2.

Figure 2: the section 67 similarity considerations

The court or Commission can make a cy-près scheme applying property for such charitable purposes as it considers appropriate, having regard to:

(a) the spirit of the original gift;

(b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes; and

(c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

[5] Bircham Dyson Bell gave the example of a school for the education of boys wishing to change its purposes to include the education of girls. To fall within the cy-près occasions, the trustees arguably have to wait until they can no longer run the school for boys, by which point the school will have been put in jeopardy. In practice, trustees have to rely on the Charity Commission to support a "creative interpretation" of s 62.

2.9 The Charity Commission summarises its policy on exercising its discretion under section 67 as follows:

> We should be flexible and imaginative in applying the cy-près doctrine, balancing usefulness and practicality with respect for the existing purposes and beneficiaries. The purpose of making a cy-près scheme is to enable a charity to continue being effective, useful and relevant to its beneficiaries' needs in modern society, where without our intervention it would not be. We should, however, exercise caution where a proposed change might be a significant departure from the founder's intentions or might exclude existing beneficiaries (unless, for example, the problem is that the existing beneficial class has ceased to exist). We should always take account of the trustees' views when deciding how to amend a charity's objects.[6]

Corporate charities

2.10 The articles of association of a company and the constitution of a CIO can generally be amended by a resolution of its members at a general meeting.[7] Companies' articles and CIOs' constitutions may, however, provide for more restrictive conditions to be satisfied before they can be amended (for example, obtaining the consent of a particular person or the Charity Commission), known as "entrenchment", but such provision cannot prevent amendment with the unanimous agreement of the charity's members.[8]

2.11 If the amendment that a charitable company or CIO wishes to make is a "regulated alteration", then it must obtain the Charity Commission's prior consent to the change.[9] A change of purposes is one such regulated alteration.

How does the Charity Commission decide whether to consent to a change of purposes?

2.12 The Commission will exercise its discretion according to its current policy, which is set in the light of case law and other relevant legislation. The Commission's current policy permits companies and CIOs to make significant changes to their purposes. In considering whether to give consent to a change of purposes, the Charity Commission asks three questions:

(1) are the new objects exclusively charitable?

(2) is the trustees' decision to make the change a rational one in the circumstances of the charity?

(3) do the new objects undermine the previous objects?[10]

6 Charity Commission, *OG2 Application of property cy-près* (March 2012) para 3.2.

7 Companies Act 2006, s 21 (charitable companies); Charities Act 2011, s 224 (CIOs).

8 Companies Act 2006, s 22; Charitable Incorporated Organisations (General) Regulations 2012 (SI 2012 No 3012), reg 15(3). We refer to the Regulations as the "CIO General Regulations 2012".

9 Charities Act 2011, ss 198 and 226.

2.13 Crucially, as long as the trustees provide a "convincing explanation as to why their proposed changes are in the charity's best interests", the amended purposes can be "significantly different from the existing objects".[11] Similarity between old and new purposes will be relevant to the decision-making process, but it is not given the same importance as under the section 67 similarity considerations.[12]

The differences between unincorporated and corporate charities

2.14 In summary, corporate charities can make any amendment by a resolution of its members, save in respect of (1) a defined category of regulated alterations which require Charity Commission consent, and (2) any provisions that have been entrenched, which can only be amended by following the conditions specified or alternatively by the unanimous agreement of the members. By contrast, unincorporated charities must rely on express amendment powers (if available), section 275 (if the charity is small), or section 280 (which is unclear in scope). If those powers are not available, they must seek a scheme from the Charity Commission. Consultees generally saw the amendment regime for corporate charities as simpler and quicker than that for unincorporated charities.

[10] Charity Commission, *OG518 Alterations to Governing Documents: Charitable Companies* (May 2015) para B5.

[11] Charity Commission, *OG518 Alterations to Governing Documents: Charitable Companies* (May 2015) para B5.1. The Commission will consider the following factors: (1) Taking into account modern social and economic conditions, do the proposals seem broadly consistent with what the charity was set up to do? (2) Have the trustees considered how the objects will be carried out? (3) Have the trustees taken into account the implications of the proposed change for the charity's members and beneficiaries? and (4) Have the consequences for the charity's beneficial class (future as well as current beneficiaries) been fully considered? (para B5.3).

[12] When considering the second question, the Commission says "the bigger the change, the more convincing a case we will require from the trustees". But "charitable companies don't need to demonstrate a failure of trusts when changing their objects and so it isn't necessary for us to apply a "cy-près" test when we consider such proposals. All that matters is that the new objects are charitable and are not likely to undermine or work against the existing ones. However, the changes must be rational ones for the charity to make. One of the ways we can assess this is whether the proposed objects seem broadly consistent with what they are replacing. If not, the trustees should be able to justify the departure. … As long as the new objects are not likely to undermine or work against the existing ones, and the trustees can show why they consider the changes to be reasonable in the circumstances of the charity, we should be able to consent to the change." (para B5.3)

THE OUTCOME OF CONSULTATION

The Consultation Paper

2.15 In the Consultation Paper, we said that it was arguable that the amendment regimes for corporate charities and unincorporated charities should be aligned. But we thought that aligning amendment powers for existing charities could be criticised on the basis that "governing documents are drafted against the backdrop of the legal rules that exist at the time of drafting" and "it is possible that a particular legal structure has been chosen for the strict (or relaxed) rules concerning amendment that it entails".[13] We said that aligning the amendment regime only for charities established in the future would create an unhelpful dual regime. As a result, despite acknowledging the argument for alignment, we reached the provisional view that the different amendment regimes for existing corporate and unincorporated charities should not be aligned. We nevertheless invited consultees' views about alignment for charities established in the future.[14]

Consultees' responses

2.16 Despite our caution about aligning the regimes for incorporated and unincorporated charities, the majority of consultees who addressed the issue expressed firm views that the amendment powers of unincorporated charities should, as far as possible, be aligned with the amendment powers of corporate charities. Consultees said that alignment would create consistency between charities and simplify the law. Some thought that an aligned amendment regime should apply to both existing and future charities. Historically, there have been numerous changes to the regime governing existing charities[15] and our provisional view that the regime should not be changed for existing charities "would suggest that charity law could never change but be crystallised around a trust as at the time it was created".[16] Some consultees cast doubt on our suggestion that a particular legal structure is chosen deliberately for the more restrictive amendment rules that apply.[17] Moreover, unincorporated charities can already transfer to the regime for corporate charities – albeit at an administrative cost – by incorporating; they can wind up and transfer their assets and operations to a new charitable company established for the purpose of carrying on the charity's work.

2.17 The main counter-argument raised by consultees was that alignment would sweep away the law of cy-près, since changes to unincorporated charities' purposes would no longer be subject to the precondition that a section 62 cy-près occasion had arisen and the section 67 similarity considerations. These consultees appeared to base their view on:

(1) the need for some limitation on charities changing their purposes;

[13] Consultation Paper, para 5.14.

[14] Consultation Paper, paras 5.13 to 5.19.

[15] For example, the introduction of the powers in ss 104A, 275, 280, 281 and 282 of the Charities Act 2011 and the expansion of the cy-près occasions in the Charities Acts 1960 and 2006, all of which changed the law as it applied to existing charities, including powers to amend governing documents.

[16] Bircham Dyson Bell.

[17] See further para 2.20.

(2) the importance of respecting the wishes of donors and founders; it was thought that increased flexibility might risk damaging donors' willingness to set up charities if they know that the purposes they specify can be changed to something altogether different;

(3) the cy-près regime providing a clear basis for the Charity Commission to make difficult decisions that must balance competing interests; and

(4) familiarity with the current regime.

2.18 By contrast, some consultees thought that removing the law of cy-près was an attractive prospect since they considered the section 62 cy-près occasions to be unnecessarily restrictive, unclear and poorly understood.

Our current view

2.19 Our current view is that the amendment regimes for corporate and unincorporated charities should, as far as possible, be aligned. In our final report, we will address how that can best be achieved. In this consultation, we explore the consequences that would arise following an alignment of the amendment powers in the case of a change of purposes. The key question is: what should be the continuing role of the law of cy-près?

CHANGING PURPOSES: ALIGNMENT OF THE AMENDMENT POWERS

Is it appropriate for a more relaxed regime to apply to unincorporated charities?

2.20 As we noted in the Consultation Paper, some founders might choose to establish a charity as a trust rather than a company in order to limit the circumstances in which changes (such as to the charity's purposes) can be made, and they might deliberately omit express powers of amendment. Such founders might, therefore, object to any expansion of the section 62 cy-près occasions, or to their removal, because it will make future changes easier. But some consultees emphasised that a particular legal structure is rarely chosen for the strict amendment powers that apply, and the absence of an express amendment power is not necessarily a deliberate decision. Moreover, we note that charitable trusts can often switch to the amendment regime for companies by incorporating.[18] We do not therefore see closer alignment with companies – and an associated relaxation of the circumstances in which a charity's purposes can be changed – as inappropriate.

[18] See para 2.16.

2.21 We are aware of potential concerns about how the trustees of a charitable trust can be expected to decide whether to seek to change the charity's purposes. The trustees must act in the best interests of the charity; almost by definition, it is contrary to the existing purposes of a charity for them to be replaced with different purposes. We think, however, that a change of purposes requires trustees to act in accordance with a wider concept of the charity's best interests. That is nothing new; such decisions by charity trustees about changing a charity's purposes are required to be made under the current law (a) under section 275, (b) when a trust includes an express power to change the purposes with the consent of the Commission (as the Commission's model trust deed does), and (c) whenever a company or CIO changes its purposes.

Sweeping aside the law of cy-près

2.22 We are mindful of consultees' concerns that alignment would sweep away the law of cy-près, which they considered would be a significant step since cy-près is an established part of charity law. As we go on to explain, however, alignment need not bypass the whole law of cy-près. And even if it does, such a change is unlikely to be as radical in practice as it might at first sight appear. When considering the concern, we think that it is important to distinguish between the two aspects of the law of cy-près, namely the section 62 cy-près occasions and the section 67 similarity considerations.

2.23 The position of corporate and unincorporated charities under the current law can be summarised in the table below.

Change of purposes by a company/CIO	**Change of purposes by a unincorporated charity (absent express power or section 275)**
Requires Charity Commission consent Charity Commission discretion, exercised in accordance with case law and other relevant legislation	Cy-près scheme can only be made if case falls within a section 62 cy-près occasion Section 67 similarity considerations will apply

2.24 In devising a regime that seeks to align more closely the amendment powers of unincorporated charities with corporate charities, there are three possible approaches to a change of purposes. The effect of each on the law of cy-près is different.

Option (1): No alignment for change of purposes

2.25 It would be possible to align the amendment powers more closely whilst retaining the law of cy-près; unincorporated charities could be given the power to make any amendments save for a change of purposes, which would remain subject to amendment under the current law (namely, any express power, the section 275 power or a cy-près scheme). This would be the preferred option for those who oppose any relaxation of the circumstances in which unincorporated charities can change their purposes.

Option (2): Complete alignment of the regimes

2.26 Complete alignment with corporate charities would mean that neither the first nor second aspect of the law of cy-près would apply; unincorporated charities would be able to change their purposes without having to establish a section 62 cy-près occasion and there would be no section 67 similarity considerations in deciding the new purposes.

2.27 Whilst this approach would effectively bypass the law of cy-près, there are arguments in favour of its adoption.

(1) As noted above, some consultees criticised the section 62 cy-près occasions, saying they were too restrictive.

(2) Many unincorporated charities can, in effect, already change their purposes under the regime that applies to companies; they will often have express powers of amendment and when such powers require the charity to obtain the Charity Commission's consent to a change (such as the power in the Commission's model governing documents),[19] the Commission will make its decision applying the same principles that it applies in deciding whether to consent to a change of purposes by a charitable company.

(3) In any event, cy-près problems can often be worked around by an unincorporated charity transferring to the regime for companies.[20]

(4) An important safeguard continues to exist, even in the absence of the section 62 cy-près occasions: any decision to change a charity's purposes would always be taken by the charity trustees in accordance with their general duty to act in the best interests of the charity.[21]

Option (3): A middle ground

2.28 We do not think, however, that alignment need necessarily bypass the law of cy-près. It would be possible to retain the section 67 similarity considerations (and, as we discuss below, extend them to companies and CIOs); they ensure that similarity between old and new purposes is an important factor in deciding a charity's new purposes, thereby protecting the wishes of founders and donors. An approach to alignment that retains the section 67 similarity considerations, but not the section 62 cy-près occasions, would not bypass the entire law of cy-près.

2.29 It is noteworthy that consultees' criticisms of the law of cy-près were aimed at the section 62 cy-près occasions, not at the section 67 similarity considerations. Conversely, consultees who were concerned about effectively abolishing the law of cy-près tended to be concerned about the purposes of a charitable trust being changed to something altogether different (that is, a loss of the section 67 similarity considerations), not about removal of the section 62 cy-près occasions.

[19] See n 3 above.

[20] See para 2.16.

[21] See para 2.21.

2.30 There is a balance to be struck between allowing charities to remain effective in changing times, and respecting the wishes of founders and donors. The Charity Law Association did not think that the section 62 cy-près occasions were necessary to achieve that but said that a requirement for the Charity Commission to consent to a change of purposes under a new amendment power provides "an appropriate level of oversight and scrutiny" and "a suitable safeguard for the wishes of the settlor". We think that is achieved by adopting the section 67 similarity considerations. Our provisional view, therefore, is that the section 67 similarity considerations should be retained when the Charity Commission is deciding whether to consent to an unincorporated charity changing its purposes under a new, aligned, amendment power.

2.31 **We provisionally propose that, if powers of amendment are aligned:**

(1) **trustees of an unincorporated charity should have a power – with the consent of the Charity Commission – to change the charity's purposes without having to establish a section 62 cy-près occasion; and**

(2) **the section 67 similarity considerations should apply when the Charity Commission decides whether or not to give its consent.**

Do consultees agree?

How should the section 67 similarity considerations be integrated into a new amendment power?

2.32 We set out the section 67 similarity considerations in Figure 2 above. They were introduced by the Charities Act 2006,[22] and they apply when the Charity Commission makes a cy-près scheme. If a new aligned amendment power for unincorporated charities were to require the Commission to have regard to the section 67 similarity considerations when deciding whether to consent to a change of purposes, it is necessary to decide how those considerations should be integrated into the new power.

2.33 There are three considerations. The first – "the spirit of the original gift" – requires the Commission to examine the motivations behind the original foundation of the charity.[23] The second requires the Commission to consider the similarity between the charity's current purposes[24] and the proposed new purposes. That is to be balanced against the third consideration, which refers to the current social and economic circumstances.

[22] Charities Act 2006, s 18.

[23] This is based on the similar wording – the "spirit of the gift" – in the section 62 cy-près occasions. That phrase, in a predecessor statute, was interpreted as meaning "the basic intention underlying the gift, that intention being ascertainable from the terms of the relevant instrument read in the light of admissible evidence": *Re Lepton's Charity* [1972] Ch 276, at 285. See, too, Charity Commission, *Application of Property cy-près (OG2)* section A1, paras 3.2 and 4.

[24] The reference to the "original purposes" means, where the original purposes have been altered, the purposes for the time being: Charities Act 2011, s 67(7).

2.34 In their application to a new amendment power, some modification to the wording of the similarity considerations is likely to be necessary.[25] But we think that the underlying policy reasons for requiring those three matters to be weighed in the balance by the Charity Commission apply equally whether the change to a charity's purposes is being made by means of a cy-près scheme or a new aligned amendment power.

2.35 **We invite the views of consultees as to whether the section 67 similarity considerations are appropriate in their application to a new amendment power for unincorporated charities.**

Consistency with corporate charities

2.36 Retaining the section 67 similarity requirements for unincorporated charities would still leave an inconsistency with the amendment powers of corporate charities, contrary to a policy of aligning the amendment regimes; the Charity Commission's approach to considering a change of purposes by a corporate charity would be different from its approach to considering a change of purposes by an unincorporated charity under the new amendment power.

2.37 It is arguable that the position for corporate and unincorporated charities should be aligned by applying the section 67 similarity considerations to a change of purposes by a corporate charity. The two tests are regarded by some consultees as quite similar in practice. It has also been suggested to us that, particularly where there are linked corporate and unincorporated charities, it is difficult to explain to trustees that there are two different tests for a change of purposes.

2.38 Our discussions with members of the Charity Law Association working group suggest that such an approach might be unpopular as it would be perceived as increasing regulation for corporate charities. But, in practice, we do not think that there would be an increase in regulation. The Charity Commission is already required to make a decision and give, or refuse, consent to a change of purposes. Adopting section 67 would simply set out in statute three compulsory considerations that must be taken into account when making that decision, rather than leaving the decision to the Commission's discretion.

[25] The reference in the second consideration to "the desirability of securing that the *property* is applied for charitable purposes which are close to the original purposes" might more appropriately refer to the desirability of securing that the purposes of the charity are, as far as reasonably practicable, similar in character to the original purposes. The first consideration would not require modification provided the reference to the spirit of the "original gift" was sufficiently clear to refer to the intentions behind the original foundation of the charity. We do not think that the third consideration would require modification.

2.39 It is possible to justify the retention of two different approaches; our policy is to align more closely the amendment powers of corporate and unincorporated charities, but some differences will have to remain owing to the different structure of both types of charity.[26] Moreover, Parliament has previously decided that a change of purposes by corporate charities should only be subject to Charity Commission consent rather than subject to a particular set of considerations specified in the statute.

2.40 The arguments are finely balanced. Our current view is that the Charity Commission's approach to deciding a change of purposes by a charity should be the same whether it is incorporated or unincorporated, and we think that the section 67 similarity considerations strike the right balance between protecting donors' wishes and allowing charities to adapt to change. We therefore think that corporate charities should be subject to the same section 67 similarity considerations when changes are made to their purposes, but we welcome consultees' views.

2.41 **We invite the views of consultees as to whether the Charity Commission should be required to have regard to the section 67 similarity considerations when it decides whether to consent to a company or CIO changing its purposes (as well as when it decides whether to consent to an unincorporated charity changing its purposes under a new aligned amendment power).**

THE CONTINUING ROLE OF THE SECTION 62 CY-PRÈS OCCASIONS

2.42 We have proposed above that, under a more closely aligned amendment regime, unincorporated charities should have a power to change their purposes without having to establish a section 62 cy-près occasion. On that basis, is there any continuing need for section 62?

2.43 The section 62 cy-près occasions are effectively redundant in the case of cy-près schemes that are made following the initial failure of a charitable gift. By definition, an initial failure only arises if a charitable gift cannot be put into effect, so it will fall within the second section 62 cy-près occasion in Figure 1.[27]

2.44 In the case of subsequent changes to a charity's purposes, a new amendment power (on the basis proposed above) would remove the relevance of the section 62 cy-près occasions; unincorporated charities will not need to establish the existence of a section 62 cy-près occasion in order to exercise the new amendment power.

[26] For example, corporate charities have a body of members, but trusts do not. The exercise of a new amendment power will have to reflect the fact that trusts do not have members and so the resolution will have to be made by the trustees.

[27] The authors of *Tudor on Charities* conclude that "the theoretical hurdle of section 62 … will automatically be cleared in cases of initial failure, and in that context its existence is of little importance": W Henderson, J Fowles and J Smith, *Tudor on Charities* (10th ed 2015), para 9-006.

2.45 If the section 62 cy-près occasions are retained, the result would be that charities would have a wider power to change their purposes (under a new amendment power) than the Charity Commission (or court) would have pursuant to a cy-près scheme. Arguably, retaining the section 62 cy-près occasions would be an unnecessary and illogical constraint on the Charity Commission's powers. It would be possible to remove the need for the Charity Commission to establish one of the section 62 cy-près occasions before making a cy-près scheme. On such an approach, the section 67 similarity considerations should still apply when the Commission decides on the charity's new purposes.

2.46 But retaining the section 62 cy-près occasions would not necessarily be problematic, since we expect that a change of purposes will generally be undertaken using the new amendment power rather than by way of a cy-près scheme. Moreover, the power to make cy-près schemes arises not just on the application of the trustees, but it can also be exercised on the application of certain other people or on the Commission's own motion.[28] Whilst it would be consistent to remove the need for section 62 cy-près occasions when the application is made by the charity's trustees, we are not convinced that the same can be said when the scheme is made on the application of a third party or on the Commission's own motion.

2.47 It would not be anomalous for the trustees of a charity to have a power to make a change which the Charity Commission could not itself make. The power for small charities to change their purposes under section 275 can be exercised without having to establish a section 62 cy-près occasion.[29] The trustees can therefore make some changes under section 275 (with Charity Commission oversight built into the process) which the Commission could not itself make by way of a cy-près scheme.

2.48 We therefore think that the policy considerations behind expanding trustees' own powers of amendment might be different from those concerning the exercise of the Commission's scheme-making powers. We do not at present believe that the introduction of an amendment power for unincorporated charities (on the basis set out above) should bring with it the removal of the section 62 cy-près occasions as gateways to the Charity Commission making a cy-près scheme.

2.49 **We provisionally propose that the section 62 cy-près occasions should be retained as pre-conditions to the Charity Commission making a cy-près scheme.**

Do consultees agree?

[28] Charities Act 2011, s 70. There is an obligation on the trustees of a charity to apply for a cy-près scheme in certain circumstances: s 61.

[29] See para 2.3(2).

CHAPTER 3
TRUST CORPORATION STATUS

INTRODUCTION

3.1 We explained the different legal forms that charities take in the Consultation Paper.[1] Charities change their organisational form for numerous reasons. For example, an unincorporated charity which has grown over time might benefit from incorporation (for example, as a charitable company or CIO) for convenience when entering into contracts and to limit the liability of the trustees. And a charity's purposes might be better served by merging with another charity to achieve efficiencies of scale.

3.2 An incorporation or merger involves the transfer of one charity's activities to another. It might include the transfer of a charity's employees, contracts, assets and liabilities. A merger is usually structured in one of two ways.[2]

(1) Charity A transfers its assets to Charity B.

(2) Charity A and Charity B transfer their assets to a new charity, Charity C.

3.3 An unincorporated charity that becomes a corporate charity transfers its assets to a new (corporate) charity. Charity incorporation, therefore, is an example of the first type of merger. Unless otherwise stated, references to a "merger" include an incorporation.

3.4 In Chapter 12 of the Consultation Paper, we set out the current law and made proposals which aimed to overcome certain legal barriers to incorporation and merger. As well as responding to our consultation questions, some consultees explained that particular difficulties arise when charities need to be made "trust corporations" following incorporation or merger. In this Chapter, after explaining the context, we explain what a trust corporation is and why it is important on a merger. We summarise how charities currently acquire trust corporation status on merger and propose that it be made more widely available.

[1] Consultation Paper, paras 1.13 to 1.23.

[2] See further Consultation Paper, para 12.12.

BACKGROUND: PROPERTY THAT CONTINUES TO BE HELD ON TRUST FOLLOWING MERGER

3.5 In order to understand the importance of trust corporation status, it is necessary to understand how property is held following merger. The issue with which we are concerned arises where assets held on certain types of trust are transferred to a corporate charity. The typical case is where the trustees of a charitable trust (Charity A) seek to incorporate by transferring the charity's assets to a charitable company (Charity B).[3] But the issue also arises in any merger where the transferring charity (whether incorporated or unincorporated) holds assets on trust.

3.6 On any such incorporation or merger, most trust assets can be transferred by the trustee(s) of Charity A to Charity B, and will then be held by Charity B as its corporate property. But if Charity A includes property which is permanent endowment,[4] it is generally believed that the permanent endowment cannot be acquired by Charity B as corporate property, but rather must continue to be held on trust. The same applies to property held on special trust.[5]

3.7 The current practice, on any merger, is for permanent endowment (and special trust property) to continue to be held on trust. The permanent endowment is treated as a separate unincorporated charity. It continues to exist as the transferring charity, retaining the transferring charity's registration number (if registered). The transferee charity usually becomes the sole corporate trustee of the permanent endowment.

3.8 In summary, therefore, the unrestricted assets of Charity A will be transferred to Charity B and will be owned by Charity B as corporate property. By contrast, Charity B will become the sole trustee of the permanent endowment of Charity A (and will not own that property as corporate property). Charity A, now comprising just the permanent endowment, will continue to exist as a separate charity of which Charity B is sole trustee.

3.9 Having set that background, we turn to consider trust corporation status.

[3] We refer to companies for ease of reference; the same applies to CIOs and other incorporated charities.

[4] See Consultation Paper, para 9.10 for the meaning of permanent endowment.

[5] See Consultation Paper, para 9.43 for the meaning of special trust.

TRUST CORPORATIONS

What is a trust corporation?

3.10 A trust corporation is a particular type of corporate trustee, defined (in the same terms) in five statutes.[6] Various persons and bodies are automatically trust corporations (for example, the Treasury Solicitor and the Official Solicitor). Others can be appointed as trust corporations (for example, a corporation appointed by the court to be a trustee).

Why is trust corporation status important?

3.11 In trust administration, there are various advantages to trustees being trust corporations,[7] in particular that a trust corporation, as sole trustee, can give a valid receipt for the proceeds of sale arising under a trust of land.[8] In the absence of a trust corporation as trustee, at least two trustees are required to give a valid receipt.

Why is trust corporation status important on incorporation and merger?

3.12 When the trustees of an unincorporated charity wish to incorporate, they will want to transfer all assets to the corporate charity. The trustees will not want to continue to hold legal title to any of the assets.

3.13 As explained above, on incorporation, most assets will be held by the corporate charity as corporate property. But permanent endowment (and special trust property) will not be transferred to the corporate charity as corporate property; rather, it continues to be held on trust.

3.14 Accordingly, when – following incorporation – a corporate charity[9] will hold any land on trust as sole trustee (rather than as part of its corporate property), it will be important for the corporate charity to have trust corporation status so that it can deal with that land (by giving a valid receipt).[10] The same applies to any other merger where a corporate charity will hold land on trust as sole trustee.

How does a charity obtain trust corporation status?

3.15 Charities will generally seek trust corporation status in one of three ways.

[6] Law of Property Act 1925, s 205(1)(xxvii); Trustee Act 1925 s 68(1)(18); Settled Land Act 1925, s117(1)(xxx); Administration of Estates Act 1925, s 55(1)(xxvi); Senior Courts Act 1981 s 128(1); all as expanded by Law of Property (Amendment) Act 1926, s 3. Trust corporation status can be conferred by statute; for example, the Church of England Pension Board is given trust corporation status by the Clergy Pensions Measure, s 31.

[7] See generally *Lewin on Trusts* (19th ed 2014), para 19-71; *Halsbury's Laws of England Vol 98* (5th ed 2013) para 238 and following.

[8] Law of Property Act 1925, s 27(2).

[9] We have heard that the assets might also be held on the same charitable trusts by a corporate body which is not itself a charity.

[10] If it does not have trust corporation status, it will be necessary for there to be a second trustee. But the purpose of incorporation is to remove the individual trustees and for all assets to be held by the corporate charity.

Route (A): Application to the Lord Chancellor

3.16 An application can be made to the Lord Chancellor for authorisation to act as a trust corporation. For the purposes of the five relevant statutes,[11] a trust corporation includes, "in relation to charitable ecclesiastical and public trusts", any corporation which:

(1) satisfies the Lord Chancellor:

(a) "that it undertakes the administration of any such trusts without remuneration", or

(b) "that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members", and

(2) is authorised by the Lord Chancellor to act in relation to such trusts as a trust corporation.[12]

Route (B): Charity Commission scheme

3.17 As noted above, a corporation appointed by the court to be a trustee is a trust corporation. In the five relevant statutes,[13] the reference to a corporation appointed by the court "includes a reference to a corporation appointed by the [Charity] Commission under [the Charities Act 2011] to be a trustee".[14]

3.18 Accordingly, if the Charity Commission appoints a corporation (such as a company or CIO) to be a trustee under its powers in the Charities Act 2011, that corporation is automatically treated as a trust corporation. There is no authority on the point, but the Charity Commission's view is that the corporation becomes a trust corporation only in relation to the charity of which it has been appointed a trustee.[15]

[11] See n 6 above.

[12] Law of Property (Amendment) Act 1926, s 3. Authorisation by the Lord Chancellor to act as a trust corporation also entitles the corporation to act as a "custodian trustee": Public Trustee Act 1906, s 4(3); Public Trustee Rules 1912 (SI No 348 of 1912), r 30(1)(d)(ii). See further Charity Commission, *Custodian Trustees (OG39)* (2012).

[13] See n 6 above.

[14] Charities Act 2011, sch 7, para 3. The Charity Commission's practice is to make a scheme if the corporate body has not yet been appointed as trustee, but if the corporate body has already been appointed it will not make a confirmatory scheme but will instead refer the charity to the Lord Chancellor: Charity Commission, *Corporate trustees (OG38)* (2014), section B1 para 4.3.

[15] Charity Commission, *Corporate Trustees (OG38)* (2014) section B1, para 4.3; *Charity Trustees: Making and Ending Appointments (OG510-1)* (2014) section B2.2.

Route (C): Vesting declaration under section 310 of the Charities Act 2011

3.19 There is a complicated route by which CIOs can acquire trust corporation status without reference to the Charity Commission or Lord Chancellor. When permanent endowment is transferred to a CIO, and the transfer is made using a pre-merger vesting declaration under section 310 of the Charities Act 2011 ("a section 310 vesting declaration"), the CIO will automatically be treated as a trust corporation. This rather complicated route requires some explanation.

3.20 Section 310 vesting declarations were introduced by the Charities Act 2006. They were intended to provide a simpler means of transferring property to the transferee charity on merger or incorporation.[16] The trustees of the original charity make a declaration by deed that, from a specified date, all the charity's property is to vest in the transferee.[17]

3.21 A section 310 vesting declaration can only be made in respect of a "relevant charity merger", which means that the original charity must cease to exist once all of its property has been transferred to the merged charity.[18]

3.22 Importantly, the default position is that a section 310 vesting declaration does not apply to a charity's permanent endowment.[19] But where the transferee is a CIO, the effect of a section 310 vesting declaration is modified by regulation 61 of the CIO General Regulations ("regulation 61") in two respects.[20] First, section 310 vesting declarations apply to permanent endowment.[21] Second, when a CIO holds permanent endowment or special trust property as trustee following a

[16] Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector* (September 2002) para 4.59 and following.

[17] Charities Act 2011, s 310(1). A section 310 vesting declaration operates to vest the legal title to all of the transferor's property in the transferee, without the need for any further document transferring it: s 310(2). Not all property is included; see s 310(3) about which we asked questions in the Consultation Paper, paras 12.57 to 12.70. A vesting declaration does not override the requirement that a transfer of land be registered: Charities Act 2011, s 310(4).

[18] Charities Act 2011, s 306(1). The meaning of "relevant charity merger" is modified in the case of a merger which involves the transfer of permanent endowment. In such a case, references to the property of a charity are to its unrestricted funds only and there is no requirement for the charity to cease to exist: Charities Act 2011, s 306(2) and (3). This modification ensures that a merger can still fall within the definition of "relevant charity merger" even if the original charity's permanent endowment remains in existence as the original (or a separate) charity. As explained in para 3.7, that will frequently be the case on incorporation; unrestricted funds will be transferred to and held by the charitable company or CIO as corporate property, but the permanent endowment will continue to be held on trust (and treated as a separate charity) with the corporate charity becoming the sole trustee of the permanent endowment.

[19] Charities Act 2011, s 312(1)(b).

[20] Charitable Incorporated Organisations (General) Regulations 2012 (SI 2012 No 3012), reg 61.

[21] CIO General Regulations 2012, reg 61(2). Reg 61(2) also expressly includes property held on special trust (which is not also permanent endowment). Only permanent endowment is expressly excluded from section 310 vesting declarations which would not, without more, exclude special trust property. Accordingly, the express inclusion of special trust property by reg 61 raises uncertainties as to whether section 310 vesting declarations apply to special trust property where the transferee is not a CIO.

section 310 vesting declaration, it is treated[22] as if it were a corporation appointed by the court to be a trustee (that is, a trust corporation).[23]

3.23 In summary, therefore, when permanent endowment (or special trust property) is transferred to a CIO by means of a section 310 vesting declaration, the CIO will automatically be treated as a trust corporation. It is unclear whether the CIO is treated as a trust corporation only in relation to the charitable trust of which it becomes trustee, or whether the CIO is treated as a trust corporation for other purposes.[24]

DISCUSSION

Views from consultation

3.24 In the Consultation Paper, we asked whether section 310 vesting declarations were helpful and whether they could be improved.[25] Consultees made various criticisms of section 310 vesting declarations and said that they were not often used in practice. But despite their limitations, section 310 vesting declarations were said to have one crucial advantage when the transfer is to a CIO, namely the fact that transferring the charity's permanent endowment by way of a vesting declaration has the effect of the CIO automatically being treated as a trust corporation.

3.25 Consultation revealed that the availability of automatic trust corporation status for CIOs is a significant driver behind the use of section 310 vesting declarations when the original charity holds permanent endowment (or special trust property). Indeed, the fact that section 310 vesting declarations effect a transfer of certain assets appeared to be of inconsequential importance (since such assets can usually be transferred by other existing means), but the availability of trust corporation status for the transferee CIO is a strong reason for charities using section 310 vesting declarations.

3.26 Consultees said that a significant difficulty faced by charities seeking to merge (where the merged charity is to hold property on trust as sole trustee) is the cumbersome process for obtaining trust corporation status: unless the transfer is to a CIO and the transaction can be shoehorned into section 310 (Route (C)), they will either need a scheme from the Charity Commission or authorisation from the Lord Chancellor. Our subsequent discussions with the Charity Law Association have revealed a strong desire for trust corporation status to be more widely available to corporate charities.

[22] For the purposes of the five relevant statutes in n 6 above.

[23] CIO General Regulations 2012, reg 61(4); Charities Act 2011, sch 7, para 3.

[24] There is no authority on the point. If the Charity Commission's view – that a corporation appointed by the Charity Commission as trustee is a trust corporation only in relation to that charitable trust (see paras 3.17 and 3.18) – is right, then for consistency the treatment of a CIO as a trust corporation under reg 61(4) should only be in relation to the charitable trust of which the CIO is trustee.

[25] Consultation Paper, paras 12.57 to 12.76.

Options for reform

3.27 We think that the policy aim of facilitating, and removing legal barriers to, merger would be advanced by making trust corporation status more widely available to charities.

3.28 We note that any corporate charity ought to satisfy the pre-conditions for authorisation from the Lord Chancellor to be a trust corporation in relation to charitable, ecclesiastical and public trusts (see paragraph 3.16 above); all charities are required to apply their income for charitable purposes and they cannot distribute profits to their members. Accordingly, there is nothing to stop all corporate charities from becoming trust corporations (in relation to charitable, ecclesiastical and public trusts) on application to the Lord Chancellor. We cannot at present see any reason why an application should have to be made, and considered by the Lord Chancellor (or any other public body), in order for corporate charities to be treated as trust corporations. We note that obtaining approval from the Lord Chancellor creates delay in the merger process and gives rise to costs both for the charity concerned and the Ministry of Justice.

Who should obtain trust corporation status?

3.29 The following options are available.

(1) The modification made by regulation 61 in the case of transfers to CIOs could be extended to other corporate charities. Whenever trust property is transferred to a corporate charity to be held as trustee by way of a section 310 vesting declaration, the corporate charity would automatically have trust corporation status. This option would be an extension of Route (C).

(2) Any corporate charity to which assets are transferred (on trust) on a merger[26] could be given trust corporation status whether or not a section 310 vesting declaration is made. This option would be a further extension of Route (C).

(3) Trust corporation status could be made available to all corporate charities. This option would be an extension of Route (A).

(4) Trust corporation status could be made available to any corporate body (whether or not it is a charity). This option would be an extension of Routes (A) and (B).

[26] Either a "relevant charity merger", or any merger.

3.30 Options (1) to (3) retain the existing conditions that must be fulfilled in order for a charity to obtain trust corporation status on application to the Lord Chancellor, but they remove the involvement and oversight of the Lord Chancellor (or Charity Commission) in the process. By contrast, Option (4) would, in some circumstances, make trust corporation status available to corporations that cannot currently obtain that status.[27]

For what purposes should trust corporation status be obtained?

3.31 Linked to the question of who should obtain trust corporation status is the purpose for which that status should be obtained.[28] In the case of all four options above, trust corporation status could be conferred:

(1) in relation to the charitable trust of which the corporation is trustee (similarly to Routes (B) and (C));

(2) in relation to charitable trusts generally (similarly to Route (A)); or

(3) for all purposes.

Should trust corporation status be automatic or optional?

3.32 In the case of Options (2) to (4), either:

(1) trust corporation status could be conferred automatically; or

(2) the corporation could be given a power to adopt trust corporation status by passing a resolution.

3.33 If any of Options (2) to (4) above are adopted, our current preference would be for trust corporation status to be acquired by the corporation passing a resolution to acquire that status, rather than it being conferred automatically. Conferring trust corporation status automatically on a particular category of corporations would be a significant step, and there might be unintended consequences. Trust corporation status is generally something that is conferred on a corporate body individually rather than something that is conferred automatically. We are cautious about automatically conferring the status (in the case of a charity merger, or more generally), as opposed to allowing a deliberate decision to be made that a particular corporate trustee should have trust corporation status. We cannot see any particular need for trust corporation status to be conferred automatically on a particular category of corporate charities, and some corporations might not want trust corporation status. We ask consultees below whether trust corporation status should be conferred automatically, rather than only being available by means of a resolution by the corporation.

3.34 We turn now to consider the four options set out above.

[27] A corporation that is not a charity can obtain trust corporation status if the Charity Commission is willing to appoint it (Route (B); see para 3.17) or if it is authorised by the Lord Chancellor by reason of the corporation administering charitable trusts without remuneration (Route (A); see para 3.16).

[28] As with Routes (A), (B) and (C), we envisage trust corporation status being conferred for the purposes of the five statutes in n 6 above.

Options (1) to (3): retaining pre-conditions for trust corporation status but removing oversight

3.35 We think that Option (1) would be uncontroversial, since it creates equivalence between CIOs and other corporate charities.[29] But, on its own, it would be of limited assistance given that section 310 has a limited use. Moreover, we are reluctant to perpetuate the current situation where section 310 is used not for its principal purpose (the automatic transfer of assets) but in order to obtain the tangential benefit of trust corporation status; unnecessary transaction costs would be created by requiring charities to shoehorn their transaction into section 310 simply to achieve trust corporation status.

3.36 Option (2) would therefore be more helpful, because it would be available on any merger, whether or not a section 310 vesting declaration is used.

3.37 But we do not see why the availability of trust corporation status should be limited to mergers. Corporate charities can acquire assets on trust in other circumstances. Option (3) would allow such charities to obtain trust corporation status, and would solve any problems for corporate charities that are already sole trustees but do not have trust corporation status.

3.38 Option (3) would also create a simpler regime overall. It would cover any case that would fall within Options (1) and (2). It would also apply to any case where a section 310 vesting declaration would currently be used (Route (C)), making that (complicated) route redundant.

3.39 We cannot see any problem with Option (3). Such corporate charities can already seek trust corporation status by way of a Charity Commission scheme or by application to the Lord Chancellor. Option (3) would not therefore change the circumstances in which trust corporation status can be acquired, but it would remove the need to make an application to the Charity Commission or Lord Chancellor. We do not think that the removal of oversight (of the Charity Commission or the Lord Chancellor) would be problematic; if the corporate charity was a CIO and if it had acquired assets by means of a section 310 vesting declaration, there would have been no oversight (Route (C)). We cannot see any reason to treat CIOs and other corporate charities differently in this respect.

3.40 We turn now to consider the purposes for which trust corporation status should be obtained. Trust corporation status could be limited to the charitable trusts (named in the resolution) of which the corporate charity is trustee; in practice, we expect that would be sufficient. But if the corporate charity were to obtain trust corporation status by application to the Lord Chancellor (under Route (C)), it would be conferred "in relation to charitable ecclesiastical and public trusts". We see no reason to limit trust corporation status to particular named charitable trusts and we therefore propose that, under Option (3), trust corporation status should be conferred in relation to any charitable trust of which the corporate charity is trustee.

[29] In response to our proposal that section 310 vesting declarations should apply to permanent endowment whether or not the transferee was a CIO (Consultation Paper, para 12.76), all consultees agreed.

Which corporate charities?

3.41 We think that the power for corporate charities to obtain trust corporation status should be available to charitable companies and CIOs, but not to other charitable corporations. The problems under the current law principally concern mergers with companies and mergers with CIOs. It will be straightforward to devise rules for resolutions to be passed by companies and CIOs; companies have a defined body of directors and members and CIOs have a defined body of charity trustees and members. To include other corporations would require a mechanism to cater for their unique governance structures. Other corporate bodies can obtain trust corporation status by Routes (A) and (B) or by other existing means.[30]

The mechanism by which trust corporation status is obtained

3.42 We said above that trust corporation status should be obtained by passing a resolution, rather than being conferred automatically. We think that the resolution should be passed by the directors of a charitable company, or the charity trustees of a CIO, and that it should not be necessary to obtain a members' resolution.

Option (4): extending pre-conditions for trust corporation status and removing oversight

3.43 There might be enthusiasm for a more general extension of trust corporation status. It would be possible to make trust corporation status available to non-charitable corporate bodies. Some non-charitable corporations can already be given trust corporations status by Routes (A) or (B). But some cannot (for example, if they charge remuneration for administering trusts, or if the Charity Commission is not satisfied that they would be an appropriate body to be appointed trustee of a charity). Each corporation would have to be assessed individually.

3.44 We do not currently see any need to make trust corporation status more widely available to non-charitable corporations. Most situations with which we are concerned involve charitable corporations. In those rare cases where non-charitable corporations wish to obtain trust corporation status, existing routes are available and each application can be considered by the Lord Chancellor or the Charity Commission. We would welcome consultees' views as to whether the existing pre-conditions for approval as a trust corporation should be relaxed so as to permit Option (4) and, if so, why. We also welcome consultees' views on the purposes for which such trust corporation status should be granted.

[30] For example, some Royal Charter and statutory charities are entitled to act as "custodian trustees" under the Public Trustee Act 1906, s 4(3) and Public Trustee Rules 1912, r 30(1)(c). Corporations which are entitled so to act are included within the definition of "trust corporation" in the five relevant statutes.

3.45 We make a provisional proposal based on Option (3); our proposal would not change the circumstances in which trust corporation status can be obtained from the Lord Chancellor, but would remove oversight in obtaining that status. We also provisionally propose the repeal of the section 310 route to trust corporation status (Route (C)), since charities that currently use that complicated route would be able to pass a resolution to acquire trust corporation status instead.[31] We ask for consultees' views on Option (4), which would extend the circumstances in which trust corporations status can be obtained from the Lord Chancellor or Charity Commission.

3.46 **We provisionally propose that:**

(1) **any charitable company and CIO should have a power, by resolution of its directors or charity trustees, to acquire trust corporation status in relation to any charitable trust of which the corporate charity is trustee; and**

(2) **the conferral of trust corporation status on CIOs by regulation 61 should be repealed.**

Do consultees agree?

3.47 **We invite the views of consultees as to whether trust corporation status:**

(1) **should be made available to non-charitable corporations;**

(2) **should be conferred automatically, rather than being available by resolution.**

[31] CIOs that already have trust corporation status by Route (C) would not be affected, but trust corporation status would cease to be available to CIOs by Route (C) in the future.

CHAPTER 4
LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

CHANGING A CHARITY'S PURPOSES

4.1 We provisionally propose that, if powers of amendment are aligned:

(1) trustees of an unincorporated charity should have a power – with the consent of the Charity Commission – to change the charity's purposes without having to establish a section 62 cy-près occasion; and

(2) the section 67 similarity considerations should apply when the Charity Commission decides whether or not to give its consent.

Do consultees agree?

[paragraph 2.31]

4.2 We invite the views of consultees as to whether the section 67 similarity considerations are appropriate in their application to a new amendment power for unincorporated charities.

[paragraph 2.35]

4.3 We invite the views of consultees as to whether the Charity Commission should be required to have regard to the section 67 similarity considerations when it decides whether to consent to a company or CIO changing its purposes (as well as when it decides whether to consent to an unincorporated charity changing its purposes under a new aligned amendment power).

[paragraph 2.41]

4.4 We provisionally propose that the section 62 cy-près occasions should be retained as pre-conditions to the Charity Commission making a cy-près scheme.

Do consultees agree?

[paragraph 2.49]

TRUST CORPORATION STATUS

4.5 We provisionally propose that:

(1) any charitable company and CIO should have a power, by resolution of its directors or charity trustees, to acquire trust corporation status in relation to any charitable trust of which the corporate charity is trustee; and

(2) the conferral of trust corporation status on CIOs by regulation 61 should be repealed.

Do consultees agree?

[paragraph 3.46]

4.6 We invite the views of consultees as to whether trust corporation status:

(1) should be made available to non-charitable corporations;

(2) should be conferred automatically, rather than being available by resolution.

[paragraph 3.47]