Technical Issues in Charity Law
Analysis of Responses
Chapter 1: Introduction

1.1 Technical Issues in Charity Law ("the Consultation Paper")¹ was published on 20 March 2015. The consultation period ran until 3 July 2015. We received responses from 91 consultees, who are listed at Appendix 1. The Consultation Paper also featured in the sector press.²

1.2 During the consultation period, we attended various consultation events:

1.2.1 a public consultation event in Bristol, hosted by Veale Wasbrough Vizards LLP;

1.2.2 a consultation event for charity professionals, practitioners and academics, organised and hosted by the University of Liverpool Charity Law and Policy Unit ("CL&PU"), at the University’s London campus; and

1.2.3 meetings with the Association of University Legal Practitioners, the Association of Charitable Foundations, the National Council for Voluntary Organisations, the Charities’ Property Association, the Churches’ Legislation Advisory Service, and officials from the Privy Council Office, Attorney General’s Office, Department for Business, Innovation and Skills (as it then was), and the Welsh Government.

1.3 Two issues arose from our initial consultation on which we did not expressly invite consultees’ views but on which we wanted to hear from consultees before deciding on our final recommendations. The first related to cy-près, the second to trust corporation status. We published a Supplementary Consultation Paper addressing those issues in September 2016.³ We received responses from 26 consultees, who are listed at Appendix 1.

1.4 In Chapter 2 of this analysis of responses, we discuss some general themes that emerged from our meetings with, and responses from, consultees. In Chapter 3 we discuss some issues raised by consultees that fall outside our terms of reference. The remaining chapters analyse consultees’ responses to the questions in our two consultation papers. References to sections are to sections of the Charities Act 2011, unless otherwise stated.

1.5 This analysis of responses is published alongside our final report ("the Report").⁴

² Civil Society, "What are the key proposals from the Law Commission review of charity law?" available at: http://www.civilsociety.co.uk/finance/indepth/technical_briefing/content/19530/what_are_the_key_proposals_from_the_law_commission_review_of_charity_law; Third Sector, “Law Commission starts review of charity law” available at: http://www.thirdsector.co.uk/law-commission-starts-review-charity-law/governance/article/1177394.
Chapter 2: General comments

INTRODUCTION

2.1 In this chapter, we gather together some of the general comments that were made by consultees in response to the Consultation Paper as well as suggestions for reform that fall outside our terms of reference.

PRINCIPLES TO GUIDE REFORM

2.2 The CLA,1 with whom Bircham Dyson Bell LLP agreed, identified various principles to assist its response to the consultation:

(1) “Think ‘charity’ first, rather than legal form”. There are myriad inconsistencies in charity law, often because of the many different legal forms that charities can take. This makes it difficult to understand, to apply and to reform. The aim should be to introduce consistency and to simplify.

(2) “Think small first”. Most charities are small and run by volunteers. Regulation needs to work for small charities with limited access to legal advice. “It is often assumed that deregulation must be helpful for smaller charities, stripping away needless administration and bureaucracy. However, it is worth noting that good regulation can be helpful for smaller charities, providing a proper structure within which to operate.”2

(3) “To ensure better regulation, which is proportionate and fair and in line with limits on resources of both the Charity Commission and the sector.”

(4) “To make it easier to run a charity, while still maintaining proper oversight and accountability.”

(5) “To provide flexibility for the future.” Primary legislation designed for charities is rare, so there should be “flexibility to adjust the regulatory regime in future without resort to primary legislation”.

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1 The Charity Law Association (“CLA”) formed a working group of 23 charity lawyers to respond to the Consultation Paper, and two further working groups to respond to the Supplementary Consultation Paper. The views of the working groups do not necessarily represent the opinions of the CLA membership, nor the organisations that each lawyer represents. For brevity, however, we refer to the responses of the CLA working groups as the response of “the CLA”.

2 Action with Communities in Rural England said that the charity trustees it works with, who manage community buildings, "like to have the reassurance and protection of clear procedures and processes especially as many are unincorporated and responsible for a building and the activities taking place in it”. It said that it encourages village hall charities to become CIOs to provide "up to date documents and a structure fit for purpose” as well as protection against personal liability.
A need for proper balance between competing interests, such as:

(a) recognising the historical position versus proposing a new approach; sweeping powers can override centuries of case law, but there is precedent for this (for example, sections 275 and 280);

(b) small versus big charities; large charities may prefer de-regulation with small charities preferring regulation, or vice versa;

(c) regulation versus deregulation; the former increases costs, the latter reduces oversight and accountability;

(d) regulation versus resources; regulation brings with it compliance costs for charities and the regulator; and

(e) third party rights versus trustee autonomy.

The role of the Charity Commission, which the CLA considered to be “essential” and which “should be resourced properly”.

Lord Hodgson “supported the ‘direction of travel’ of the [Consultation Paper]”. He was guided by three broad principles in providing his response.

1. The need to maintain “public trust and confidence” in the sector, which “requires a regulatory regime to prevent malfeasance. But it also requires a regulatory regime that is proportionate. A regulatory regime whose administrative costs swallow up a large part of the benefit is inappropriate.”

2. That donors give to charities to ‘do’ something; people “want their chosen charity to be taking action – not driven by regulatory paralysis into the shoals of inactivity”. He suggested that, as far as possible, Charity Commission powers should be powers to review or object to a decision after it has been made rather than to require prior permission.

3. “Trustees need to be given as transparent a regulatory regime as possible … phrases like ‘cy-près’ and ‘permanent endowment’ can have a ‘chilling effect’ on trustees especially when banded about freely by advisers who themselves do not always seem to have a grasp of all the technical details”.

WCVA said that the way in which charities are required to operate has altered recently, and it was therefore “keen to remove inefficient and unduly complex legal provisions that impose unnecessary administrative and financial burdens on charities. Therefore we welcome proposals to amend the law, ensuring that it is both clearer and more relevant to those organisations that are required to abide by it, but also providing sufficient protection to prevent abuse.”

The Wellcome Trust said “we would like to express our general support for the principle of clarifying and simplifying the legal framework wherever possible, as reflected by the proposals in this consultation”.

2.6 The joint response of NCVO, ACF, CFG and IoF\(^3\) supported “the aim of removing unnecessary administrative and financial burdens faced by charities because of inefficient and unduly complex law”, but suggested that the policy and regulatory agenda had “considerably shifted” since the Lord Hodgson’s Report\(^4\) and that there was “an increasing awareness of the need for safeguards to protect charities and ensure trustees make the right decisions”. It therefore aimed “to strike the balance between reducing any unnecessary bureaucracy, time and expense involved in operating charities, with the need to ensure that the legal and regulatory framework in which they operate promotes a high level of public trust and confidence in the sector”.\(^5\)

2.7 The National Trust said “we recognise the very special regard in which the charitable sector is held and the public benefit that flows from its work. In our view the protection of such public benefit necessitates appropriate regulatory requirements”.

2.8 The Welsh Government had specific concerns about our proposals relating to higher education institutions and charity land, but was “content that the majority of the proposals under consultation represent an opportunity to remove some of the more unwieldy requirements placed on charities and their trustees and will also strengthen the regulatory arm of the Charity Commission for England and Wales”.

**FINANCIAL THRESHOLDS**

**Arbitrary results from thresholds**

2.9 The CLA said that “the rationale for choosing an income threshold is not always clear”. The assumption tends to be that it limits the provision to small charities, but an income threshold does not exclude a charity with “very significant assets which yield little or no income”. They can also be variable in their application, with the same charity falling under the threshold in one year and above the next, or a charity might fall under the threshold fortuitously by shortening its financial year.

**Adjusting the thresholds to reflect inflation**

2.10 Lord Hodgson noted that “wherever the statutes have specific monetary amounts there is the challenge of declining ‘value’. … It would be helpful for an automatic inflation adjuster to be built in to the regulations.” He also said that it would be helpful if existing powers to increase values in the legislation could be made more widely known.

2.11 The CLA made similar comments and said that financial thresholds “tend not to be reviewed and updated with any regularity, or at all” even when there is a power to change thresholds by secondary legislation. Accordingly, if any threshold is introduced, it will be “in effect, set in stone”.

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\(^3\) National Council for Voluntary Organisations, Association of Charitable Foundations, Charity Finance Group and Institute of Fundraising.


\(^5\) Bates Wells Braithwaite made the same comments.
2.12 We discuss these comments about the financial thresholds in Chapter 3 of the Report.

RESOLUTIONS OF MEMBERS

2.13 Our proposals concerning Royal Charter and statutory charities, and our proposals concerning resolutions under section 275 to change purposes, included conditions requiring resolutions of the trustees to be approved by the members of the charity. Various comments were made about requiring resolutions of members of a charity. Some charities – such as universities or schools – have a very large, and perhaps uncertain (and uncontactable) body of members. There was concern about such charities having to obtain the agreement of their members in respect of our proposals (though it is noteworthy that the requirement for a members’ resolution already exists under section 280).

2.14 Two of our recommendations require trustees’ resolutions to be approved by the members of a charity. Our requirement for a resolution of the members is intended to capture situations where the charity has a membership which is involved in the governance of the charity, for example by electing trustees. We have therefore confined the requirement for a members’ resolution to those charities with a membership that has voting rights under the charity’s governing document.

GUIDANCE

2.15 Guidance was generally seen as a good thing, but some consultees expressed concerns about it becoming “de facto” law without Parliamentary oversight, and said that it can be (or can be interpreted as being) inflexible.

2.16 The CLA suggested that any new guidance arising from new legislation should be produced in draft and consulted upon. We agree that this would be good practice.

CHARITY COMMISSION RESOURCES

2.17 Consultees expressed concerns about the reduction in the Charity Commission’s resources; some said that it had affected the service provided by the Commission, and others said that cost savings for the Commission did not, in themselves, justify deregulation. The National Trust said:

We note that much of the focus of the consultation is on reducing regulatory burdens on charities. We recognise that this burden can be time consuming and a review is welcome but we are unclear whether the unacknowledged corresponding aim of the proposals is to reduce the burden on the Charity Commission at a time of increasing budgetary pressures. If this is the case, we would question whether such an aim is appropriate given the undoubted social benefit of maintaining public confidence in charities as bodies which exist to deliver public benefit, often over the long term.

6 The expanded power for unincorporated charities to amend their governing documents (Report, para 4.121) and the default amendment power for Royal Charter charities (Report, para 5.56).

7 Bircham Dyson Bell LLP; similar comments were made by University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Independent Schools Council.
Without in any way removing from trustees the duty to carry out their roles properly, we consider that it is important that the legal framework for charities provides for the long-term interests of the public to be clearly articulated by an independent person or body with a sound understanding of the sector and the principles which underlie it. With its breadth of experience and depth of knowledge it would appear to us that the Charity Commission, if it is resourced properly, is ideally placed to provide this.

In providing our response we have therefore not taken as justification for the proposals the mere fact that it would reduce the Charity Commission’s workload, rather where the justification is that it would reduce the burden on charities, we have tried to be realistic about any countervailing risks that less independent involvement may have.

2.18 The CLA also expressed concerns about the Charity Commission’s resources. They said the Charity Commission was different from other regulators and registrars, since it has facilitative powers and quasi-court powers (such as the power to make schemes), it must make legal decisions concerning whether or not an organisation is a charity, its regulatory decisions involve judgment calls, and the sector is extremely broad and largely run by volunteers. They thought the Commission’s emphasis on its enforcement and compliance role was unfortunate and disproportionate, since “deliberate abuse is a tiny fraction of the sector”. “We believe that the more important role of the Commission overall is to help the overwhelming majority of well-meaning volunteer charity trustees to understand and comply with their duties. … we would encourage an emphasis on the maintenance of good quality guidance and on ensuring that such guidance is well publicised and easily accessible.” They had detailed concerns about how difficult it was to find and navigate the Charity Commission’s part of the new “gov.uk” website. They were firmly of the view that this needed to be addressed, at least by re-introducing a numerical list of all Charity Commission guidance.

2.19 They said these concerns had implications for our project: reform will need to be publicised, guidance will need to be updated and easily accessible to the public, and any new facilitative regime will need to be implemented, all of which requires resources.

2.20 We can see great value in the Charity Commission being properly resourced for the benefit of charities and the public. The Charity Commission’s annual report for 2014-2015 stated:

Our primary risk this year, as in the previous year, was the impact of our funding on our capacity to deliver risk based regulation. Significant year-on-year reductions in government funding have meant that we now operate in real terms with 50% of the funding we had in 2007-08. Our staff are dedicated to delivering more with diminishing resources, but choices have to be made on priorities.8

2.21 The Chair of the Charity Commission, William Shawcross, told Public Administration and Constitutional Affairs Committee that “the Charity Commission does not have

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enough money” and that “it is quite difficult for us to do our job as well as we would like to”.

Our budget is £20 million a year approximately, and if we were cut down by salami-slicing of financial reviews year by year to £15 million over the next five years, we wouldn’t be able to do the job at all.9

2.22 We cannot comment on the Charity Commission’s resources. But we must acknowledge the practical reality of the Commission’s reduced resources. Our recommendations are not guided by an objective of saving the Charity Commission money, but rather by the objective of setting an appropriate regulatory framework for charities balancing the various competing interests set out in paragraph 2.2 above. Whilst we have kept in mind the impact of our recommendations on the Charity Commission’s workload, it has not been determinative.

2.23 The strain on Charity Commission resources was raised by consultees in response to most chapters of the Consultation Paper. We do not repeat those comments in each chapter. Taken as a whole, we believe that our recommendations will provide costs savings both to charities and to the Charity Commission.10

FURTHER CONSULTATION

2.24 The CLA said that, given the breadth of the consultation, it was concerned that there were some issues that it had not considered in sufficient depth, and they suggested further consultation in some areas. We have had subsequent meetings with members of the CLA working group to discuss some of these topics.


Chapter 3: Issues outside our terms of reference

3.1 Some consultees raised points that went beyond our terms of reference. The CLA adopted a “clean sheet of paper” approach to our proposals, considering what would be appropriate if starting from scratch. That resulted in their responses going beyond the scope of some of the questions. We have, where possible, addressed some of these points in our final recommendations, where we felt able to do so without further consultation. On other issues, the CLA raised wider questions for consideration in the future, if not within this project. We will pass these comments to the Department for Digital, Culture, Media and Sport and the Charity Commission.

(1) *The procedures relating to CIOs.* We summarise the CLA’s comments about CIOs in Chapter 6); we make recommendations in respect of some issues, but others fall outside our terms of reference.

(2) *The duties of members of a charity.* There is an inconsistency between the statutory duty under section 220 on members of a CIO when they exercise their powers, and the absence of such a duty on the members of a charitable company. The CLA thought that there might be good reasons for this inconsistency and that the status quo should be preserved until more is understood about how the section 220 duty works in practice.

(3) *Defined benefit pensions schemes.* Problems can arise when charities restructure or incorporate (or even when the trustees of an unincorporated charity change) as this can trigger a “section 75 pensions debt”. The response is sometimes to restructure in a particular way (for example, by appointing a sole corporate trustee, rather than a full incorporation), so the pension “tail” wags the restructuring “dog”. The CLA thought there should be “better procedures for enabling proper charity reorganisation … with no attempt to strip away assets for the pension liabilities”. Government issued a call for evidence in respect of section 75 pension debts in 2015 and subsequently consulted on draft regulations in 2017.

(4) *Permanent endowment.* The CLA said that permanent endowment was not well understood. We comment on some of the CLA’s general concerns in Chapter 8 of the Report.

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(5) *The extent to which statutory powers override existing rights.* This can be uncertain, for example, whether there is a difference between a right of veto and a requirement for unanimity.

(6) *Cy-près.* A review of cy-près was suggested, though the necessity for this would be reduced if the CLA’s proposals concerning section 275 and 280 were adopted. Similarly, Bircham Dyson Bell made criticisms of the cy-près occasions, which we discuss in Chapter 5.

3.2 Bircham Dyson Bell LLP added a further suggestion, namely enabling a charity on incorporation to retain the original charity registration number.

3.3 HEFCE\(^{14}\) noted that the receivership provisions of the Insolvency Act did not apply to higher education corporations\(^{15}\), yet they apply to companies and to statutory and Royal Charter bodies, suggesting this anomaly should be addressed.

3.4 Two consultees criticised Schedule 6 to the Charities Act 2011 which sets out the decisions of the Charity Commission that can be appealed to the Charity Tribunal.\(^{16}\) We make a recommendation that Schedule 6 be reviewed in the Report.\(^{17}\)

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\(^{14}\) Higher Education Funding Council for England.

\(^{15}\) See Report, para 5.127.

\(^{16}\) Patrick Ryan; Lord Hodgson.

\(^{17}\) Report, para 9.40.
Chapter 4: Charities incorporated by statute or by Royal Charter: changing purposes and amending governing documents

INTRODUCTION

4.1 57 consultees commented on the issues discussed in Chapter 4 of the Consultation Paper. Responses tended to focus on the amendment process for Royal Charter charities rather than statutory charities.

4.2 Prof Gareth Morgan said that “there is no doubt that improvements are needed in the current arrangements”. Some consultees expressly endorsed our statement in the Consultation Paper that “there is no need or justification for making it more difficult for charities governed by statute or Royal Charter to alter their constitutions”. Lord Hodgson supported the objectives set out in paragraph 4.22 of the Consultation Paper and our proposals that gave effect to them. “The law imposes general duties and responsibilities on trustees (of whatever variety of charity) and they should as far as possible be left to discharge them without being asked to jump through further administrative hoops.”

The problem of out-dated governing documents

4.3 Francesca Quint said that “In my experience, charities governed by Royal Charter often have very out-of-date administrative provisions simply because of the daunting process of effecting change and it would be beneficial to make it much simpler and cheaper to modernise them.” Similarly, the CLA were concerned that “charities which should properly seek to amend their constitutions are currently put off from doing so because of the view that it will be too difficult and expensive”; they gave the example of a charity whose constitution limited its beneficiaries to one parent, and which the

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18 National Churches Trust; City of London Corporation; Institution of Civil Engineers; Francesca Quint; Geldards LLP; Royal Archaeological Institute; Conference of Colleges Legal Panel, on behalf of the Colleges of the University of Oxford ("the Oxford Colleges"); Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Colleges in the University of Cambridge ("the Cambridge Colleges"); OSCR; Association of the Heads of University Administration ("AHUA"); the Royal Photographic Society; Pinsent Masons LLP; the Charity Law and Policy Unit at the University of Liverpool ("the University of Liverpool CL&PU"); Wales Council for Voluntary Action ("WCVA"); Lord Hodgson of Astley Abbots; University of Durham; Churches’ Legislation Advisory Service; University of Warwick; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braine; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission for England and Wales ("Charity Commission"); Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link Consultancy Ltd ("Legacy Link"); University of Cambridge; Lawyers in Charities (LinC); Department for Business, Innovation and Skills; Open University; University of Oxford; Imperial College of Science, Technology and Medicine ("Imperial College London"); Institute of Directors; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; William Henderson; General Medical Council; RSPCA; Charities’ Property Association; Keith Lawrey, whose response was supported by the Engineering Council; the Methodist Church; Privy Council Office; Higher Education Funding Council for England ("HEFCE"); NCVO; ACF; CFG; IoF; Welsh Government.

19 National Churches Trust; Francesca Quint; Plymouth University. See Consultation Paper, para 4.41.
trustees wanted to extend to both parents but they were reluctant to go through the amendment process.

**Royal Charter charities: the extent of the problem**

4.4 The Privy Council Office (“the PCO”) questioned whether there was evidence that the perceived problems or delays for Chartered charities were on a scale that warrant statutory intervention. It only deals with two or three new Charters each year, and had dealt with just 34 Charter amendments in the last year. “In the majority of cases, where feedback is received from the chartered bodies, it is invariably positive on all aspects of our service. The only process “delays” we are aware of are as a result of a chartered charity proposing amendments that are perhaps inappropriate or unacceptable to the Privy Council’s advisers (e.g. failing to comply with current legislation or attempting to introduce membership categories without appropriate level of skills), not as a consequence of the approval process.”

4.5 The PCO said that, whilst statute can make provision in respect of matters regulated by the prerogative, “once the prerogative is displaced by statute it cannot be revived. So it would be a fairly major constitutional shift – which begs the question of how much of a problem it is in the first place.”

**Royal Charter charities: the role of the Privy Council**

4.6 Stone King LLP acknowledged “the Privy Council’s expertise and assistance” with constitutional amendments by Royal Charter charities but said “charities feel that the procedure is complicated and lengthy and is bureaucratic in requiring the involvement of various public bodies (even though the PCO and Charity Commission are comparatively efficient in practice)” as well as being costly. “It is therefore an attractive proposition to make the process easier. We do not consider that the Privy Council or Parliament need to be involved when charities are seeking to make minor amendments to their constitutions but that their involvement is necessary where more fundamental changes are being proposed as this is where their expertise and regulatory function would be more valuable.”

4.7 The Institute of Chartered Secretaries and Administrators reported feedback from its members in Royal Charter charities.

1. There is respect for “the prestige and status of being a Royal Charter body and the cache it brings” and a desire to protect that status.

2. Given the Privy Council’s role in seeking comments on proposals from other public bodies, “the time it takes for minor amendments to be approved appears to be disproportionate to the complexity of a response. This is particularly so where those amendments reflect good practice in other organisations”.

3. There is a perceived reluctance to see some provisions moved to bye-laws and regulations.

4. Experiences of dealing with the Privy Council were “mixed, with some offering nothing but praise and others highlighting inconsistencies and unexplained delays”. “The ability of [its] advisers to provide expert guidance and experience to charities should be paramount as it will be invaluable to Royal Charter
charities … At times, the experience of some Royal Charter charities is that the
decision-making by the [Privy] Council’s advisers can be arbitrary and lacking in
consistency.”

(5) “It would be helpful for [the Privy Council] to publicise and adhere to a service
standard regarding the speed of their responses”.

4.8 The CLA reported “mixed results regarding how the current regimes work in practice.
Some find the process tends to work well, noting that the Privy Council officers are
contactable to discuss matters and tend to be responsive. Others report difficulties,
with some finding the process overall can be slow, expensive and applied
inconsistently.” They noted that “the process can become a political process, rather
than a legal process” for example with Government departments and public bodies
playing objections against one another, and they queried whether the PCO scrutinised
comments that were received from advisory bodies.

4.9 The Institute of Directors defended the role of the Privy Council:

The role played by the Privy Council seems to be largely misunderstood and a
significant amount of folklore seems to have developed around their role and the
perception has developed that they are blockers and stallers of progress when
changing Charters and By-laws. We do not have evidence of this.

The Privy Council provide guidance on changing Charters and by-laws on their
website which gives a clear overview of the process; this is also backed up with
advice in person (which is invaluable and advertised on the website). It is an
important part of any change process – particularly changes to the governing
documents – to identify the bodies which need to be included in the decision making
process and to map these out in advance … . Many people do not recognise this as
part of the planning process when changing governing documents and it seems that
this lack of understanding is the cause of the folklore. It is not necessarily Privy
Council communication which is at fault here as they cannot prescribe for individual
requirements within different governing documents.

Aside from the approval process, the identification of the stakeholders interested in
the decisions is vital to ensure that they are fully on board with the proposed
amendments and therefore this is a necessary piece of consultation which needs to
be managed in any case.

4.10 The Privy Council Office expressed its concern that it had not been consulted during
the production of the Hodgson Report so was unable “to clarify many of the
misconceptions and perceived problems in relation to the Charter amendment
process”.

The special status of statutory and Royal Charter charities

4.11 Stone King LLP noted the “range of charities set up by Royal Charter – from charities
set up centuries ago, which might not be set up in the same way today given the
range of options now available, through to Royal Charter bodies set up in the last few
years, where there has been an active decision to choose a Royal Charter ‘vehicle’
with the ability to regulate it more tightly. For that reason, we do not consider that the
restrictions on amendments to Royal Charter bodies’ constitutions should be lifted to the extent that has occurred for charitable companies (which is effectively now limited to section 198 of the Charities Act 2011)."

**Charitable and non-charitable Royal Charter bodies**

4.12 The Cambridge Colleges noted that there were “other, non-charitable, corporations established by Royal Charter and there seems every reason to reform the process for the amendment of charters in a way that applies to all”. Keith Lawrey said that a dual system “may well result in inconsistency”. Similar comments were made by Bates Wells Braithwaite. We cannot address this in our project, which is limited to charity law. When considering our recommendations for reform, however, Government might decide that our recommendations could be extended to other Charter bodies.

4.13 The Privy Council Office noted a further complexity caused by the devolution of charity law in circumstances where Royal Charters operate across the United Kingdom. There would be “three tiers of chartered bodies with differing governance approval arrangements”:

1. Chartered bodies that are not charities;
2. Chartered bodies that are charities in England and Wales (where our proposed reforms would apply); and
3. Chartered bodies that are charities in Scotland\(^20\) (where our proposed reforms would not apply).

4.14 This would create “a real danger of ‘un-levelling the playing field’ for chartered bodies”.

**Different categories of Royal Charter charity**

4.15 The Privy Council Office said that Royal Charter charities can be divided, broadly, into two groups: (1) “those which can be described loosely as benevolent institutions”, and (2) “professional and management institutions which, whilst operating in the public good, often exist to regulate professions”. "Whilst the streamlining and deregulation of certain processes and practices for benevolent institutions might be supported by the Privy Council Office, this support would not necessarily extend to, or be appropriate for, all chartered charities."

4.16 Similarly, Keith Lawrey separated out professional institutions. He reported that a former Clerk to the Privy Council had proposed a fast-track route for petitioning for Royal Charters for organisations that did not exercise regulatory control over their members, and thought that this suggestion could be revived. “On the other hand, professional institutions are concerned with establishing standards of competence to begin and continue professional practice (including the imposition upon their members of codes of professional competence, requirements for continuing professional development, and the holding of enquiries into complaints about professional incompetence).” These are “important regulatory matters” of “considerable public interest” for which the scrutiny of the Privy Council is important, and they are not

\(^{20}\) Or Northern Ireland, since charity law is devolved to Scotland and Northern Ireland.
matters of interest for the Charity Commission. Changes to these matters require oversight and, whilst this might cause delays, "the Privy Council Office is remarkably efficient in seeking comments from its advisers". Any delays "are caused by the inability of one or more of the advisers to respond as swiftly as petitioners might wish" and this "will not be addressed simply by changing the organisation that requests the advice". Dispensing with these advisers may result in a quicker process, "but without the caveats, restrictions or even rejections that currently and properly follow the serious consideration given by advisers".

4.17 Many other consultees commented on the wide range of Royal Charter charities when considering whether it would be possible to devise a list of minor amendments that would be appropriate for all such charities: see, further, paragraphs 4.76 to 4.79.

Written records

4.18 Keith Lawrey emphasised "the importance of re-printing and sealing altered Charters (and their bye-laws). Printing of Charters and Supplemental Charters is a significant cost but it is vital that there should be definitive printed copies of the latest versions for legal purposes."

Scotland

4.19 The Scottish Charity Regulator ("OSCR") said that there were no provisions in Scotland comparable to section 73 (for statutory charities) or section 68 (for Royal Charter charities) of the Charities Act 2011. Royal Charter charities must ask the PCO to make changes to their Charter, and PCO will seek OSCR's views as part of that process. OSCR thought that our proposals would affect charities established in England & Wales but registered both in England & Wales and in Scotland. It queried whether our proposals would also affect charities established and registered in Scotland. In either case, OSCR was supportive of our proposals.

Section 73 schemes

4.20 William Henderson referred to the power of the Charity Commission (under section 73(5)) to amend a scheme that has been made under section 73, and said it would be helpful to clarify "whether that power only extends to a provision included by the s 73 scheme or extends to the whole constitution however minor the s 73 amendment had been". We addressed the scope of the section 73(5) power in the Consultation Paper, and we comment on this point in the Report.

Scope of section 280

4.21 Francesca Quint suggested that, where an Act of Parliament incorporates a charity's governing body, but not the charity itself, section 280 of the Charities Act 2011 can already be used to amend the Act since it applies to any "unincorporated charity", even if governed by Act (and presumably Royal Charter). Whilst we can see the logic of the argument, consultees' responses suggest that this is not a widely

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21 See Report, Ch 5, for an explanation of these sections.
22 Consultation Paper, para 3.43, and n 76.
23 Report, para 5.6.
24 See Report, Ch 4, for an explanation of the power in section 280.
accepted view – or at least that charities might be cautious about seeking to rely on it. We comment on this point in the Report.  

**RESPONSES TO INDIVIDUAL QUESTIONS**

4.22 We now consider consultees’ responses to the individual questions in Chapter 4 of the Consultation Paper.

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<th>Consultation Question 1.</th>
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<td>We provisionally propose that, subject to paragraphs 4.31 and 4.32 below, the Royal Charter and bye-laws of Royal Charter charities should be deemed by statute to include a power for any provision of the Royal Charter or bye-laws to be amended, subject to any amendment being approved by the Privy Council.</td>
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<td>Do consultees agree?</td>
<td>[Consultation Paper, paragraph 4.30]</td>
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4.23 32 consultees answered this question:

1. 31 agreed;
2. none disagreed; and
3. 1 expressed other views.

**4.24** Bates Wells Braithwaite had not encountered many Royal Charter charities without an express amendment power. Nevertheless, Veale Wasbrough Vizards LLP thought this would help older charities “who may have been put off from amending their charters by the lack of an appropriate power of amendment”. Similarly, Anthony Collins

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25 Report, para 5.4, n 220.

26 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; Lord Hodgson; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; the Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

27 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Pinsent Masons LLP; the University of Liverpool CL&PU; Lord Hodgson; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission (which had no objection); Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA (which had no objection to the proposal); Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

28 The Cambridge Colleges.
Solicitors LLP said this would create a “level playing field” between those, generally more recent, charities with an express power, and those, generally older, charities without such a power. “The need for a supplemental Charter, sometimes for relatively minor amendments, is disproportionate and creates (sometimes significant) additional costs as well as making the amendment process much more time-consuming.”

4.25 The Privy Council Office agreed with the proposal, which “could reduce the time taken to give effect [to] any proposed changes by removing the currently unavoidable need for a Supplemental Charter and the consequential production costs of around £6,000.”

Charter and bye-laws

4.26 The Cambridge Colleges agreed that Charters should be deemed to include a provision permitting the Privy Council to approve any amendment, but they considered that the equivalent proposal for bye-laws was “unprincipled and unnecessary”. They said that bye-laws will have been created (i) by the Charter, (ii) under the Charter, or (iii) by some other person, such as the charity’s founder. A deemed power to amend the Charter would cater for (i) (because the bye-laws form part of the Charter) and for (ii) (because the Charter may be amended to permit a process for the amendment of the bye-laws). “However in case (iii) the proposal interferes with other persons who possess the authority to amend the bye-laws (assuming that the charity trustees do not have that power themselves). This is a point affecting the Colleges, the Statutes of which are subject to Parliamentary authority, under the [Universities of Oxford and Cambridge Act 1923], and not that of the Privy Council.”

Qualifications to the power

4.27 The CLA agreed with the proposal, but thought that third party rights should be protected so that any requirement for a third party to approve an amendment should apply to the new power.

4.28 The Privy Council Office said that charities should retain the right to petition for a Supplemental Charter if they want to, and that only the numbered articles, and not the preamble paragraphs, of a Charter should be capable of amendment; “when a chartered body undergoes a significant change, such as a change of name or a merger with another body, the historical narrative in the preamble should be updated to reflect the change, and this is only achievable via the grant of a supplemental Charter.”

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29 The Institute of Chartered Secretaries and Administrators also thought that “for consistency and clarity, it might be advantageous to legislate that the statutory power applies to the Royal Charter rather than both the Charter and bye-laws”.

30 With whom Bircham Dyson Bell LLP agreed. The CLA’s principal suggestion was to permit all but regulated alterations though an expedited procedure. On this general approach, the power proposed here would only be relevant to those charities without an express amendment power wishing to make “regulated alterations”.

31 They thought that the Charity Commission should have the power to override this qualification, for example, where the third party’s involvement was no longer appropriate or the third party had ceased to exist.

32 Similarly, the University of Birmingham said that use of the new power should be optional.
Consultation Question 2.

We provisionally propose that the power of amendment should be exercisable:

(1) by a resolution of at least two-thirds of the trustees who vote on the resolution; and

(2) if the charity has a separate body of members, by a further resolution of at least two-thirds of the members who vote on the resolution at a general meeting.

Do consultees agree?

[Consultation Paper, paragraph 4.31]

4.29 30 consultees answered this question:\(^{33}\)

(1) 21 agreed;\(^{34}\)
(2) 3 disagreed;\(^{35}\) and
(3) 6 agreed that trustees’ and members’ resolutions should be required but suggested other majorities.\(^{36}\)

4.30 The University of Liverpool CL&PU thought this “an appropriate safeguard with an effective balance between oversight and empowerment”.

Alternative majorities

4.31 Francesca Quint suggested that, if Charity Commission and Privy Council consent was required for “regulated alterations”, a simple majority of the trustees would be sufficient (by analogy with section 280).

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\(^{33}\) Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

\(^{34}\) Institution of Civil Engineers; Anthony Collins Solicitors LLP; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Stone King LLP; Charity Commission (which had no objection); Cancer Research UK; Legacy Link; Lawyers in Charities; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA (which had no objection to the proposal); Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

\(^{35}\) The Cambridge Colleges; Independent Schools Council; Society for Radiological Protection.

\(^{36}\) Francesca Quint; Geldards LLP; Plymouth University; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP.
4.32 Bates Wells Braithwaite suggested a simple majority of trustees, but agreed with a two-thirds resolution of the members as this would be consistent with the express provisions in some of the Royal Charters that they had seen.

4.33 The CLA, Bircham Dyson Bell LLP and Plymouth University suggested a resolution by a bare majority of the trustees supported by 75% of the members, in line with special resolutions for charitable companies.

4.34 Geldards LLP suggested that, for consistency with ordinary and special resolutions passed by charitable companies, the requirements should be:

1. in the case of a charity with no separate body of members, a resolution of 75% of the trustees; and

2. in the case of a charity with a separate body of members, a simple majority of the trustees and a further resolution of 75% of the members.

4.35 Stone King LLP acknowledged that the two-thirds threshold was slightly lower than for charitable companies but nevertheless thought it appropriate as it “picks up a common thread through other structures, such as the threshold required to amend trust deeds and amendment to the rules of unincorporated associations”. Similarly, Veale Wasbrough Vizards LLP agreed with a two-thirds resolution of the trustees as consistent with sections 275 and 280, and slightly more flexible than special resolutions for charitable companies.

The need for a members’ resolution

4.36 Some consultees37 agreed with a requirement for a resolution of two-thirds of the trustees but questioned the need, or wisdom, of requiring a members’ resolution. The Society for Radiological Protection thought it unnecessary since the members had elected the trustees. Veale Wasbrough Vizards LLP said a members’ resolution was “logical” but thought that “from a practical perspective, obtaining member consent can add significantly to the cost and complexity of the process. Introducing this requirement may therefore have the practical impact of negating some of the administrative benefits that the new power is intended to provide.”

4.37 The Cambridge Colleges thought this proposal “overlooked the potential diversity of the constitutional structure of Royal Charter charities”. “The notion of ‘members’ is undefined, and there may be different classes of membership, some of which have a peripheral or non-existent role in governance of the charity.” They said that “the key issue in governance terms is the definition of the persons authorised to take decisions for the body”. However, “the actual governance arrangements for corporations established by Royal Charter vary one from another and it is difficult to see how an overarching statutory process for the amendment of the Charter can properly reflect the constitutional processes of every chartered corporation (nor, perhaps, why it is thought desirable to depart from the corporation’s established procedure).” The same applies to bye-laws; the corporation’s “decision-makers have implied authority to do

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37 Society for Radiological Protection; Veale Wasbrough Vizards LLP; the Cambridge Colleges; Independent Schools Council.
whatever may be necessary to carry forward its purposes” including making, varying
and revoking general rules, subject to any constraints of the Charter.

4.38 The Independent Schools Council accepted that some Royal Charter charities would
need a mandate from its members, but for schools with a separate body of members –
frequently ex-pupils – involving them in constitutional change would be time-
consuming and expensive. Furthermore, the members are “often removed from the
governance and therefore not best placed to assess what is in the school’s best
interests”.

Consultation Question 3.

We provisionally propose that the power of amendment should not apply to a charity’s
Royal Charter or bye-laws if those documents already make express provision for
their amendment.

Do consultees agree?

[Consultation Paper, paragraph 4.32]

4.39 31 consultees answered this question:

(1) 23 agreed;
(2) 6 disagreed; and
(3) 2 expressed other views.

4.40 The Institute of Chartered Secretaries and Administrators noted that existing
amendment powers might require a lower threshold for amendments. It thought that
such tailored powers should be respected as their reasons for inclusion “might have
been intrinsic to the values and representation of the charity and therefore still
relevant”.

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38 Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Charities’ Property Association; Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

39 Institution of Civil Engineers; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; Stone King LLP; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA (which had no objection to the proposal); Charities’ Property Association; Keith Lawrey; Privy Council Office; HEFCE; Welsh Government.

40 Geldards LLP; CLA; Bircham Dyson Bell LLP; Anthony Collins Solicitors LLP; Plymouth University; Charity Commission.

41 The University of Liverpool CL&PU; Prof Gareth Morgan.
4.41 Cancer Research UK thought that trustees would be confused if they had a choice between the statutory power and their express amendment power. Veale Wasbrough Vizards LLP agreed with this proposal, but noted that it was inconsistent with section 280 for unincorporated charities.

4.42 Prof Gareth Morgan said that, if an existing amendment power only applies to some provisions in a governing document, the new statutory power should be available in respect of other provisions.

Operation as an alternative to, or instead of, existing amendment powers

4.43 Whilst most consultees agreed with us that, for the reasons in paragraph 4.29 of the Consultation Paper, this amendment power should only be available where the Charter and bye-laws do not already make express provision for their amendment, a significant minority of consultees thought that it should be available as an alternative to (or even replace) existing powers of amendment.

4.44 Geldards LLP thought the power “should override any existing provisions … to ensure a consistent approach to all major changes”. Anthony Collins Solicitors LLP noted that, if a very high consensus is required, “relatively small groups of trustees or members can block change, which can be very detrimental to a charity”. They therefore suggested that the new power should override any contrary provisions in a Royal Charter or bye-laws.

4.45 The University of Liverpool CL&PU thought that “in the spirit of enablement” the new statutory amendment power should also be available where the Charter contains an express power that is subject to more onerous conditions. Plymouth University thought that the power of amendment should be available to all charities so that they “stand on an equal footing”. It described the differences as “largely historic anomalies”. But it said that charities should be able to opt out of the new statutory power and to rely on its own express powers instead.

4.46 The Charity Commission and CLA thought the power should be an alternative to existing express powers, as under section 280. The CLA considered, however, that any requirements for third party consent to the exercise of an express amendment power should continue to apply to the exercise of the new power, and acknowledged that it might be difficult to define a protected third party right for these purposes (see paragraph 4.27 above).

4.47 Stone King thought it “rather strange” that the power would only apply where there was no existing amendment power. “In theory, this could be giving greater flexibility to a charity which previously had no power of amendment over a charity with an existing (but more stringent) power of amendment….”

4.48 Bircham Dyson Bell LLP disagreed with the assumption in paragraph 4.29 of the Consultation Paper that the inclusion of an express amendment power would have been carefully framed to suit the charity; “it could be assumed that it was a deliberate

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42 Though they went on to say that “the power should set the minimum requirements allowing charities to increase the requirements in their own bye-laws if they so wish”, which is more consistent with our proposal that any conditions attached to existing amendment provisions should continue to apply (rather than being replaced with the new default amendment power).
decision to omit an express power of amendment, with the Charter being framed accordingly”. They thought excluding the statutory power where there was an express power was “illogical”, the result would be “random”, and that our proposal “cherry-picked” some aspects of section 280 but not its main feature, namely that it applies to all unincorporated charities including those with an express amendment power. They thought that the requirement for Privy Council approval would provide adequate safeguards.

4.49 They accepted that, by extending the statutory power to all charities, there would need to be consideration as to how the statutory power applied to charities with express powers, but they thought this should be left to the discretion of the Privy Council. Any relevant procedural restrictions in an express power, such as a requirement for unanimity or third party consent, would guide the Privy Council’s decision about whether to give consent under the statutory power. “In general, we would expect the Privy Council to make obtaining such consent [as is required by an express power] a condition of its approval, unless (due to the particular terms of the consent requirement or because of evidence that it was impossible or impractical) it considered it appropriate not to attach such a condition.”

Consultation Question 4.

We invite the views of consultees as to whether Royal Charter charities would find it helpful for the Privy Council and Charity Commission to issue guidance concerning the types of provision that they consider to be appropriate for the Royal Charter, byelaws and regulations, to form a basis for Royal Charter charities to seek amendments to their governing documents.

[Consultation Paper, paragraph 4.37]

4.50 34 consultees answered this question:43

(1) 29 thought that such guidance would be helpful;44

(2) 2 did not;45 and

43 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; OSCR; AHUA; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; University of Warwick; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Keith Lawrey; Privy Council Office; HEFCE.

44 Institution of Civil Engineers; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; OSCR; AHUA; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; University of Warwick; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Keith Lawrey; HEFCE.
(3) 3 expressed other views.\textsuperscript{46}

4.51 Consultees’ comments on guidance fell into two categories. First, consultees commented on the process for amending Royal Charters; this was addressed in our proposal in paragraph 4.91 of the Consultation Paper. The PCO already provides guidance on drafting proposed Charter amendments. Some consultees said this guidance was helpful; others said it could be improved. Second, consultees commented on whether guidance should address the distribution of provisions between the Charter, bye-laws and regulations; this concerns questions of good governance and the substance of amendments. It is this second point with which this question was concerned.

4.52 The Charity Commission said it was happy to assist in providing such guidance.

4.53 The CLA and Bircham Dyson Bell LLP thought that guidance on the amendment process itself was a higher priority than guidance on re-allocating provisions. Similarly, the Institute of Chartered Secretaries and Administrators did not think that guidance on re-allocation was a high priority given the relatively low number of Royal Charter charities that it would effect and the funding constraints of the Charity Commission.

Guidance would be helpful

4.54 Anthony Collins Solicitors LLP thought this “could facilitate a more standardised approach to Royal Charters and bye-laws.” “There is, perhaps, a small risk that this could lead to a flood of applications for amendments although, given that the amendment process will remain fairly time-consuming and costly, it is perhaps more likely that charities would wait until there is a particular need for a change to its governing documents and then take the opportunity to make more wholesale changes in line with this guidance.”

4.55 University College London said such guidance “would be particularly helpful in assisting Royal Charter bodies that are looking to undertake a more substantial overhaul of their governing documents, and in particular moving provisions between different parts of those documents. … having more detailed and more clearly understood and available guidance can only help to facilitate the amendment process”.

4.56 Plymouth University thought such guidance would be helpful, and that it would be helpful for charities to have a model Charter, bye-laws and regulations to refer to. The CLA thought “there would need to be a number of different models for different types of Royal Charter charities” for example, to distinguish between those charities with and without a membership. They also thought that model documents would be helpful. Stone King LLP thought model bye-laws might be helpful, but concluded that they might reduce flexibility by being treated as prescriptive; “one of the advantages of a Royal Charter body over a charitable company is that company law (mainly) does not apply and bodies are accordingly much freer to constitute themselves as they consider fit”.

\textsuperscript{45} Francesca Quint; University of Birmingham.

\textsuperscript{46} The Royal Photographic Society; Charity Commission; Privy Council Office.
4.57 As noted in paragraph 4.15 above, the Privy Council Office distinguished between benevolent institutions and professional bodies. “For benevolent institutions, the Privy Council Office agrees that it may be appropriate for the Charity Commission to issue guidance concerning the types of provisions that they consider to be appropriate for the various levels of governance. However, given the wide-ranging remits and sizes of the remaining bodies, we think that it would be very difficult to produce general guidance of any real practical use that could meet those different requirements.” Guidance should not be extended to other types of chartered charities “without further consultation with government corporate governance experts”.

4.58 HEFCE noted that many Royal Charter charities are exempt charities with principal regulators, and suggested that the Charity Commission should have a duty to consult with the various principal regulators in preparing such guidance.

Higher education institutions (“HEIs”)

4.59 University College London, Imperial College London and the University of Durham said that sector-specific guidance would be helpful, given the specific issues relating to universities. The University of Durham said “this would allow quicker decision-making within the university to reflect changes in the [higher education] landscape as well as reducing the burden on the Privy Council to consider minor amendments.”

4.60 Pinsent Masons said: “Our experience is that in the HEI sector there is generally a good level of awareness and easy access to expert advice or peer group knowledge-sharing on this. A high level guidance paper building on constitutional reform work carried out by a number of institutions over the last 10 years might still be valuable and save time and expense for other institutions in the future. It is probably not the highest priority of the proposals in the consultation though. The statutory power to make minor amendments is more important and significant.”

The importance of flexibility in guidance

4.61 The University of Liverpool CL&PU strongly agreed that guidance would be helpful, but noted the importance of guidance being just that and not suggesting that it is binding. The Institute of Chartered Secretaries and Administrators agreed, noting that existing charities should not be expected to comply with the guidance.

4.62 Bates Wells Braithwaite said the allocation is currently very flexible; sometimes provisions concerning membership are moved into regulations, but for other charities such provisions are seen as crucial and they remain in the Charter or bye-laws to ensure more scrutiny of amendments. “Guidelines would be useful, provided it is clear that the flexibility to deviate from them remains.” Bircham Dyson Bell LLP made similar comments; they warned of the risk of guidance being overly prescriptive and not being suitable for all. They were also concerned that charities should not feel pressured to bring their constitutions into line with the guidance. They therefore said that such guidance should suggest allocation only in broad terms and to make clear that there will be exceptions. The Independent Schools Council emphasised that “trustees need to be able to retain discretion in determining an approach which is suitable for their charity”.

4.63 Veale Wasbrough Vizards LLP said “the process in relation to amending by-laws is not significantly less burdensome than amending charters using an express (or the
new proposed statutory) power therefore we see the main merit here in moving provisions into regulations which can be amended by the trustees without involving the Privy Council or the Charity Commission. Once moved into regulations, amendments could obviously be made more easily and typically without the approval of the charity’s members, which may not be appropriate for some charities. Trustees therefore need to retain overall discretion in determining an approach which is right for their charity.”

Guidance would be unnecessary

4.64 Francesca Quint suggested that, if there was a wide power for trustees to make amendments with Charity Commission consent for regulated alterations, such guidance would be unnecessary.

4.65 The University of Birmingham was concerned that “the guidance would be too prescriptive, stifling innovative changes for the benefit of the organisation. In addition, in order to reflect the myriad types of organisations which hold a Royal Charter, the guidance, if tailored to different categories of charity as suggested in the consultation document, would become either confusing or unwieldy.” Similarly, the Institute of Chartered Secretaries and Administrators also commented that “the varied nature of Royal Charter charities adds further to the complexity the guidance must cover”, and the fact that it must refer to the different regulatory regimes in Scotland and Northern Ireland.

Consultation Question 5.

We provisionally propose that charities established or governed by statute or Royal Charter should have a statutory power to make minor amendments to their governing documents.

Do consultees agree?

[Consultation Paper, paragraph 4.54]

4.66 51 consultees answered this question:47

(1) 46 agreed,48

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47 National Churches Trust; Institution of Civil Engineers; Francesca Quint; Royal Statistical Society; Geldards LLP; Royal Archaeological Institute; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; OSCR; AHUA; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; WCVA; Lord Hodgson; University of Durham; University of Warwick; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; University of Cambridge; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; General Medical Council; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE; NCVO; ACF; CFG; IoF; Welsh Government.
2 disagreed;\textsuperscript{49} and
3 expressed other views.\textsuperscript{50}

General comments

4.67 Anthony Collins Solicitors LLP agreed, “since the existing process for amendment is archaic and entirely disproportionate”. The Royal Statistical Society said that it “would allow us to be more effective as a charity” if it could make minor changes without the need to go to the Privy Council. The Association of the Heads of University Administration said such a power “would help institutions avoid having inconvenient, inappropriate and out-of-date governing documents”. The Methodist Church said it “would welcome any amendment to charity law that enabled the Church to make amendments to the Methodist Church Act [1976] without the need to go through Parliament”.

4.68 NCVO, ACF, CFG and IoF (in their joint response) thought the level of oversight should be tailored to the importance of the amendment. They agreed that minor amendments did not require such a high level of scrutiny and wanted the bureaucracy and expense of amendments to be minimised. They considered it important, however, that the existing procedures should continue for more significant amendments. They thought that Royal Charter and statutory charities had a special status, either because of their historic origins or their activities, and that a greater degree of Governmental or Parliamentary oversight was therefore warranted.

4.69 Plymouth University said that, “to the extent possible, all charities should be treated in a consistent nature, irrespective of their legal form”. The Charity Commission said the new power would follow the position of charitable companies and unincorporated charities. Veale Wasbrough Vizards LLP said “there is no reason why the position in relation to Royal Charter charities should diverge significantly from that in relation to unincorporated charities”.

4.70 Francesca Quint thought that amendments that would be “regulated alterations”\textsuperscript{51} for a company or charitable incorporated organisation (“CIO”)\textsuperscript{52} should require Privy Council and Charity Commission consent, but that other changes should only require

\textsuperscript{48} National Churches Trust; Institution of Civil Engineers; Francesca Quint; Royal Statistical Society; Geldards LLP; Royal Archaeological Institute; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; OSCR; AHUA; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU (agreed in principle); WCVA; Lord Hodgson; University of Durham; University of Warwick; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; Stone King (qualified for some statutory charities); Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; University of Cambridge; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust (which thought such a power “may be appropriate”); Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; General Medical Council; RSPCA; Keith Lawrey (with some qualification); the Methodist Church; HEFCE; National Council for Voluntary Organisations; Association of Charitable Foundations; Charity Finance Group; Institute of Fundraising.

\textsuperscript{49} The Cambridge Colleges; Privy Council Office.

\textsuperscript{50} CLA; Bircham Dyson Bell LLP; Welsh Government.

\textsuperscript{51} See Report, para 4.5.

\textsuperscript{52} See Report, para 2.5.
notification. She thought that the Charity Commission should remain involved in approving regulated alterations as it is “desirable to encourage consistency between the treatment of comparable charities having technically different legal forms”.

4.71 Bates Wells Braithwaite welcomed changes that would allow such charities to amend their governing documents more easily and supported the proposals. But for statutory charities, they perceived three difficulties:

(1) many provisions that might be considered “minor” for many charities (such as the constitution of the trustee body) might not be for statutory charities;

(2) the drafting style in statutes is different, and it would not be easy for trustees to draft even minor amendments; and

(3) it is questionable whether it is appropriate, or possible, for trustees to have a power to amend a statute without Parliamentary oversight.

4.72 Keith Lawrey said that “Allowing charities effectively to amend Orders of Council would mean allowing private bodies to amend the law. This is undesirable in itself, and it would have the effect of making the law uncertain, as it will not be possible to determine the legal position by reference to the original Order of grant or any subsequent amending Orders.” Nevertheless, he supported the proposal, subject to the Privy Council’s continued oversight in respect of professional institutions.

4.73 The Welsh Government expressed concerns about certain matters falling within the amendment power, for example, powers for the Welsh Minister to appoint trustees should not be diluted.

Disagreement

4.74 The Privy Council Office disagreed with the proposal: “This power could be misused, difficult to monitor, and consideration would need to be given as to the effect on an amendment made under this power if the power were misused or used unlawfully and a successful challenge brought; i.e. would the amendment be invalid/void? The PCO does not have resources to challenge inappropriate amendments; it would be for policy Departments who will have higher priorities, so poor governance could be created by default. Surely the current method of approval before formal resolution safeguards against poor decisions which will be costly to rectify?”

4.75 The Cambridge Colleges disagreed with the proposal and instead preferred the re-allocation approach, relying where necessary on the deemed power to amend with consent, so that “a charity can shape its own governance processes, subject always to Privy Council approval of the enabling Charter amendment”.

Definitional difficulties

4.76 We noted the difficulty of defining an appropriate list of minor amendments in the Consultation Paper. The University of Liverpool CL&PU agreed with our proposal in principle, but had concerns over whether it would be possible to define minor
amendments: "the affected charities are diverse and quite distinct as bodies, so one size may not fit all". They noted that changes to trustee appointment could be very controversial for university colleges, but not for other Charter charities. Similarly, the criteria for membership could be controversial. Even powers to employ staff, which might be thought to be minor, might be controversial where, for example, "the organisation is strongly wedded to the voluntary principle".

4.77 The Cambridge Colleges did not think that it would be possible to devise a list or category of minor provisions that would be appropriate for all Royal Charter charities. "It is by no means plain in all cases that what may be a minor amendment for most Royal Charter charities should be regarded as a minor amendment for all. … The making of all amendments to a Royal Charter should therefore require Privy Council approval. Moreover, the approval process should provide a means for interested persons to object." The Cambridge Colleges were, however, in favour of the re-allocation approach: "an initial amendment could establish, for the Royal Charter charity concerned, the appropriate demarcation between minor and non-minor amendments."

4.78 The Privy Council Office had concerns about the definition and interpretation of "minor" amendments, which would "vary widely from one body to another". It said that provisions that are minor for benevolent institutions would not be for professional and management institutions. For example, membership criteria can include permission to use various levels of chartered membership or chartered designations. "Privy Council oversight of membership criteria and levels, and the power to use titles and post nominal descriptors must be retained to ensure stability and parity within the chartered professional title area." It endorsed the re-allocation approach; if guidance suggested matters that were minor, "we would be happy for the body to apply to remove those elements from their governance documents using the usual approval mechanism specified in their Charter, and consider each case on its merits".

4.79 The CLA and Bircham Dyson Bell LLP did not think that it would be feasible to define "minor amendments" for all statutory or Royal Charter charities: "Indeed, we think that for some charities it would be difficult to find any amendment which would be considered "minor" for that charity’s constitution." They noted that this legal form might be chosen deliberately because the nature of the charity’s work “means that it is appropriate for them to be subject to a certain additional level of Governmental supervision”. They said that “ostensibly minor amendments … could potentially have far-reaching consequences. For example, a change to the criteria for membership of a medical college (many of which are Royal Charter charities) could impact on who is entitled to undertake specialist medical training in the UK."

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53 So, too, did the Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite (in respect of statutory charities); CLA; Bircham Dyson Bell LLP; Independent Schools Council; Privy Council Office; the Cambridge Colleges.

54 They did not support a regime that set out a list of permitted alterations because (1) it would be almost impossible to devise an appropriate list, and (2) it would rarely, if ever, be updated, even if there was a power to update it by secondary legislation.
The CLA’s proposal

4.80 In light of the difficulties in defining minor amendments, the CLA\(^{55}\) suggested an alternative regime where any amendment, save for a “regulated alteration”\(^{56}\), would be possible, subject to a non-objection, or deemed consent, process. This would come closer to harmonising the regimes between different types of charity. It would retain oversight (by the Privy Council or Parliament, as the case may be) for all amendments, but it would give the power a wider remit (covering everything short of regulated alterations) and would overcome difficulties defining “minor” amendments. Bircham Dyson Bell LLP thought this approach would provide charities with flexibility, it would be easy to understand and to apply, and it would maintain appropriate oversight.

4.81 The procedure would operate as follows:

1. the trustees pass a resolution proposing an amendment;
2. the trustees submit that resolution to the PCO; and
3. the PCO has three months to consider the resolution, consult interested bodies, and – if appropriate – object to the resolution on procedural grounds or on the merits of the proposed amendments.

4.82 This would be a negative objection, or deemed consent, procedure, similar to that under section 275 for small unincorporated charities to change their purposes.\(^{57}\)

4.83 The CLA thought that a members’ resolution should not be required before approaching the Privy Council owing to the expense of putting a resolution to the members. Such an expense can be wasted if an objection is made to the resolution by the Privy Council, leaving the trustees to put an amended resolution back to the members or to abandon the amendment altogether. They suggested that trustees could give the PCO 90 days’ notice of their intention to effect an amendment, similarly to the consent process under section 16 of the Charities and Trustee Investment (Scotland) Act 2005. The charity would then have the certainty of deemed consent before it went to the expense of seeking a resolution of the members.

4.84 They suggested a deemed consent process on the basis that it would demand fewer Privy Council resources, but “charities would generally prefer to receive an acknowledgement at the expiry of the set period, confirming no objection”.

4.85 The CLA said that their experience was that “many of the delays when making amendments to the governing documents of Royal Charter charities stem from the need for amendments to be put before a meeting of the Privy Council”. They suggested that “the power to consider (and, if thought fit, object to) resolutions to

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\(^{55}\) With whom Bircham Dyson Bell LLP agreed.

\(^{56}\) Under ss 198 or 226 of the Charities Act 2011.

\(^{57}\) The CLA noted the potential inconsistency here with their suggestion that deemed consent procedures elsewhere in the Charities Act 2011 be replaced with a requirement for prior Charity Commission consent, but they said that that is because the existing deemed consent procedures cover significant amendments, whereas this power would apply to less significant amendments.
make minor amendments should be exercised by the officers of the Privy Council", drawing an analogy with the role of the officers of the Charity Commission in making various decisions. They said that, if this approach were not followed, it would be helpful for the dates of Privy Council meetings for the year ahead to be advertised so that Royal Charter charities could factor this in to the amendment process.

4.86 The CLA said that changes by statutory charities are rare, but it was unclear whether this was "caused by reticence on the part of the charities because the procedure is currently too cumbersome and costly, or because they very rarely need to make changes to their governing documents". The CLA suggested a similar negative objection procedure for statutory charities, with proposed amendments being laid before Parliament with a limited time period for objections to be made.

Whether the power should apply as an alternative to existing amendment powers

4.87 The National Trust noted that the new power would supplement existing amendment powers (so charities can choose which procedure to use), and thought this should be the case even where those existing amendment powers appear in a section 73 scheme.58

4.88 Veale Wasbrough Vizards LLP said it was important that any new amendment power should supplement, and not replace, the existing amendment procedures: “[w]e would be concerned if the Privy Council adopted the policy of the Charity Commission not to make any changes which trustees have the power to make themselves, even if they form part of a wider set of changes which require a scheme (which we appreciate is driven by the Commission's resource considerations). Where Royal Charter charities wish to make changes to their charter and by-laws, this may be part of a wider constitutional review which may warrant the cost and time commitment of obtaining a new supplemental charter and by-laws.”

4.89 Bates Wells Braithwaite, Stone King LLP and the CLA agreed that the minor amendment power should be an alternative to existing powers, but they thought that any express provisions that require third party consent to an amendment should be respected.59 On the CLA’s approach, the Privy Council could still object to any amendment so a failure to consult such a third party could form the basis of an objection by the Privy Council. But they thought that the Charity Commission or Privy Council should have a power to override such consent provisions where it is in the interests of the charity to do so.

4.90 By contrast, the University of Oxford said that the minor amendment power should only be the default position where there is no existing mechanism for amendments; the power “should be subordinate to the charity’s own powers", such as its own powers to make minor amendments under the Universities of Oxford and Cambridge Act 1923.

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58 The National Trust’s own section 73 scheme made in 2005 includes an express power of amendment.

59 The CLA noted that difficult lines would have to be drawn. A requirement for a named individual third party’s consent, as an effective veto, should be respected. But they were undecided whether a more restrictive process, for example that requires a unanimous decision for a particular amendment, should qualify as a protected third party right for these purposes.
Statutory charities: regulators of healthcare professionals

4.91 The General Medical Council (the “GMC”) responded to the consultation with reference to its response to our earlier consultation, Regulation of Health Care Professionals; Regulation of Social Care Professionals in England. The GMC is a statutory body governed by the Medical Act 1983 and was granted charitable status in 2001. It explained that the regulations made under the 1983 Act concerning the GMC’s duties and powers cannot be amended without the involvement of the Department of Health, Privy Council and Parliament; “this has seriously hampered our ability to respond quickly to changing operational needs and changing expectations of us”. It supported reform of the 1983 Act as proposed in our draft Regulation of Health Care Professions etc Bill, and noted that the extent to which the GMC should be given rule-making autonomy was already under discussion. At the same time, it “strongly endorsed” our proposal for Royal Charter and statutory charities to have a power to make minor amendments without prior consent “although we consider this should operate more broadly for the healthcare professional regulators”.

Terminology

4.92 Veale Wasbrough Vizards LLP noted that changes to governance arrangements or membership criteria – which would fall within the new power – can be significant; they therefore suggested that the new amendment power should be referred to as a power to make “administrative” – rather than “minor” – changes.

Consultation Question 6.

We invite the views of consultees as to the types of amendment that should fall within, and outside, the amendment power.

[Consultation Paper, paragraph 4.55]

4.93 38 consultees answered this question. Of those that supported a new amendment power:

(1) 17 thought that the division in paragraphs 4.51 and 4.52 of the Consultation Paper was broadly appropriate.

60 (2014) Law Com No 345, Scot Law Com No 237, NLIC 18.

61 Institution of Civil Engineers; Royal Statistical Society; Francesca Quint; Geldards LLP; Royal Archaeological Institute; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; WCVA; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Briscoe; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE; Welsh Government.

62 The Cambridge Colleges and Privy Council Office did not.
19 consultees expressed other views.\(^6^4\)

4.94 As noted in paragraphs 4.76 to 4.79 above, many consultees said it would be difficult to devise an appropriate list of minor amendments. The Independent Schools Council noted that provisions that were “minor to some charities might be significant to others”, for example, for independent schools with a religious designation, a change to the criteria for trustees’ religious beliefs is likely to be a significant change. Conversely, some consultees thought that it would be possible to devise a suitable list: for example, Imperial College London thought “there should be sufficient overlap between all sectors of Royal Charter charities for a list of permitted amendments to be feasible”.

Examples of suggested minor amendments

4.95 The Royal Statistical Society gave examples of three recent amendments that it suggested should fall within a new power: the requirement for the Vice President to be a current member of the elected council, the composition of a sub-committee, and the date of the charity’s annual general meeting.

4.96 The Royal Archaeological Institute also gave examples of amendments that ought to be permitted: changing provisions concerning subscriptions and allowing charities to take advantage of modern technology, for example by removing a requirement for accounts to be posted to members if email delivery is a suitable alternative. It suggested permitting any amendments, save for a change of purposes.

4.97 For Royal Charter charities, Bates Wells Braithwaite thought the amendment power should cover membership categories, committee structures, governance structures, and powers of appointment for different categories of members.\(^6^5\) The Royal Photographic Society suggested that procedural and administrative matters, including the management of elections, should fall within the new power. For trustee benefit provisions, Veale Wasbrough Vizards LLP thought the power should permit amendments which reflect the general law, such as sections 185 and 189.

Matters falling outside an amendment power

4.98 It was generally accepted by consultees that “regulated alterations” under section 198 should fall outside the amendment power. Some consultees thought that all other

\[^6^3\] Institution of Civil Engineers; Geldards LLP; University of Birmingham; Pinsent Masons LLP; WCVA; University of Durham; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite (in respect of Royal Charter charities); Stone King LLP; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Imperial College London; Veale Wasbrough Vizards LLP; Keith Lawrey; the Methodist Church (in respect of para 4.50); HEFCE.

\[^6^4\] Royal Statistical Society; Francesca Quint; Royal Archaeological Institute; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; the Royal Photographic Society; the University of Liverpool CL&PU; CLA; Bircham Dyson Bell LLP; University College London; Charity Commission; Lawyers in Charities; Open University; University of Oxford; the National Trust; Prof Gareth Morgan; RSPCA; Welsh Government.

\[^6^5\] Bates Wells Braithwaite qualified its suggestion in para 4.89 above (namely that existing amendment procedures requiring third party consents to constitutional amendment should continue to apply) in the case of amendments to the appointment rights of a particular category of members; the appointment powers of members should fall within the amendment power. Essentially, members should not be treated as third parties for these purposes.
amendments should be permitted so as to align amendment powers with other corporate charities. Others thought that further matters should fall outside an amendment power:

1. the matters in paragraph 4.52 of the Consultation Paper;
2. changes to the charity’s name;
3. any change to the duties imposed on trustees;
4. provisions relating to governance structure, investments and funding;
5. trustee appointment provisions and third party rights or benefits;
6. a power to change the number of trustees should be subject to a minimum (say 5) and maximum (say 25);
7. permanent endowment restrictions;
8. the powers of statutory and Royal Charter charities; “very specific powers may have been given or not given … when the charity was formed”;
9. the powers (for example, to borrow, to acquire property and to merge) of certain statutory bodies, such as non-departmental public bodies, should be subject to Parliamentary oversight;
10. degree-awarding powers and university title;
11. removal or disenfranchisement of members.

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66 Francesca Quint; Bircham Dyson Bell (who supported this approach in principle, but said that if this was not possible they supported the CLA’s proposed regime); Lawyers in Charities.
67 See n 63 above.
68 Plymouth University; RSPCA; the Oxford Colleges.
69 Plymouth University.
70 Royal Photographic Society.
71 Charity Commission; Institution of Civil Engineers; the Oxford Colleges; Stone King LLP; Welsh Government. The Institution of Civil Engineers thought a power for a third party to appoint trustees should always fall outside the amendment power, even where the third party has ceased to exist or has consented to the change (so disagreed with the inclusion of para 4.51(3) in the Consultation Paper). Conversely, Plymouth University did not think that Privy Council consent should be required to amendments to powers for a third party to appoint trustees, even where the third party did not consent to the change (so disagreed with the exclusion of para 4.52(5) in the Consultation Paper).
72 HEFCE.
73 Charity Commission.
74 Prof Gareth Morgan.
75 Stone King LLP.
76 Pinsent Masons LLP.
77 RSPCA.
(12) “any powers relating to professional qualifications and powers relating to professional registration and codes of professional conduct”, and
(13) accounting and reporting requirements, “given that some statutory charities are exempt charities and hence not directly subject to the accounting requirements of the 2011 Act”.

4.99 The Methodist Church thought the list of amendments requiring consent in paragraph 4.52 of the Consultation Paper was unnecessarily prescriptive as other charities would often be able to amend such provisions simply with Charity Commission consent. “Whilst it is appreciated that it is often the larger and most well-known charities that are established by Royal Charter and Acts of Parliament, these are the charities least likely to do anything that the public would question as they are the subject of the most public scrutiny.” It suggested that even a change of purposes might not be a major amendment, giving the example of the schedule to the Methodist Church Act 1976 Act prohibiting the use of Methodist property by other faith groups; they would have to go through Parliament “merely to enable letting of Church property to other faiths and to allow multi-faith worship on Methodist premises”.

4.100 Veale Wasbrough Vizards LLP said that references to trustees’ duties often reflect trustees’ duties under the general law; they questioned whether the exclusion of trustees’ duties from the new power should only apply to specific duties over and above the general law.

Defining permitted amendments or defining excluded amendments?

4.101 Veale Wasbrough Vizards LLP thought that, in light of the uncertainty that has arisen from section 280, it would be preferable for provisions within or outside the power to be listed rather than described as a general category.

4.102 There was general agreement that any new regime should define or individually list excluded amendments, rather than define or individually list permitted amendments:

(1) Francesca Quint did not want “a lengthy list of possible types of “minor” amendments”; she wanted “a uniform or nearly uniform system applicable to all charities for distinguishing between cases where greater formality is needed (major changes) and those which are under the trustees’ control (minor changes)”.

(2) Anthony Collins Solicitors LLP emphasised the need for a clear definition of what fell within the new power. They suggested that the power should permit any amendment subject to specified exclusions; they said that mirroring the list of regulated alterations for charitable companies would provide “useful consistency”. Similarly, Bircham Dyson Bell LLP said that a defined list of permitted alterations would be “laborious and expensive to devise (if it was.

78 Keith Lawrey said “If this area is not subject to control, it would leave open the possibility of unregulated proliferation of qualifications and designations.”
79 Prof Gareth Morgan.
80 Plymouth University and the Institute of Chartered Secretaries and Administrators made similar comments, noting the current confusion as to the meaning of s 280 of the Charities Act 2011.
feasible to do so at all) and to keep updated (if it was kept updated), with too high a risk that useful amendments were omitted”.

(3) Stone King LLP did not favour setting out a list of permitted amendments and a list of excluded amendments as this would create a “gap” between the two lists. They preferred one list of excluded amendments, with any other amendment being permitted.

4.103 Conversely, the National Trust thought that the power should set out a broad description of permitted amendments, with others requiring external validation. It thought the Charity Commission should have the power to rule on whether a proposed amendment fell within the new statutory power.

**Consultation Question 7.**

We invite the views of consultees as to whether the Secretary of State should have power to alter any list of permitted amendments by secondary legislation.

[Consultation Paper, paragraph 4.56]

4.104 32 consultees answered this question.81 Of those that supported a new amendment power:82

(1) 23 thought the Secretary of State should have such a power (to amend a list of permitted amendments or a list of excluded amendments),83

(2) 4 thought not;84 and

(3) 3 expressed other views.85

4.105 Veale Wasbrough Vizards LLP thought a regulation-making power would be helpful as it will be difficult to specify in advance all matters that should fall within or outside the

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81 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; WCVA; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Lawyers in Charities; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

82 The Cambridge Colleges and Privy Council Office did not.

83 Geldards LLP; the Oxford Colleges; Plymouth University; University of Birmingham (with qualification); Pinsent Masons LLP; WCVA; University of Durham; University College London; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Lawyers in Charities; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; the Methodist Church; HEFCE.

84 Francesca Quint; Anthony Collins Solicitors LLP; CLA; Bircham Dyson Bell LLP.

85 Institution of Civil Engineers; the University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators.
power and the categories are likely to develop and require clarification over time. Similarly, Imperial College London said matters that “might usefully be added to such a list” might become clearer as the power starts to be exercised. It thought such a power might work well with guidance on re-allocation so that matters that originally fall outside the amendment power can be moved to fall within the power.

4.106 Prof Gareth Morgan agreed to conferring a regulation-making power, but said such a power had to be “viewed with caution” given delays in making secondary legislation in other areas of charity law. Both the CLA and Bircham Dyson Bell LLP expressed similar practical concerns. The University of Liverpool CL&PU said that, in light of the difficulties of devising an effective list of minor amendments, they had concerns about conferring a power on the Secretary of State to amend it.

Restrictions on a delegated power

4.107 HEFCE said the power should be subject to the affirmative procedure. The University of Birmingham and Geldards LLP suggested that any regulation-making power should only permit the removal of matters from the new power (or add to the matters that can be addressed by the trustees without oversight); “it should not be possible to increase Privy Council oversight without primary legislation”.  

Regulation-making power unnecessary

4.108 On the approach suggested by Francesca Quint and Anthony Collins Solicitors LLP (permitting any amendment save for “regulated alterations”), there would be no need for such a power. However, they both said that if permitted amendments were set out in a list, then a power to alter that list by secondary legislation would be appropriate.

Consultation Question 8.

We provisionally propose that the power to make minor amendments to statutory and Royal Charter charities’ governing documents should be exercisable by the trustees of the charity rather than by the Charity Commission.

Do consultees agree?

[Consultation Paper, paragraph 4.59]

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86 University of Birmingham.

87 Similarly, there would be no need for a regulation-making power on the approaches suggested by the CLA and by Bircham Dyson Bell LLP.
35 consultees answered this question. Of those that supported a new amendment power:

1. 32 agreed;
2. none disagreed; and
3. 1 expressed other views.

Veale Wasbrough Vizards LLP thought the Charity Commission only needed to be involved when amendments concern the status of a Royal Charter charity as a charity, that is, the equivalent of “regulated alterations”. Such changes would require the consent of the Privy Council, which would consult with the Charity Commission.

Anthony Collins Solicitors LLP thought Charity Commission consent would be disproportionate, and would unnecessarily increase its workload and create significant delays for charities in waiting for a response. The University of Liverpool CL&PU said our proposal was “entirely consistent with the concept of minor amendments: it would be unnecessarily bureaucratic to require the trustees to make an application to the Charity Commission.” The Charity Commission said that it is not involved with such amendments made by charitable companies and unincorporated charities and saw no reason to be involved with such amendments by statutory and Royal Charter charities.

The National Trust suggested that changes to a statutory charity’s purposes should require Parliamentary oversight, but that other significant changes (falling outside a power to make minor amendments) could be approved by the Charity Commission rather than Parliament.

The University of Oxford pointed out that involvement of the Charity Commission would not be appropriate where it was not the charity’s principal regulator, as with HEIs.

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88 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

89 The Cambridge Colleges and Privy Council Office did not.

90 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite (with qualifications); CLA and Bircham Dyson Bell (subject to their proposed additional requirement for Privy Council and Parliamentary oversight); Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; HEFCE.

91 The National Trust.
Consultation Question 9.

We provisionally propose that the power should be exercisable by a resolution of the trustees and, if the charity has a separate body of members, by a further resolution of at least two-thirds of the members who vote on the resolution at a general meeting.

Do consultees agree?

[Consultation Paper, paragraph 4.66]

4.114 37 consultees answered this question. Of those that supported a new amendment power:

(1) 27 agreed;

(2) none disagreed;

(3) 5 agreed that trustees’ and members’ resolutions should be required but suggested other majorities;

(4) 1 agreed that a members’ resolution should be required, but not a trustees’ resolution;

(5) 2 agreed that a trustees’ resolution should be required, but not a members’ resolution; and

(6) 1 expressed other views.

92 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Royal Archaeological Institute; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; AHUA; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

93 The Cambridge Colleges and Privy Council Office did not.

94 Institution of Civil Engineers; Francesca Quint; Royal Archaeological Institute; Anthony Collins Solicitors LLP; University of Birmingham; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite (with qualifications) above); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; HEFCE.

95 Geldards LLP; Plymouth University; AHUA; CLA and Bircham Dyson Bell (subject to their proposed additional requirement for Privy Council and Parliamentary oversight).

96 Prof Gareth Morgan.

97 The Oxford Colleges; Independent Schools Council.
Alternative majorities

4.115 Geldards LLP, Plymouth University, the CLA and Bir cham Dyson Bell LLP suggested that the members’ resolution should be a 75% majority. The Association of the Heads of University Administration thought that a two-thirds majority of the trustees should be required, rather than a bare majority.

The need for a resolution of members

4.116 Veale Wasbrough Vizards LLP thought a resolution of members was necessary because administrative changes can have a “significant impact on a charity and its relationship with its members”.

4.117 Prof Gareth Morgan thought that a vote of the members (where it was a membership charity) should be sufficient; he said that members might need to change the constitution – for example, to limit the term of office for trustees who refuse to step down – and trustees should not be able to prevent this.

4.118 The National Trust thought it should also be possible for the Charity Commission or Parliament to have the option of approving a resolution of the trustees which was not supported by the members but which was nevertheless in the best interests of the charity.

The problem of numerous or unascertainable members

4.119 Some consultees discussed this issue in response to paragraph 4.31 of the Consultation Paper: see paragraph 4.29 above. The Oxford Colleges were opposed to a requirement for a resolution of the members of a college; this would be difficult to define and “wholly unworkable”. They also suggested that the University should retain involvement, and that there should be a single procedure common to all colleges. The Cambridge Colleges commented on the difficulty of defining the members of a charity (see paragraph 4.37 above) and said that “the governance of the charity is defined by or under its Charter and there is no case for cutting across its normal rules for decision-making”.

4.120 University College London noted that universities do not have “members” in the same way as other charities, though students and others are often referred to as members. It suggested that the power should be exercisable by a resolution of the trustees only. Similarly, the University of Birmingham agreed to a requirement for a members’ resolution, but not in the case of higher education charities. The Independent Schools Council preferred a requirement to consult with the members: see paragraph 4.38 above.

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98 University of Oxford (as well as agreeing).

99 It also noted that it currently requires two internal Council meetings to make amendments, and wanted to ensure that this process would be overridden by the new amendment power.
Consultation Question 10.

We provisionally propose that the power should apply to provisions in a charity’s governing document, whether those provisions are contained in a statute, regulations made pursuant to a statute, a Royal Charter, or bye-laws or regulations made pursuant to a Royal Charter.

Do consultees agree?

[Consultation Paper, paragraph 4.67]

4.121 34 consultees answered this question. Of those that supported a new amendment power:

1. 28 agreed;
2. 1 disagreed; and
3. 3 expressed other views.

General comments

4.122 Anthony Collins Solicitors LLP agreed, saying a consistent approach would avoid confusion. The University of Liverpool CL&PU said “to do otherwise invites unnecessary complexity, purely on the basis of the origin of the provisions affected”. Plymouth University agreed, though noted that most provisions that fell within the new amendment power would be contained in bye-laws or regulations.

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100 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

101 The Cambridge Colleges and Privy Council Office did not.

102 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite (with qualifications); CLA; Bircham Dyson Bell LLP; Stone King LLP; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; University of Oxford; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

103 Open University.

104 The Oxford Colleges; Charity Commission; the National Trust.

105 The Charity Commission noted that Royal Charter charities can usually amend their bye-laws or regulations themselves, which it thought was satisfactory provided those provisions are not “regulated alterations”.

4.123 The National Trust noted that provisions might also appear in a section 73 scheme, and they should be included within the new power.

4.124 The Open University disagreed with the proposal and supported Lord Hodgson’s recommendation; the governing body “should have power to make changes to the University’s statutes … so they can be amended in line with changing governance of the University”.

Consultation Question 11.

We provisionally propose that amendments should take effect once the necessary resolutions have been passed.

Do consultees agree? 

[Consultation Paper, paragraph 4.68]

4.125 33 consultees answered this question. Of those that supported a new amendment power,

1. 29 agreed;
2. none disagreed; and
3. 2 expressed other views.

4.126 Anthony Collins Solicitors LLP agreed, saying this would be consistent with changes by members of a charitable company.

4.127 Some consultees agreed that this should be a default position, but that it was important for the trustees to be able to specify a different (future) date to allow

106 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; Privy Council Office; HEFCE.

107 The Cambridge Colleges and Privy Council Office did not.

108 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; University College London; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; RSPCA; Keith Lawrey; the Methodist Church; HEFCE.

109 CLA; Bircham Dyson Bell LLP.
amendments to tie in with other events such as accounting years, arrangements with associated charities or mergers. This would mirror the position under section 280.

4.128 The CLA had suggested an alternative approach: see paragraph 4.80 above. Under that regime, they suggested that charities should be able to decide whether the resolution takes effect at the expiry of the time period for objection, or from the date it is passed (subject to no objection being raised).

4.129 The University of Oxford and the Oxford Colleges agreed with the proposal “subject to the provisions of the [Universities of Oxford and Cambridge Act 1923]” and to any requirement for consent from the University. Similarly, the Cambridge Colleges said any amendment should not take effect unless any necessary third party consent has been obtained.

**Consultation Question 12.**

We invite the views of consultees as to whether charities that exercise the power should be required to notify the Privy Council or lay the amendments in Parliament (as the case may be).

[Consultation Paper, paragraph 4.69]

4.130 33 consultees answered this question.

1. 23 thought that notification should be required;

2. 8 thought notification unnecessary;

3. 2 expressed other views.

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110 Francesca Quint; University of Birmingham; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP.

111 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; Anthony Collins Solicitors LLP; University of Birmingham; the Cambridge Colleges; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; the Methodist Church;Privy Council Office; HEFCE.

112 Institution of Civil Engineers; Francesca Quint; Geldards LLP; the Oxford Colleges; the Cambridge Colleges (who disagreed with the proposed power); the Royal Photographic Society; Pinsent Masons LLP; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA (notification being a crucial part of their proposed procedure); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; the National Trust; Prof Gareth Morgan; Keith Lawrey.

113 University of Birmingham; the University of Liverpool CL&PU; University of Oxford; Veale Wasbrough Vizards (for Royal Charter charities); RSPCA; the Methodist Church; Privy Council Office (which disagreed with the proposed power); HEFCE.
Notification necessary

4.131 Geldards LLP said that notification was necessary as “documents of public record require public notice”. The Institute of Chartered Secretaries and Administrators thought notification sensible as it would “provide an additional source of information on the governance and constitutional powers of each Royal Charter charity”, which might be helpful in the case of subsequent disagreement as to the current position. The Society for Radiological Protection thought that notification to the Privy Council was an additional scrutiny check.

4.132 Francesca Quint thought that the Charity Commission should be notified of, and record, all amendments to Acts and Charters. She thought that Charter amendments should also be recorded by the Privy Council. In the case of amendments to Acts, she suggested that they be recorded somewhere associated with Parliament, such as the library.

4.133 The Institution of Civil Engineers suggested that minor amendments be disclosed and included in the trustees’ annual report. The Royal Photographic Society thought that amendments should be made publicly available on the charity’s website or on request to the charity’s secretary, as well as being notified to the Charity Commission or Privy Council.

4.134 Pinsent Masons LLP, the University of Durham and University College London thought that advance notification of a proposed amendment was unnecessary, but that the amended governing documents should be sent to the Privy Council for its records. University College London said that if the Privy Council had concerns about an amendment, it could have a power to require re-amendment; in practice, however, such concerns are unlikely to arise in the higher education sector given the regulatory requirements of HEFCE, the Charity Commission and others.

Notification unnecessary

4.135 The University of Liverpool CL&PU thought notification unnecessary; the process requiring a resolution of the trustees and members “is sufficiently robust and can be trusted”. HEFCE thought it unnecessary to notify the Privy Council and Parliament, provided the Charity Commission or principal regulator is informed. Similarly, the CLA said that (if its proposed regime was not adopted) it was enough that registered charities would have to notify the Charity Commission of amendments under section 35 and the equivalent should apply to exempt and excepted charities.

4.136 Anthony Collins Solicitors LLP said that the PCO should be notified of Royal Charter amendments if the PCO retains a file on each Royal Charter body with a copy of the most recent, up-to-date governing documents. But “there would seem to be little point

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114 Anthony Collins Solicitors LLP; Bircham Dyson Bell LLP.
115 HEFCE added that, as principal regulator of higher education providers, it requires higher education institutions to maintain a page on their websites setting out the core information that would be held on the Register of Charities if they were not exempt charities. This includes a history of changes to their governing documents.
116 Bircham Dyson Bell LLP made similar comments.
in the charity filing amendments” if the PCO does not keep such records. Veale Wasbrough Vizards LLP and the Charity Commission made similar comments.

4.137 If a power to make minor amendments were introduced, the Privy Council Office did not think that there would be any benefit in notifying it of amendments to provisions outside its control.

**Consultation Question 13.**

We invite the views of consultees as to whether the power of amendment) should operate (a) alongside, or (b) instead of, guidance from the Privy Council concerning the reallocation of provisions in governing documents.

[Consultation Paper, paragraph 4.72]

4.138 30 consultees answered this question. Of those that supported a new amendment power:

(1) 26 thought the power of amendment should operate alongside guidance;

(2) 2 thought it should operate instead of guidance.

4.139 Anthony Collins Solicitors LLP saw the two as complementary; “Even if the amendment power is relatively wide the guidance will still be helpful in clarifying the views of the Privy Council and Charity Commission as regards the nature and form of Royal Charters, bye-laws and regulations with a view to a better general understanding of this form (particularly amongst trustees of Royal Charter charities) and a greater consistency between Royal Charter charities' governing documents.” Plymouth University and Stone King LLP agreed; re-allocation would still take place even if the minor amendment power is relatively wide. The guidance would be “useful

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117 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; OSCR; AHUA; the University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Privy Council Office; RSPCA; Keith Lawrey; HEFCE.

118 The Cambridge Colleges and Privy Council Office did not.

119 Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; OSCR; AHUA; the University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; HEFCE.

120 Francesca Quint; Lawyers in Charities.
for new Royal Charter bodies or for Royal Charter bodies considering major restructuring of their governing documents”.¹²¹

4.140 University College London thought that, even with a new minor amendment power, such guidance would be helpful for universities to understand how best to structure their governing documents. It also noted that “if the power to make amendments is not framed broadly enough to enable all required changes to be made, this would necessitate an amendment process via the Privy Council in any event. Guidance would facilitate that process.”

4.141 Veale Wasbrough Vizards LLP thought both would give charities flexibility; they welcomed the deregulatory benefits of guidance, but noted that amending bye-laws pursuant to such guidance would still be more burdensome than amendment pursuant to the new power.

4.142 Francesca Quint said that, on her suggested approach, there was no need for guidance.

**Consultation Question 14.**

We invite the views of consultees as to whether, and if so how, the involvement of the Charity Commission in making amendments to statutory and Royal Charter charities’ governing documents should be increased or reduced.

[Consultation Paper, paragraph 4.88]

4.143 29 consultees answered this question.¹²²

(1) 16 thought the Charity Commission’s involvement should remain the same;¹²³

(2) 5 thought the role of the Privy Council and Parliament should be reduced, and (where necessary) replaced by the Charity Commission;¹²⁴

¹²¹ Stone King LLP.

¹²² Institution of Civil Engineers; Francesca Quint; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators; University of Durham; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Lawyers in Charities; University of Oxford; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; the Methodist Church; HEFCE.

¹²³ Institution of Civil Engineers; Anthony Collins Solicitors LLP; University of Birmingham; the University of Liverpool CL&PU; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (for Royal Charter charities); Stone King LLP; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Keith Lawrey; HEFCE.

¹²⁴ Francesca Quint; Plymouth University; Lawyers in Charities; Bircham Dyson Bell LLP (for statutory charities); the Methodist Church.
(3) Conversely, 5 thought the Charity Commission’s role should be reduced and/or replaced by the Privy Council;\(^\text{125}\)

(4) 5 expressed other views.\(^\text{126}\)

### Maintaining the status quo

4.144 The CLA thought the Charity Commission’s involvement should stay the same: “it is appropriate for the Charity Commission to continue to be consulted where the proposed amendment to a statutory or Royal Charter charity’s governing document would be a “regulated alteration” if made by a charitable company or CIO. However, we see no need to involve the Commission generally in other cases.”\(^\text{127}\) Bircham Dyson Bell LLP agreed in respect of Royal Charter charities.

4.145 The Institution of Civil Engineers thought there was little to be gained from reducing or increasing the Charity Commission’s involvement in the amendment of Royal Charter charities’ governing documents “as the Privy Council should retain control over significant amendments”.

4.146 Anthony Collins Solicitors LLP thought that the Privy Council would be uncomfortable if the Charity Commission’s role was reduced as it defers to the Commission in relation to most changes. “The position would be clearer if trustees only needed to obtain Privy Council consent for a limited number of regulated alterations … and the issue would then be rather more about finding ways to streamline the process as much as possible when both the Privy Council and the Charity Commission have to be involved.”

4.147 Cancer Research UK favoured no requirement for Charity Commission consultation for minor amendments.\(^\text{128}\) For major amendments, it suggested that the Privy Council and Charity Commission provide joint guidance as to which body should be consulted and to avoid duplication between the two.

### Increasing the role of the Charity Commission

4.148 Francesca Quint said that the trustees of other charities are given more responsibility and the official controls have been relaxed “so as to increase efficiency in administration”. She thought that it was “quite reasonable to apply the same sort of process to charities constituted and partially regulated by either the Privy Council Office or Parliament, which are some way behind other charities in relation to such developments.”

4.149 Plymouth University thought “there is no particular reason for subjecting [Royal Charter] charities to a higher degree of regulation (nor to regulation by different

\(^{125}\) Pinsent Masons LLP; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; RSPCA.

\(^{126}\) The Oxford Colleges; the Cambridge Colleges; University of Durham; Charity Commission; University of Oxford.

\(^{127}\) The qualification to this was the CLA’s proposed power for the Charity Commission to override an express requirement for third party consent to an amendment.

\(^{128}\) Independent Schools Council made the same point. It supported reducing the regulatory burden on the Charity Commission wherever possible.
bodies) than other charities. We are inclined to the view that the Charity Commission should perform this role generally which would produce a more consistent regulatory approach. Accordingly, we would like to explore further the possibility of the Charity Commission replacing the Privy Council in this area. … it would still be open to the Commission to … refer to the Privy Council as necessary.” Plymouth University made the same suggestion in respect of statutory charities.

4.150 The Methodist Church wanted to see the Charity Commission’s involvement increase as it has the expertise to draft schemes and to avoid burdening charities with the task of drafting when they are likely to have to instruct solicitors to deal with the section 73 procedure.

Reducing the role of the Charity Commission

4.151 The University of Birmingham said that the role of the Charity Commission in respect of Royal Charter charities “should be restricted to a review of charity law compliance” and, where there is a principal regulator, “there is a significant argument for saying that even that role should be performed by the principal regulator within guidance from the Charity Commission”.

4.152 The Charity Commission said it favoured a more permissive regime except in the case of regulated alterations and other sensitive areas. Similarly, Prof Gareth Morgan thought the Charity Commission should only be involved where a charity seeks to make an amendment that would be a “regulated alteration”. Pinsent Masons LLP thought the Charity Commission’s involvement in amending HEI’s constitutions “should be limited to questions of charity law” such as changes to the institution’s purposes or proposals to pay its trustees. The University of Durham and University College London made similar comments.

Other comments

4.153 The University of Liverpool CL&PU had concerns that, regardless of the merits of increasing the Charity Commission’s role, the Charity Commission would struggle to undertake such work given their budgetary constraints.

4.154 The Oxford Colleges thought the Charity Commission should be notified of amendments before they are adopted. The Cambridge Colleges said any amendments should be notified to the Charity Commission with a power for the Commission to object within a reasonable period.

Consultation Question 15.

We provisionally propose that all section 73 schemes should be subject to the negative procedure, regardless of whether the governing document is contained in a private Act or a public general Act.

Do consultees agree?

[Consultation Paper, paragraph 4.89]
4.155 22 consultees answered this question, all of whom agreed.129

4.156 The National Churches Trust, whose section 73 scheme was subject to the affirmative procedure,130 supported this proposal: “The parliamentary process (involving the affirmative procedure) included work by the NCT on briefing ministers in both Houses of Parliament, including advising on their speeches and answers to likely questions, and liaising with opposition frontbenchers. We were able to deal with this effectively but this might be a challenge for some small charities not used to dealing with Parliament and its technical procedures.”

4.157 The CLA agreed that the negative procedure should apply to charities established by private Act or public general Act; it “provides a sufficient degree of Parliamentary oversight for amendments to governing documents”. Bircham Dyson Bell LLP agreed, but did not think it would do much to ease the administration and costs for statutory charities; they thought that the Charity Commission should have more powers to make changes.

Consultation Question 16.
We provisionally propose that the Privy Council Office amend its guidance to make clear that amendments to bye-laws only require approval when that is expressly required by the Royal Charter itself.

Do consultees agree?

[Consultation Paper, paragraph 4.90]

4.158 28 consultees answered this question:131

(1) 27 agreed;132

129 National Churches Trust; Francesca Quint; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission (who did not object); Society for Radiological Protection; Legacy Link; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; the Methodist Church; HEFCE.

130 The Charities (Incorporated Church Building Society) (England and Wales) Order 2013, SI 2013 No 641; see para 4.243 below.

131 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; Privy Council Office; HEFCE.

132 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; the Royal Photographic Society; Pinsent Masons LLP; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London;
(2) none disagreed; and

(3) 1 expressed other views.  

4.159 Some consultees, however, misunderstood this question as suggesting that all bye-laws should be capable of amendment without Privy Council oversight.

4.160 The Privy Council Office said it was happy to clarify its guidance, but noted that “only a handful of Charters (about 1-5%) are, in fact, silent on the matter of amendment, so we do question the value added”.

**Consultation Question 17.**

We invite the views of consultees as to whether it would be helpful for the Office for Civil Society and Charity Commission to issue joint guidance in respect of the amendment of statutory charities’ governing documents, and for the Privy Council and Charity Commission to issue joint guidance in respect of the amendment of Royal Charter charities’ governing documents.

[Consultation Paper, paragraph 4.91]

4.161 28 consultees answered this question:  

(1) 27 thought such guidance would be helpful, and  

(2) 1 expressed other views.

4.162 As noted in paragraph 4.51 above, consultees’ comments on guidance concerned, first, the process for making amendments, and second, the appropriate allocation of

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133 Charity Commission.

134 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Open University; Imperial College London; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey; Privy Council Office; HEFCE.

135 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; the Cambridge Colleges; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Legacy Link; Open University; Imperial College London; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Keith Lawrey (guidance from the Privy Council and Charity Commission); the Methodist Church; HEFCE.

136 The University of Liverpool CL&PU.
provisions. This question concerned guidance on the process for making amendments.

4.163 Anthony Collins Solicitors LLP said “clear, concise and easily accessible guidance would be very helpful since current guidance is very limited”. Stone King LLP said “we think that the way the Privy Council’s website sets out the procedure required to make amendments to Royal Charter charities’ constitutions leads charity trustees to believe that it is procedurally very complicated and it could potentially put trustees off pursuing amendments that they wish to make. Guidance issued could go further to assist with this and simplifying the procedure is an attractive proposition.”

4.164 Veale Wasbrough Vizards LLP thought guidance would be helpful: “while in our experience the service provided by the Privy Council in connection with amending Royal Charters is excellent and the staff are extremely helpful, the guidance available on the Privy Council Office’s website could be improved. For example, flowcharts setting out the process and giving indications of the likely timescales between each step would be useful, as would some templates or example documents for the various steps (e.g. a template petition).” Improved guidance “is likely to reduce the need for charities to take legal advice. However, the wording of charters and by-laws is typically rather archaic and we wonder how many charities would be able to prepare new draft supplemental Charters and petitions without legal advice.”

4.165 The CLA and Bircham Dyson Bell LLP thought guidance on the process for amendment of Royal Charter charities’ governing documents would be very helpful, providing transparency to the process. Such guidance should:

1. set out the steps that charities need to take before proposing amendments;

2. “specify the process for consultation with other bodies” – including how the Privy Council assesses the views of advisory bodies so the process is understood, is consistent and avoids becoming politicised; and

3. provide the typical timescale for different steps.

4.166 Similarly, for statutory charities, they thought that guidance about the basic procedure should improve openness and transparency.

4.167 Some consultees commented on the advantages of joint guidance in ensuring consistency between different parties; it “provides a single point of information from the relevant parties, thereby reducing the opportunity for inconsistency or misunderstanding”.

4.168 The University of Durham and Imperial College London thought joint guidance for universities from the Privy Council and Charity Commission would be helpful to make clear the extent to which each body is involved in the amendment procedure. University College London thought specific guidance for universities would be helpful,

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137 Stone King LLP also commented that the Privy Council Office was “very helpful”.

138 Suggested by Bircham Dyson Bell LLP.

139 Institute of Chartered Secretaries and Administrators. Similar comments were made by Society for Radiological Protection.
issued jointly by the Privy Council and HEFCE, and possibly with input from the Charity Commission.

4.169 Bates Wells Braithwaite noted that some statutory charities are UK-wide, so it would be helpful for OSCR and the Charity Commission for Northern Ireland to be involved in the preparation of that guidance. They also suggested that, for statutory charities, it would be helpful for guidance to contain advice on when an Impact Assessment will be required and at what stage in the process.

4.170 The University of Liverpool CL&PU thought that “in practice this might be difficult to achieve. An additional concern is that involving three bodies might elevate the status of the guidance in the eyes of the sector” noting that guidance should not be prescriptive. The RSPCA thought it important that any guidance is subject to consultation with charities affected.

Consultation Question 18.

We invite the views of consultees as to whether any further amendments could be made to the existing procedures for amending the governing documents of statutory and Royal Charter charities.

[Consultation Paper, paragraph 4.92]

4.171 15 consultees answered this question.

(1) 9 thought further changes could be made;

(2) 6 thought that no further changes were necessary.

Service level standards

4.172 The Institute of Chartered Secretaries and Administrators suggested the Privy Council establish and publish “set service level standards” and “details as to what might impact on those standards”. This “would enable charities to better understand the timeframe for all types of dealings with the Privy Council Office”.

Fast-track procedure

4.173 University College London suggested the introduction of a “fast-track approval procedure” under which charities could show that their proposed changes fell entirely

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Francesca Quint; Geldards LLP; the Cambridge Colleges; the University of Liverpool CL&PU; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Stone King LLP; Charity Commission; Imperial College London; the National Trust; Veale Wasbrough Vizards LLP; HEFCE.

Francesca Quint; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; Stone King LLP; Charity Commission; the National Trust; Veale Wasbrough Vizards LLP; HEFCE.

Geldards LLP; the Cambridge Colleges; the University of Liverpool CL&PU; University of Durham; CLA; Imperial College London.
within matters covered by guidance, or permitted amendments, and the Privy Council could then agree to approve the changes without going through the process of consulting with stakeholders.

**Drafting and filing amendments**

4.174 Bates Wells Braithwaite suggested that the Privy Council’s requirements for the drafting of resolutions to make changes be relaxed as they can cause considerable costs. This would be a change in practice rather than a change in the law. They said that the Privy Council had recently “been very helpful in allowing us to show replacement provisions in a schedule to the resolution, which is much quicker”. They suggested allowing charities to adopt a complete set of provisions set out in a schedule to a resolution in place of the existing constitution.

4.175 Stone King LLP suggested that online forms to seek consent to amendments to Royal Charters would be helpful.

4.176 Bates Wells Braithwaite suggested that section 73 schemes be prepared in conjunction with Parliamentary Counsel to save the costs of having to re-work proposed amendments to conform with statutory drafting styles.

**Vellum**

4.177 Bates Wells Braithwaite also suggested removing the requirement for supplemental Charters to be printed on vellum, which is "an affectation and an unnecessary expense", and also suggested that the requirement to advertise supplemental Charters in the London Gazette for eight weeks be removed or the time period reduced.

4.178 Veale Wasbrough Vizards LLP said that it was important for charities to be able to obtain a supplemental Charter, but queried the need for it to be printed on vellum. “As well as the significant cost involved, the practical issue with this is that it is not possible to copy the final sealed Charter and instead what charities end up with is a PDF of the final form, but without the date it was sealed.”

**Cross-border issues**

4.179 The National Trust raised cross-border issues. It operates in Northern Ireland, but the Charity Commission for Northern Ireland did not have the equivalent power to make section 73 schemes, so changes required primary legislation.

**Charity Commission schemes**

4.180 Francesca Quint thought that, given section 280 applies to administrative changes to trusts of unincorporated charities governed by Act of Parliament, the Charity Commission should have the power to make “regulated alterations” to such trusts by scheme. This is already the case once a section 73 scheme has been made; the matters within the section 73 scheme are freed from Parliamentary oversight.

**Section 68 schemes**

4.181 The Charity Commission thought that its scheme-making jurisdiction in respect of Royal Charter charities (under section 68) should be removed, with regulated alterations being subject to the PCO’s consent (who would consult with the Charity
Commission). “Any underlying trusts to the Charter should be automatically changed in accordance with the changes to the Charter.” For statutory charities, “a scheme should only be required in the case of regulated or sensitive alterations”.

Exempt charities

4.182 HEFCE thought it important to involve principal regulators when exempt charities are involved.

Consultation Question 19.

We provisionally propose that the new power of amendment should not apply to the governing documents of Parochial Church Councils.

Do consultees agree?

[Consultation Paper, paragraph 4.97]

4.183 17 consultees answered this question:

1. 14 agreed;
2. 1 disagreed; and
3. 2 expressed other views.

4.184 The Churches’ Legislation Advisory Service thought that “because PCCs are sui generis and governed by ecclesiastical law, it would be appropriate for them to be excluded from the proposal”. Veale Wasbrough Vizards LLP agreed that individual PCCs should not have this power. The Church Representation Rules (which govern all PCCs) are amended relatively regularly. The result of permitting individual PCCs to amend those Rules in so far as they applied to that PCC “would most likely be inconsistent and unclear, especially where the change in church officers occurs quite frequently; it would require records to be very well maintained” and as PCCs with an income below £100,000 are excepted from registration, it would not always be possible for such a record to be kept by the Charity Commission.

4.185 Bates Wells Braithwaite were concerned that PCCs did not have “modern and adequate governing documents”. They did not suggest that the power of amendment

143 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.
144 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; Lord Hodgson; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Veale Wasbrough Vizards LLP; Stewardship; RSPCA (which had no objection).
145 Lawyers in Charities.
146 The University of Liverpool CL&PU; Prof Gareth Morgan.
should apply to PCCs, but instead suggested the Church of England review and update the Measures governing PCCs.

4.186 Prof Gareth Morgan thought “the Church of England should be required to update the Church Representation Rules to give members of a church electoral roll voting at the APCM similar powers to make minor amendments to the composition, meeting arrangements etc for PCCs. At present many issues cannot be controlled locally, and other amendments such as to the size of the PCC or methods of election can only be implemented a year later than the original agreement. If the Church of England General Synod is reluctant, then perhaps PCCs should not be exempted from the new proposals.”

4.187 Francesca Quint queried whether the same approach would apply to the governing bodies of Anglican Cathedrals.

**Consultation Question 20.**

We invite the views of consultees as to:

(1) whether the new amendment power should apply to higher education institutions without modification;

(2) whether the new amendment power should apply to higher education institutions in accordance with regulations made by the Secretary of State and Welsh Ministers setting out the provisions that can be amended without Privy Council oversight;

(3) whether, and if so how, the 2006 list\(^\text{147}\) for universities should be revised;

(4) whether, and if so how, that approach should be extended to higher education corporations;

(5) whether, and if so how, the amendment procedure for higher education corporations (HECs) under the Education Reform Act 1988 (“the 1988 Act”) could be improved; and

(6) whether, and if so how, the amendment procedures for the universities and colleges set out in Figure 7 of the Consultation Paper could be improved.

[Consultation Paper, paragraph 4.110]

4.188 23 consultees answered this question.\(^\text{148}\)

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\(^{147}\) See Report, para 5.129.

\(^{148}\) Francesca Quint; Geldards LLP; the Oxford Colleges; Plymouth University; University of Birmingham; OSCR; AHUA; the University of Liverpool CL&PU; University of Durham; University College London; Bates Wells Braithwaite; CLA; Stone King LLP; Charity Commission; University of Cambridge; Lawyers in
4.189 There are four categories of higher education institution (“HEI”):

(1) universities established by Royal Charter;
(2) universities established by individual Act of Parliament;
(3) higher education corporations (“HECs”), incorporated under the 1988 Act; and
(4) other designated institutions (companies or unincorporated) which are governed by the 1988 Act.

4.190 HEFCE noted that some bodies were established by statute and subsequently constituted by Charter. It also noted that some charitable higher education providers are companies (limited by shares or by guarantee), and a small number remain unincorporated.

Comments from lawyers

4.191 Pinsent Masons LLP, with whom the University of Warwick agreed, had the following general comments about HEIs:

(1) There are no major problems with Royal Charter universities, which “have considerable flexibility and wide powers. They can usually achieve what they want to in terms of constitutional reform and modernisation. The Privy Council Office advisers are helpful and knowledgeable, providing a good level of service. Institutions which have not yet modernised their charters and statutes [also known as bye-laws] have the ability, if they want, to make amendments which will speed up their own decision-making and update constitutional arrangements to be more fit for purpose. However, we think it would be sensible and helpful to take steps to limit the involvement of the Privy Council so that it would not have to get involved unnecessarily in minor matters.”

(2) HECs are “much more problematic. The way they were set up under ERA 1988 considerably restricts their scope to make modernising amendments in some important respects affecting their governance. This needs to be addressed. The solution is likely to involve amendment to Schedule 7A of the ERA 1988 …”. “HECs should have the same freedom and flexibility to amend their constitutions as charitable HEIs established by Royal Charter or as companies limited by guarantee.” They referred to a project led by the Association of Heads of University Administration “with the aim of modernising their governance to remove unnecessarily burdensome and out-of-date provisions”, which had led to law reform proposals being drafted. HECs were encouraged “to pursue reform as far as they could within the limits of current legislation” but the primary legislation limits the changes that can be made. The proposals were considered and pursued by the Department for Business, Innovation and Skills (as it then was), but legislation was not brought forward.

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149 The Instrument and Articles of Government are “tied to the era of 1988 when HECs were set free from local authority control (but with strings attached)”. 
HEIs established by an Act of Parliament “have deeper constitutional problems. … The problem usually lies in the way that the Act prescribes the content of underlying statutes, so that the scope for amendment of the statutes is limited. In those cases the procedure, length of time and expense involved in making changes to the Act (in order to free up the statutes) have been so daunting that the institutions have decided instead to live with disadvantageous provisions and find ways of working around them. This is far from ideal and leaves a small number of institutions significantly hampered in their freedom to operate compared to their peer group. We think that deeper reforms than those proposed in the present consultation paper are needed, for example significant streamlining of the section 73 procedure outlined in the paper.”

“It is our view that Government (in the form of Privy Council) control over university constitutions should be minimised and focus only on key areas of oversight.” Pinsent Masons LLP suggested that a new power to make minor amendments should be tailored for HEIs, and the Secretary of State and Welsh Ministers should have a regulation-making power for this purpose. They suggested that Privy Council oversight should be maintained in respect of:

(a) degree awarding powers;
(b) university title;
(c) name;
(d) objects;
(e) application of property on dissolution;
(f) payment of trustees; and
(g) powers of amendment.

“These matters are important in terms of charity law, are of public interest and potentially affect the brand and reputation of UK higher education. All other matters should be for individual universities to determine themselves, as autonomous charitable bodies.”

They suggested that this should be the case for all charitable HEIs, and not just Royal Charter universities. The 2006 Letter\textsuperscript{150} should be amended accordingly, and “fundamental reform” to the 1988 Act and individual Acts of Parliament in Figure 7 of the Consultation Paper would be required.

Veale Wasbrough Vizards LLP agreed that, in principle, the new amendment power ought to apply equally to all types of charity, including HEIs. “However, in our view HEIs are sufficiently numerous and unique in terms of their governance arrangements, the provisions which are typically found (or required to be included) in their constitutions, their nature as publicly funded institutions and their exempt charitable status to warrant their own specific regime.”

\textsuperscript{150} See n 147 above.
4.193 They continued: “Because the requirement for Privy Council oversight applies to HEIs as HEIs ..., we also think it makes more sense for there to be one regime which applies to all HEIs regardless of how they are constituted rather than different regimes which apply to chartered HEIs, HECs and those constituted as companies. It is difficult to see how the new power could be made to apply to companies as amendments to their articles of association are governed by company law (and the [1988 Act]). On balance, therefore, we think the best approach would be for the 2006 [Letter] to be revised so that more provisions fall outside the Privy Council's control. To the extent that the White Paper and the 2006 Letter do not apply to HECs, in our view it needs to be made clear that the list applies to HECs as well as to HEIs incorporated as companies.” On this approach, the new statutory power should not apply to HEIs but the result would be similar.

4.194 They suggested that the following matters should be removed from the list in the 2006 Letter (and therefore from Privy Council control):

(1) functions, responsibilities and over-arching powers of the Governing Body;
(2) delegation of the Governing Body's powers;
(3) composition of the Governing Body and terms of office of members;
(4) quorum for conducting Governing Body business;
(5) auditors and Audit Committee; and
(6) the Model Statute (concerning employment matters).

4.195 Making changes that go beyond these matters would require Privy Council approval. But “if the changes are made in the context of a more general review of the constitution, obtaining Privy Council's consent may not add much complexity to the process”.

4.196 Bates Wells Braithwaite said that HEI's receipt of Government funding through HEFCE put them into a different category. They thought that HEIs that did not receive Government funding should have the same amendment powers as other Royal Charter and statutory charities. For HEIs that receive Government funding, they thought that restrictions and compliance obligations should be imposed through HEFCE grant terms, rather than through detailed involvement in the organisation's governance.

4.197 Bates Wells Braithwaite thought “there should be a general aim to harmonise as far as possible the essential governance requirements of higher education organisations. The current level of complexity is extreme. It is difficult and costly to identify, interpret and apply provisions relating to governance, let alone change them.” They thought that all HEIs should be brought within the new powers of amendment, with “core governance features … being capable of change only by regulations”.

4.198 Francesca Quint said “since HECs are creatures of statute which are not regulated by the Charity Commission, there is no very strong argument for bringing their amendment procedures into line with those applying to charities which are regulated
by the Commission", but she thought that a consistency of approach would be convenient so suggested that the same regulated alteration approach should apply to HECs.

4.199 The University of Liverpool CL&PU thought “it would be dangerous to simply ‘bolt on’ the new, proposed amendment procedure to the existing procedures for HEIs; the creation of a whole new system for HEIs might be necessary.”

4.200 The CLA said that its proposal for a new amendment power (see paragraph 4.80 above) should apply to HEIs, and said that where an HEI currently had to consult, or seek approval from, an associated body before making a constitutional change, that requirement should continue (for example, the requirement that Oxford Colleges obtain the University’s consent). They said that the list in the 2006 Letter should not be extended, and that HEIs would continue to be able to make amendments moving provisions down into bye-laws and regulations. They said that the new amendment power should apply to HECs, with the “deemed consent” procedure applying to amendments to the instrument and articles of Government.

4.201 The Charity Commission thought that the new regime could be tailored for HEIs, but hoped for the principles to be consistent with other types of charity. It was sympathetic to the list in the 2006 Letter being revised.

4.202 OSCR noted that the Scottish Government had consulted on the amendment of HEI’s governing documents in relation to the Higher Education Governance (Scotland) Bill, proposing the establishment of a Scottish Committee to simplify the current amendment process.

Comments from HEIs and representative bodies

4.203 The Association of the Heads of University Administration agreed with our comments in the Consultation Paper that the current amendment process is “overly burdensome and not tailored to the importance of a proposed amendment”. The Association said “it would appear that the sector is fundamentally very supportive of the Commission’s proposals in chapter 4”; this would “make amending Charters/Statutes much easier and quicker than is currently the case”. The Association was in favour of our proposed power to make minor amendments, and guidance on re-allocation of provisions, for the benefit of HEIs.

4.204 The University of Birmingham made the following suggestions.

(1) HEIs without powers of amendment should be deemed to have them, and should have the option of using the new amendment power in place of its existing amendment powers.

(2) It would be helpful for the Secretary of State to be able to change the list of permitted amendments by secondary legislation, after consultation with the sector, provided such changes only remove matters from Privy Council oversight, rather than increase Privy Council regulation.

(3) There are already “many layers of existing regulation in addition to that provided by the Privy Council”, in particular from HEFCE (which ensures good
governance) and the QAA.\textsuperscript{151} With the increasing number of private providers who are not constrained in the same way, the provision of “flexibility and the ability to adapt quickly to changing circumstances would be welcome”.

(4) The following matters should be removed from the list in the 2006 Letter: university years; Court; audit committee terms; and the Model Statute. This “would allow universities to introduce flexible teaching models, to enhance their ability to attract excellent students from around the world, and through a remodelled Court, engage with the local and business community in alternative ways.”

(5) A new regime should apply to HECs, to ensure a level playing field.

(6) “Consultation should be limited to an internal consultation on any proposed changes to the Royal Charter and statutes, and a consultation with HEFCE as principal regulator. It should not be necessary to publish changes in the London Gazette, when changes will be available on the institution’s website.”

4.205 The University of Durham expressed a desire to be able to amend its statutes “to keep pace with changes in the university landscape”; its current amendment procedures “are restrictive due to the Privy Council requirement and therefore are in need of reform”. It thought that tailored provision should be made for all HEIs, with a regulation-making power for the Secretary of State. It suggested that the matters in the 2006 Letter and in paragraph 4.52 of the Consultation Paper should require Privy Council oversight as they affect charity law and the public interest. Other matters should be for the university to amend.

4.206 The University of Warwick supported measures “which make it easier to amend governing instruments and which reduce the number of items that would require Privy Council approval. As such, we are supportive of further guidance and definition of items that can be amended locally without recourse to the Privy Council.”

4.207 University College London favoured a tailored power for all HEIs, which could be made under regulations issued by the Secretary of State. It noted that universities already have wide-ranging duties (equalities, employment, and education legislation), and duties to HEFCE and other regulators such as QAA and UKVI.\textsuperscript{152} It suggested that there should only be Privy Council control over matters with charity law or public interest angles, namely:

(1) the matters in paragraph 4.52 of the Consultation Paper where relevant to universities; and

(2) the list in the 2006 Letter, save that:

   (a) the Model Statute should be removed;

   (b) universities could have greater flexibility concerning governance, such as delegation, composition, voting and quorum requirements;

\textsuperscript{151} Quality Assurance Agency for Higher Education.

\textsuperscript{152} UK Visas and Immigration.
(c) student union provisions could be simplified, given the statutory responsibilities in the Education Act 1994; and

(d) the reference to university years should be clarified as it is unclear why this should concern the Privy Council.

4.208 Plymouth University said “the current amending powers are varied and sometimes confusing, depending on whether the institution is constituted by Royal Charter, individual Act of Parliament or the 1988 Act”. It suggested a “common approach” for all universities that removed “largely historic anomalies”:

(1) “a new model Instrument of Government to apply to all universities, setting out the core provisions, amendment of which would require regulatory approval”. “Core provisions” should be:

(a) the matters in paragraph 4.52 of the Consultation Paper (with some modification);

(b) academic freedom provisions (in accordance with the 2006 Letter); and

(c) student union provisions (in accordance with the 2006 Letter).

(2) “any other matters would be dealt with in bye-laws or regulations and guidance on where particular provisions should reside would be welcome”, though it suggested that wherever they were located, their amendment should not require regulatory approval. Matters that should be capable of amendment without oversight are:

(a) roles, rights and responsibilities of university officers, academic staff, members and students;

(b) the composition, administrative arrangements and meetings of university bodies and committees; and

(c) the university structure.

4.209 Plymouth University said that this list of matters should be capable of amendment by secondary legislation. This approach should “replace the myriad amendment procedures” applying to the different universities, though universities with a collegiate structure may need to retain a more tailored procedure.

4.210 Plymouth University suggested that the Charity Commission should take over the Privy Council's role in the amendment of Royal Charter charities’ governing documents. Whilst universities are exempt charities and not registered with the Charity Commission, Plymouth University suggested that an increased role for the Charity Commission was still possible, so as to treat all charities in the same way as far as possible. It suggested that the Charity Commission could become the principal regulator in this area.

4.211 The Open University thought the new amendment power should apply to HEIs in accordance with regulations setting out matters that can be amended without oversight, based on a revised version of the list in the 2006 Letter. It suggested the
following matters should fall within a new amendment power: “detailed roles and appointment of officers, powers, make up and meetings of the Council and the Senate, structure of the University, amendments to statutes”, and that the following matters should fall outside the amendment power: “degree awarding powers, university title, objects and broad powers, audit committee, academic freedom provisions, student organisation, method of amending main governance document (the Charter)”. 

4.212 Imperial College London thought that the new amendment power should apply to HEIs in a way that was compatible with the list in the 2006 Letter, which reflected the special position of HEIs. It was content with the balance struck in the 2006 list between matters requiring and not requiring Privy Council oversight.

4.213 HEFCE said “it would be helpful if arrangements to amend governing documents could be harmonised as far as possible. And we see no pressing reason why, conceptually, the types of minor and major changes should be particularly different from those that apply beyond the HE sector.”

Government view

4.214 The Department for Business, Innovation and Skills (“BIS”, as it then was)) said that, as higher education is devolved to Wales, Scotland and Northern Ireland, its response was limited to England. It noted that the Privy Council approved changes to governing documents of HEIs in the devolved jurisdictions.

4.215 BIS said its “long-standing policy aims [were] to deregulate the arrangements for HEIs’ governing documents both in terms of Privy Council approval processes and reducing the contents within governing documents that require such approval to issues of ‘public interest’ only”. It was “fully supportive” of our proposals “to deregulate charities’ governance” and wanted HEIs to benefit. However, “the proposals as presented do not work for HEIs because the Privy Council’s requirements on the contents of HEIs’ governing documents are different from the Law Commission’s proposals for charities in general”. BIS agreed to the creation of a faster and simpler process for HEIs to make amendments without recourse to the Privy Council, but said that the categories in paragraphs 4.51 and 4.52 of the Consultation Paper were not appropriate for HEIs; it therefore agreed that separate provision should be made for HEIs, and that this could be achieved by conferring on BIS or the Privy Council a power to make regulations that set out the matters within HEIs’ governing documents that require Privy Council approval. BIS said that the content of such regulations would have to be agreed by BIS and the Charity Commission with input from stakeholders in the higher education sector. The regulations would be based on the matters in paragraph 4.52 of the Consultation Paper, the 2006 Letter (re-evaluated), and other matters that the Charity Commission and stakeholders wished to include. It said the regulations should apply to the governing documents of all providers upon becoming HEIs and to any amendments.

4.216 BIS thought that the requirements for HECs’ governing documents are “now unnecessarily prescriptive”. Those requirements would conflict with any new regulations for HEIs and put HECs “at a further disadvantage to other HEIs”, so

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153 In the 1988 Act, ss 124A and 125, and schs 7 and 7A.
should be repealed “to allow the Regulations to apply equally to HECs”. BIS said that, at the same time, “it would also be helpful to repeal other legislative provisions relating to the HECs, in particular the Secretary of State’s power to dissolve and transfer the assets of a HEC, and the power to direct a HEC to change its governing documents”.

4.217 BIS noted that all HEIs require Privy Council approval to governing document changes, but that the precise requirements differ depending on their legal form. It said “there is one common aspect of many of the different approval processes that could be changed to make them faster and simpler. Many of the processes require an Order in Council and/or Order of Council to signify approval.” The former requires a meeting of the Privy Council with the Queen and the latter requires approval of particular Privy Councillors. If, instead, the requirement were simply that amendments must be “approved by the Privy Council”, this would allow the Privy Council to decide whether an Order in, or of, Council was required, or whether approval could simply be by letter. BIS did not think, however, that this should be the case for HEIs founded by Royal Charter for three reasons:

1. “it would create two tiers of Chartered bodies”; the non-HEI Chartered bodies without this power available to them “may perceive themselves as being disadvantaged”, and conversely the HEI Chartered bodies “may perceive themselves as being in the ‘lower tier’ as approval of governing documents by letter would no longer require the personal presence of Her Majesty”.

2. “a move to change to approval by letter through primary legislation (which would effectively remove both Her Majesty’s direct oversight of Chartered bodies’ governing documents and decrease Her prerogative powers in relation to such Charters) may stall through the significant constitutional sensitivities raised and related legal issues”.

3. “the process and implications of change are disproportionate to the small number of HEIs that would (questionably) benefit anyway”.

4.218 The Welsh Government was more reticent about applying our proposals to HEIs. The eight HEIs in Wales are registered charities. In 2006, Welsh Ministers wrote to all HEIs in Wales in similar terms to the 2006 Letter. The Welsh Government welcomed “in principle, the idea of simplifying the process for HEIs to make amendments to their governing documents”. It noted the special position of HEIs compared with other charities as recipients of significant public investment. “As such there is considerable public interest in their governance arrangements both to safeguard the public funds that they receive and to protect the interests of students and the reputation of the Welsh higher education sector.” The lists in paragraphs 4.51 and 4.52 of the Consultation Paper “do not align closely with the list of key principles of public interest” in the 2006 Letter. As for the option of giving Welsh Ministers a regulation-making power, the Welsh Government still had concerns as to whether it would be possible to define minor and major amendments “in a generalised way across the sector”; it considered that such matters were institution-specific and context-specific and “what may constitute a minor amendment for one institution may not be so for another”.

4.219 The Welsh Government thought that, following “significant change in recent years” in the higher education sector including recent mergers, HEIs in Wales should have the opportunity to organise their governance arrangements in accordance with the 2006
Letter, and Privy Council oversight should not be reduced at this stage. The Welsh Ministers therefore did not consider the amendment power should apply to HEIs in Wales. They preferred the approach in the 2006 Letter, which provides institutions with autonomy but also maintains Privy Council oversight. They welcomed further dialogue about “more streamlined and risk sensitive forms of governance” by building on the approach in the 2006 Letter, and acknowledged that the public interest matters in the 2006 Letter may need to be revisited and reconsidered.

The Universities of Oxford and Cambridge Act 1923 (“the 1923 Act”)

4.220 The Oxford Colleges’ response focused on the specific regime for Oxford colleges. They were supportive of a power to change minor matters in the college bye-laws (referred to as “statutes”) “without the somewhat wieldy Privy Council procedure” under the 1923 Act. They thought that such a power should be specifically framed for the Oxford (and perhaps other) colleges. They suggested that “the University should retain involvement where its interests are affected in both minor and major amendments by colleges to their statutes”.

4.221 The Oxford Colleges said that a list of minor matters would not work because “College statutes … make moderately detailed provision for a range of issues arising in the running of the colleges – those issues varying from one college to another. Accordingly, we suggest that such “minor” matters should be defined by excluding what is not minor”. They suggested that the following matters should fall outside the amendment power:

(1) “the procedural requirements presently embodied in the [1923 Act]”;
(2) “the protection of vested rights”;
(3) “the description of a college’s objects”; and
(4) “(possibly) its name”.

4.222 By contrast, the Cambridge Colleges thought that the specific process to amend College statutes under the 1923 Act “should be retained as it stands”. “The Act provides for the interconnection of the interests of the University and the several Colleges inter se and for the preservation of existing interests.”

4.223 The University of Cambridge explained that it had significantly amended its statutes in 2013 in line with Privy Council advice to minimise the need to seek Privy Council consent in respect of future changes. The amended statutes “now comprise only the fundamental constitutional and governance provisions of the University; less fundamental provisions have been moved out of the Statutes, so amendments to these provisions can be made without the Privy Council’s involvement, but are otherwise still subject to all the internal procedures which previously applied”. Accordingly, a new amendment power would only apply to Cambridge in limited circumstances, such as in respect of the special trusts which – “for somewhat anomalous reasons” – are still regulated by the statutes. Nevertheless, the University thought any new amendment power should still apply to it.

4.224 The University of Cambridge did not have any suggestions for amendment to the 1923 Act, save to say that, when the Privy Council Office consults the Charity Commission,
it would be helpful for the University to correspond directly with the Charity Commission rather than through the Privy Council Office. The University of Oxford said the same thing: “direct dialogue should be made possible between charity and Commission”.

4.225 The University of Oxford thought a new amendment power should apply to all charities, including HEIs, but it wanted the 1923 Act to remain in place. “This may result in Oxford and Cambridge having a choice of provisions to achieve a particular constitutional amendment, but we do not see that as problematic. We would, however, have significant concerns if the proposed reforms were to have implications for the 1923 Act.”

4.226 The University of Oxford said that it could make amendments without Privy Council consent to trusts recorded in regulations, but not to those scheduled to its statutes. “There is no logical reason for this inconsistency”; it should be possible to amend administrative provisions in trusts that have been scheduled to its statutes without Privy Council oversight. The University suggested that “amendments to purely administrative provisions should not have to go to the PCO purely because they appear in a Queen-in-Council statute”. 154 It also said that amendments consequential on other (non-Queen-in-Council) amendments should not require Privy Council approval; for example, changing cross-references or the names of titles of officers or departments.

Consultation Question 21.
We invite the views of consultees as to whether there are any other categories of charities established by statute or Royal Charter for which special provision should be made when creating any new amendment power.

[Consultation Paper, paragraph 4.112]

4.227 9 consultees answered this question:155

(1) 5 thought special provision was not required;156

(2) 3 identified other charities for which special provisions might be appropriate;157 and

(3) 1 expressed other views.158

154 The University of Oxford has historically agreed with the Privy Council which of its statutes can be amended with, and without, the Privy Council’s consent. Statutes which require approval at a formal meeting of the Privy Council are referred to as “Queen-in-Council statutes”.

155 Francesca Quint; Geldards LLP; the Cambridge Colleges; the University of Liverpool CL&PU; Bates Wells Braithwaite; CLA; Stone King LLP; Veale Wasbrough Vizards LLP; RSPCA.

156 Geldards LLP; the University of Liverpool CL&PU; CLA; Veale Wasbrough Vizards LLP; RSPCA.

157 Francesca Quint; Bates Wells Braithwaite; Stone King LLP.
4.228 The CLA favoured harmonisation of regimes, so generally opposed the creation of special regimes for certain categories of charity.

4.229 Bates Wells Braithwaite noted that the Methodist and United Reformed Churches, similarly to PCCs, had statutory governing documents and suggested that they too should be excluded from the new amendment power.

4.230 Stone King LLP identified certain statutory charities as deserving special treatment, such as non-departmental public bodies.

4.231 Francesca Quint thought that constitutional change should be simplified for:

1. charities administered by health authorities, which are usually governed by NHS legislation.

2. unincorporated charities administered by local authorities: "Here again authorities are often trustees of local charities and trusteeships change with changes in the structure of local Government. It is not clear [whether] the powers of delegation exercisable by a local authority trustee are restricted to those conferred by local Government legislation or whether the trustee is able to adopt an express power under section 280 or the Charity Commission able by administrative scheme to specify alternative delegation arrangements (both being possibilities in my view, but there is no authority on the question)."

3. statutes governing Christian denominations such as the United Reformed Church and the Methodist Church.\(^{159}\)

4.232 The Cambridge Colleges did not want any new amendment power to apply to them.

**Consultation Question 22.**

We invite consultees to share with us their experiences of amending statutory or Royal Charter charities’ governing documents, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 4.114]

4.233 26 consultees answered this question.\(^{160}\)

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\(^{158}\) The Cambridge Colleges.

\(^{159}\) See para 4.230

\(^{160}\) National Churches Trust; City of London Corporation; Royal Statistical Society; Francesca Quint; Royal Archaeological Institute; the Oxford Colleges; Anthony Collins Solicitors LLP; Plymouth University; the Cambridge Colleges; University of Durham; Institute of Chartered Secretaries and Administrators; University College London; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Society for Radiological Protection; Lawyers in Charities; University of Oxford; Imperial College London; the National Trust; Veale Wasbrough Vizards LLP; RSPCA.
General comments

4.234 Francesca Quint said: “constitutional change for charities of these kinds is often put off because it is perceived as expensive, long-winded and complex or because non-specialist solicitors simply don’t know how best to advise. There has also been, in recent years, very considerable resistance from the Charity Commission in the face of any request to embark on a section 73 scheme.”

Royal Charter charities

4.235 In 2013, the Royal Statistical Society made a minor change to allow its Vice President to be elected from the charity’s membership, rather than from its council. “This took substantial staff time to engage with the Privy Council, including a six week wait for comments and then a response time after our Special General Meeting. Waiting on the Privy Council makes it difficult to predict when changes will take effect to allow for comprehensive planning.” More recently, the Society has made minor changes to its governance (the date of the annual general meeting and the composition of a sub-committee); “again we have had to use staff resource, not to mention the time of the Privy Council to make relatively minor changes to allow us to be more effective and to engage better with our membership”.

4.236 The Royal Archaeological Institute was “concerned about the time and costs involved in making alterations”. The most recent amendment it had sought from the PCO was in 1991; the words “Sponsors or” were deleted, and the Royal Archaeological Institute considered this clearly to have been a minor amendment within our provisional proposals.

4.237 Cancer Research UK reported that it was in the process of amending its Charter and bye-laws “to simplify the complex administrative provisions which are no longer appropriate or viable”. It has engaged external lawyers and reports it being a costly and time-consuming process. If the amendments cannot be made by order, a supplemental Charter will have to be printed on vellum at a cost of £500 per page plus VAT “which seems extortionate”.

4.238 The Independent Schools Council reported that its member schools established by Royal Charter have found constitutional change “disproportionately complicated, time-consuming and expensive”.

4.239 The Society for Radiological Protection said the time and expense was “not particularly excessive but it does take a long time in order to be thorough”.

Statutory charities

4.240 The National Churches Trust (NCT) explained its recent experience of amending the Church Building Society Act 1828 by a section 73 scheme. The 1828 Act “contained many provisions which were unsatisfactory or even incapable of practical fulfilment” and which needed to be brought up to date. The Incorporated Church Building Society (ICBS) was already being administered by the NCT and the NCT wished to be appointed as the sole trustee, which also required amendment of the Act. A previous merger of the NCT and the Historic Churches Preservation Trust had been

"comparatively simple", but the process for the ICBS was “complex” requiring a section 73 scheme and an affirmative resolution from both Houses of Parliament. The process was expensive for the charity and took 10 years; “it is completely unreasonable to expect charities to incur this amount of staff time and mounting legal fees over a considerable period of years, when such resources could instead be put to the primary task of delivering the charity’s objects”.

4.241 The NCT therefore “fully [concurred] with the expressions of frustration and complaint about the section 73 procedure” set out in the Consultation Paper. The change was not to purposes but to “basic governance arrangements to enable the charity to operate effectively and efficiently”; the existence of those governance arrangements “was largely one of historical accident” dating from a time when one of the only methods of incorporation was by statute. Given its experience, the NCT was therefore “strongly supportive of the reforms proposed” in the Consultation Paper.

4.242 The City of London Corporation explained its experience of obtaining a section 73 scheme for the Bridge House Estates charity. The power sought by the charity was minor – to allow it to divert or block an elevated walkway – but it was “a very time-consuming process”; this was in contrast to another section 73 scheme which had taken six months.

4.243 The National Trust explained that it had a section 73 scheme approved in 2005 to make changes to its governance structure. “While [dialogue with the Charity Commission] was a lengthy process, we consider that it was proportionate to the action being taken and we found the discipline of complying with the legislative requirements very helpful. However, the Parliamentary process which followed was rather more difficult to navigate and required us to instruct specialist parliamentary agents at a relatively high cost. In retrospect, the process of what is required to get a scheme approved by Parliament could be made more streamlined.”

4.244 The RSPCA is incorporated by statute, namely the Royal Society for the Prevention of Cruelty to Animals Acts 1932, 1940 and 1958. It is a membership charity and also an umbrella body for 162 RSPCA branches, all of which are charitable unincorporated associations. The RSPCA’s rules were set out in a schedule to the 1932 Act, and section 10 of the 1932 Act permits the RSPCA to amend those rules subject to conditions, principally requiring approval by the Charity Commission or court if an amendment “affects either directly or indirectly the property or funds of the Society”. This condition had been overlooked until 1993, when the Charity Commission made a comprehensive order to regularise the position. The section 10 amendment power has been the source of uncertainty for the charity and has been the subject of two High Court rulings (in 1999 and 2001). The RSPCA concluded: “Whilst such issues may be of great interest to lawyers, it makes the business of updating the charity’s constitution very complicated and costly which benefits neither the charity nor the wider public.”

4.245 The General Medical Council, a statutory charity governed by the Medical Act 1983, said the 1983 Act was “detailed, complex, difficult to penetrate and, in places,
inconsistent”. The legislative framework “unnecessarily [constrains] our ability to respond to … changing needs”.

HEIs

4.246 Imperial College London said its “experience of agreeing amendments to its Charter and Statutes with the Privy Council has been positive. Response times have been very good and the Privy Council officers have provided helpful guidance and support.”

4.247 Plymouth University, a HEC established under section 121 of the 1988 Act, said that until recently it had “refrained from making constitutional changes (even though certain changes would have been advisable at an earlier stage) because of the time and costs anticipated in applying to the Privy Council”.

4.248 The University of Durham said that “the nature of the work and the combination of the internal processes … before the proposed amendment can reach the Privy Council is time consuming and requires the involvement of a number of individuals”. This results “in a very expensive and prolonged process”.

4.249 University College London said “the process is length and challenging”, not because of problems with the Privy Council, but because so many stages are involved (the requirement for special resolutions at two Council meetings, which are only quarterly; the need to discuss proposed changes with the Privy Council; and the need for the Privy Council to consult with others). It said that “this level of ‘process’ has acted as a deterrent to bringing forward re-organisational changes to our governing documents”. It had engaged external lawyers, and the fees had been significant.

4.250 The Cambridge Colleges said that they had occasional experience of petitioning for a supplemental Charter and that “no problems appear to have arisen”. The Oxford Colleges said that amendment of college Charters was “very unusual”, and that “the process for amendment of college statutes, pursuant to the 1923 Act process, where only minor matters are concerned, is unwieldy and can involve unreasonable expense and delay”.

4.251 The University of Oxford said “The 1923 Act is extremely important to the University and we would not want to see it changed. However, the current processes can be extremely lengthy, and this can delay implementation of changes which would deliver immediate benefit to the institution. Internal expertise and familiarity with the process keeps costs and amount of work to manageable levels”.

Comments from lawyers

Royal Charter amendments

4.252 Geldards LLP said that constitutional amendment by Royal Charter charities became more complex and time-consuming in the case of bilingual English/Welsh documents, which have to be agreed by the Secretary of State for Wales or the Welsh Government. Geldards LLP had acted on a range of amendments. A simple amendment was to amend references to the Secretary of State for Wales to the National Assembly of Wales following devolution. More complicated amendments involved negotiating with the Charity Commission and Welsh Government for entirely new supplemental bilingual Charters for two organisations. This process took 3½
years to complete and cost £50,000 plus VAT in legal fees as well as the expense of printing on vellum. Geldards LLP gave a further example of Charter amendments to update the trustee appointment provisions together with wholesale modernisation of the bye-laws. The process took nearly 2½ years, which included a lengthy internal consultation with the members of the charity. Costs were increased further by a former member of the charity making an objection to the PCO. The total costs exceeded £25,000 plus VAT.

4.253 The experience of Anthony Collins Solicitors LLP was that “amendments for Royal Charter charities are significantly more time-consuming and costly than for other charities, often disproportionately so. This is partly because of the procedures which have to be followed by the Privy Council (in the context of much wider responsibilities) and the interplay between the Privy Council and the Charity Commission which at times can be rather disjointed. Reducing the role of both organisations as much as possible in relation to amendments for Royal Charter charities will reduce this problem but where involvement remains necessary then finding ways of operationally improving the interplay would be helpful.”

4.254 Bates Wells Braithwaite said the Privy Council “is very responsive and helpful”, but that amending governing documents “can be a time-consuming process, incurring costs far in excess of those incurred in changing a trust or company’s constitution”.

4.255 Stone King LLP said the Privy Council was “extremely helpful” and had a “quick response time”. “It conducts very thorough, specialist constitutional reviews and appreciates that each amendment is unique. Due to funding constraints, the Charity Commission is unable to provide the same level of service in relation to turnaround time and can no longer give detailed consideration to the amendments proposed.”

4.256 Veale Wasbrough Vizards LLP said “the service provided [by the PCO] is excellent and the staff are very helpful. The process for obtaining supplemental charters is cumbersome and lengthy, but this is largely because the steps have to tie in with meetings of the Privy Council and there are certain months of the year in which no meetings are held.” They added that the time involved, and various steps to be taken, makes the process costly.

4.257 Lawyers in Charities reported that the requirement to obtain Privy Council consent increased the work involved and therefore the legal fees incurred by charities, as well as increasing the time taken for changes to be made. This was particularly the case when the charity’s members only met annually to consider amendments. “Such requirements had little benefit and seemed disproportionate given that other charities of the same size did not require consent to make similar amendments.”

4.258 The CLA set out the process by which the British Council amended its Charter in 2010 and 2011. It added a fifth object, allowed for the chair of trustees to be paid, allowed foreign trustees, and updated the language. The process was lengthy, but this included a lot of internal time before the PCO was approached. Once the amendments were re-drafted (following an initial approach to the PCO), it took six months between submitting the initial letter to the PCO and obtaining approval. Those involved “felt that the process of PCO approval was very opaque and hard for non-legal (or even legal but non-specialist) colleagues to understand”. “In general it was felt that the process could certainly be clearer and more transparent but that overall
the need for PCO approval for changes to the Royal Charter was acceptable. Costs were significant and this reflected the nature and extent of the changes, as well as the scale of consultation.”

4.259 Bircham Dyson Bell LLP’s experience of dealing with Royal Charter charities was mixed. The Privy Council caseworkers are readily contactable and “tend to be helpful, responsive and knowledgeable”. But the process can be frustrating, opaque and applied inconsistently (for example, as to who is contacted for comment and the impact of those comments). Further, the process can become political; guidance could be helpful to make the process clearer, transparent, to emphasise charities’ independence, and to set out the reason for allowing Government influence within a charity.

4.260 The Charity Commission said:

It is our experience that there is much confusion about when a section 68 scheme is required and it appears to be the case that in most cases this can be avoided. The confusion arises because of the question whether there are underlying charitable trusts or whether the Charter body holds its property corporately. We appreciate this issue will continue to be unresolved. However, it would be possible to make statutory provision that the terms on which a charitable Royal Charter body holds its property are modified in accordance with the changes to the Charter such that there is no issue as to whether a section 68 scheme is required.

Statutory charities

4.261 Bircham Dyson Bell LLP said that, for statutory charities, the process of amendment can be very long and drawn-out and can seem opaque, particularly to those who are unfamiliar with Parliamentary procedure. Charities can be so put off that they decide not to make amendments, or to look for other ways around the problem. There is a particular difficulty when a statutory charity’s governing document omits useful powers, such as to borrow or mortgage; “it would be useful if statutory corporations could be given basic powers, or a power to give themselves such powers, subject only to Charity Commission consent”.


Chapter 5: Other charities: changing purposes and cy-près schemes

INTRODUCTION

5.1 40 consultees commented on the issues discussed in Chapter 5 of the Consultation Paper. Before setting out their responses to the individual consultation questions, we set out the additional comments raised by some consultees.

GENERAL COMMENTS

The law of cy-près

5.2 Consultees commented on the cy-près occasions in section 62 of the Charities Act 2011 (the “section 62 cy-près occasions”) in response to various questions in the Consultation Paper. Most significantly, in response to our question about aligning amendment powers, consultees noted that applying the regime for charitable companies to unincorporated charities would effectively sweep away the law of cy-près since a change of purposes would become a matter for the Charity Commission’s discretion. Many were content with that, often because they had criticisms of the cy-près occasions. Others thought it would be going too far, at least without further consultation. This was an issue on which we sought further views in the Supplementary Consultation Paper.

Criticisms of the law of cy-près

5.3 Many members of the CLA working party expressed dissatisfaction with the cy-près regime, saying the cy-près occasions were poorly understood, unclear, and too limited.

5.4 Bircham Dyson Bell said the section 62 cy-près occasions in section 62 “may appear quite comprehensive” but often when faced with a situation in practice “it is not easy to place the situation before you into one of the occasions”. The cy-près occasions require trustees “to wait until the situation has become almost unrescuable” so they

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164 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; OSCR; the University of Liverpool CL&PU; WCVA; Lord Hodgson; University of Durham; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Legacy Link; Lawyers in Charities; University of Oxford; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; William Henderson; RSPCA; Charities’ Property Association; Law Society of England and Wales; HEFCE; NCVO; ACF; CFG; IoF.

165 See Report, para 4.37 and following.

166 Francesca Quint; Plymouth University; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Charity Commission; Veale Wasbrough Vizards LLP. See para 5.9 below where we set out Francesca Quint’s comment that the Charity Commission’s approach is guided by the law of cy-près.
“do not encourage trustees to think ahead and plan to make their charity more effective before such a situation arises”.

5.5 They gave the example of a school established for the education of boys where the trustees consider it would be in the best interests of the school to extend its purposes to include the education of girls. The trustees might be concerned – based on consultation with parents and the local community – whether they can maintain the school in the long term if it is limited to the education of boys. They could enhance the school’s educational offering by including the education of girls, it would increase the school’s roll and income, and enable the trustees to create a bursary scheme, making it more secure for the future. It is difficult to shoe-horn such a case within the cy-près occasions; the original purposes have not “ceased to be suitable”, nor “ceased to provide a suitable and effective method of using the property”. To fall within these provisions, 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 section 62 of the Charities Act 2011.

Further consultation on the law of cy-près

5.6 Veale Wasbrough Vizards LLP said that applying the regime for charitable companies to unincorporated charities “would effectively be sweeping aside the doctrine of cy-près as it applies to new charities. Being a fundamental and longstanding principle of charity law, if that is to be considered, we think it warrants further consultation. There is also, in our view, a risk of this having a negative impact on the willingness of donors to set up charities if they know that the purposes they have specified can be changed to something altogether different.”

5.7 Bates Wells Braithwaite said “cy-près has historically developed as a regime to ensure that charities have the necessary flexibility to ensure effective use of their funds, balanced with securing the use of the funds for as close a use as possible to the donor’s original intentions”. They were cautious about sweeping aside the law for unincorporated charities and suggested, instead, a review of the current section 62 cy-près occasions. They thought, for example, that the requirement that the purposes have “ceased to be suitable and effective” might more appropriately be a requirement that changing the purposes would allow the funds to be applied “more suitably or more effectively”.

5.8 Anthony Collins Solicitors LLP thought “the circumstances which represent a cy-près occasion should be reviewed, in some cases clarified and might possibly be broadened further to enhance the [Charity] Commission’s ability to facilitate change in appropriate circumstances having had regard both to donor wishes and current circumstances”.

The Charity Commission’s approach to considering a change of purposes by a charitable company

5.9 Francesca Quint suggested that the issues considered by the Charity Commission in deciding whether to consent to a change of purpose by a company were similar to the cy-près occasions. “There was a time when the question asked by the Commission was whether the change was ‘fundamental’ such that no reasonable donor would have expected the funds he/she had given to be used for the new purposes, in which
case it refused consent. There was a later stage at which the Commission used simply to apply the cy-près rule by analogy. The current formulation appears to be similar in that it requires consistency with ‘what the charity was set up to do’ i.e. its original objects, not purely rationality.” She therefore thought that the Commission’s approach to amending the purposes of both corporate and unincorporated charities was similar, and that we overstated the difference in paragraph 5.12 of the Consultation Paper.

**Scheme-making powers in respect of corporate charities**

5.10 Francesca Quint said that there was uncertainty as to whether the Charity Commission or court could always make schemes (whether cy-près or administrative) in respect of charitable companies or other corporate charities. It is generally accepted that corporate charities hold property beneficially rather than on trust, and the scheme-making power derives from the existence of a trust. She noted that the Sign Manual might be available in the absence of a trust.

5.11 Similarly, William Henderson explained that it was not clear whether the ordinary scheme-making jurisdiction of the court and Charity Commission was available in respect of a charitable company. He said it would be helpful for the law to be clarified to confirm that such a power is available.

**The use of section 275 in respect of restricted funds**

5.12 Consultees’ responses revealed differing views as to the scope of section 275 of the Charities Act 2011 (“section 275“). Many consultees said, or assumed, that section 275 can be used by a large charity in respect of permanent endowment or other restricted funds with an income of up to £10,000, the fund itself being treated as a “charity” for the purposes of section 275. Others considered that section 275 was not available in respect of such funds unless the charity itself had an income of up to £10,000.

**Scotland**

5.13 The Scottish Charity Regulator (“OSCR”) said: “In Scotland the consents and notifications regime applies across all types of charities, where the charity’s governing document gives the charity trustees powers to make changes. Where this is not the case, charity trustees may apply for OSCR’s approval of a charity ‘reorganisation scheme’ under chapter 5 of the 2005 Act.”

**RESPONSES TO INDIVIDUAL QUESTIONS**

5.14 We now consider consultees’ responses to the individual questions in Chapter 5 of the Consultation Paper.

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167 Bates Wells Braithwaite (when the permanent endowment or restricted fund is held by an incorporated charity; the same comment was made in the joint response of NCVO, ACF, CFG and IoF); University of Durham; Veale Wasbrough Vizards LLP; University of Oxford; Independent Schools Council.

168 Prof Gareth Morgan; RSPCA. Other consultees are likely to have assumed that this was the case without saying so expressly.
Consultation Question 23.

We invite the views of consultees as to whether, and if so how, the powers to amend charities' purposes (and other provisions in their governing documents) should be aligned between incorporated and unincorporated charities established in the future.

[Consultation Paper, paragraph 5.19]

5.15 27 consultees answered this question.\(^{169}\)

1. 18 thought that powers of amendment should be aligned.\(^{170}\) Of those, 12 went further and thought that powers of amendment should be aligned for both existing and future charities;\(^{171}\) others may have shared this view, but as views on existing charities were not explicitly sought, they did not express a view one way or the other.

2. 9 thought that powers should not be aligned.\(^{172}\)

3. 1 expressed other views.\(^{173}\)

5.16 As noted in paragraph 5.2 above, some consultees pointed out that complete alignment with the regime for charitable companies would sweep aside the law of cy-près for unincorporated charities.

Different regimes for existing and future charities

5.17 Many consultees commented that a dual regime, one for existing and one for future charities, would be undesirable.\(^{174}\) In addition, the Institute of Chartered Secretaries

\(^{169}\) Institution of Civil Engineers; Francesca Quint; Geldards LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG; IoF.

\(^{170}\) Institution of Civil Engineers; Francesca Quint; Geldards LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; CLA; Bircham Dyson Bell LLP; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers ("ACAT") (subject to qualification); Prof Gareth Morgan; Stewardship (but not if alignment only applied to future charities).

\(^{171}\) Francesca Quint; Geldards LLP; Plymouth University; the University of Liverpool CL&PU; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; CLA; Bircham Dyson Bell LLP; Charity Commission; Fellowship of Independent Evangelical Churches; Prof Gareth Morgan; Stewardship.

\(^{172}\) Anthony Collins Solicitors LLP; Action with Communities in Rural England; Imperial College London (which was "content for there to be no alignment"); Veale Wasbrough Vizards LLP; RSPCA (on the basis that a dual regime for existing and future charities would be undesirable); NCVO; ACF; CFG; IoF.

\(^{173}\) Bates Wells Braithwaite.
and Administrators noted that it could be worked around, at a cost, by trustees establishing a new charity (which would benefit from the new regime) and transferring to it the existing charity’s assets. Whilst this might coincide well for an unincorporated charity wishing to incorporate, it would be an unnecessary burden for charities wishing to take advantage of the new rules without changing their organisational status.

5.18 By contrast, the Independent Schools Council favoured alignment but agreed with the view in the Consultation Paper that this should not apply to existing charities.

Against alignment

5.19 Anthony Collins Solicitors LLP thought that “the difficulties in aligning the approach would outweigh the benefits”. Action with Communities in Rural England agreed with the discussion in the Consultation Paper that a dual regime for existing and future charities “would be necessary and consequently cause complexity for volunteer trustees”.

5.20 NCVO, ACF, CFG and IoF (in their joint response) said that “although a uniform amendment regime is an attractive concept, our view is that it should be approached with caution”; the distinction between corporate and unincorporated charities is “long-standing”, and the two regimes “generally cater for two different types of charity”. They did not want to see any further relaxation of the regime for incorporated charities; they noted that, although section 275 provides unincorporated charities with a further relaxation that is not available to incorporated charities, it can only be used if the new purposes are similar, whereas no such requirement applies to a change of purposes by charitable companies and CIOs.

5.21 Veale Wasbrough Vizards LLP said that alignment with corporate charities would have advantages. If powers were aligned:

(1) the effect would be that unincorporated charities would be able to make more significant changes (since there would be no requirement for new purposes to be similar); and

(2) they suggested that an equivalent of section 275 should be retained for all small charities (with the existing requirement for new purposes to be similar), otherwise small unincorporated charities would face an additional restriction, namely a requirement to obtain Charity Commission consent to a change of purposes rather than merely giving notice under section 275.

5.22 They agreed with paragraph 5.14 of the Consultation Paper that alignment should not apply to existing charities and that a dual regime for existing and future charities would create additional complexity. In addition, aligning the powers even for future charities would sweep away the law of cy-près, which should not be done without further consultation (see paragraph 5.2 above). They concluded that the separate regimes for corporate and unincorporated charities should continue, but that section 275 should be significantly extended.

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174 University of Liverpool CL&PU; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

175 Contrast Francesca Quint’s comments in para 5.9 above.
5.23 Bates Wells Braithwaite were cautious about alignment. They said that most modern trusts had an express power to amend purposes with Charity Commission consent, and that schemes modernising older trusts often included an express amendment power. In considering whether to consent to changes under such clauses, the Charity Commission applies similar principles to its consideration of a charitable company changing its objects. “In that sense, there is already alignment in relation to the many trusts with express powers and incorporated charities.” The cy-près regime, or section 275, will therefore mainly apply to:

(1) older trusts with no express power of amendment; and

(2) donations given to a charity for particular purposes (such as gifts by will); where the gift is to a corporate charity, it will usually hold the gift on a separate charitable trust.

5.24 Broadening unincorporated charities’ amendment powers, or aligning them with charitable companies, “would extend to these gifts, allowing charities much greater flexibility to update the purposes”. As this could sweep aside the law of cy-près, they were cautious about alignment and instead suggested a review of the current cy-près occasions (see paragraph 5.7 above).

In favour of alignment

5.25 Francesca Quint said “In my view the benefits of aligning the principles applicable far outweigh the benefits of technical fidelity to the legal form chosen by the founder of a charity.” She noted (i) that the cy-près occasions had been altered in 1960, 1992 and 2006, and that since 1985 small charities had been given a simplified, do-it-yourself regime, and (ii) that the rules for charitable companies had been altered in 1992 and 2006 and the Charity Commission had modified its guidance and practice. “It is not, therefore, so difficult to change the rules applicable to existing charities that the benefits of alignment, and thence better understanding and efficiency, ought to be lost for the sake of non-interference.” She thought that “the current principles applying to companies and CIOs should be applied as far as reasonably practicable to unincorporated charities” and suggested that, for all charities:

(1) “regulated alterations” should always require Charity Commission consent unless there is an express power which makes this unnecessary, and smaller charities (both corporate and unincorporated) should enjoy a simplified regime;\(^ {176}\) and

(2) changes that are not “regulated alterations” (including amendments by an unincorporated charity under an express power, and by a corporate charity under a statutory power\(^ {177}\)) should only require notification.

5.26 Plymouth University thought that “charities should be treated in a similar manner, however they are constituted”. This should apply to future charities and “we should

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\(^{176}\) This would be akin to the s 275 regime. She suggested, as an alternative, the abolition of the s 275 regime and allowing trustees of all charities to make any amendment, subject to a requirement to obtain Charity Commission consent to regulated alterations.

\(^{177}\) Such as the Companies Act 2006, or any new legislation relating to Royal Charter charities.
move towards this position for existing charities”, allowing a suitable transition period for existing charities to adjust. The long-standing distinction between corporate and unincorporated charities “does not justify its continuation” and the regime for corporate charities should apply to unincorporated charities.

5.27 The University of Liverpool CL&PU thought alignment would make the procedures “easier to both explain and understand”. They noted that many trustees, and even more donors, are unaware of the legal form of a charity. They expressed “deep reservations about having a dual regime”, with alignment for future charities and retention of the differing amendment regimes for pre-existing charities. They thought this would be “fraught with difficulty”, and there would be a lack of awareness and understanding of the two regimes (referring by analogy to similar provisions in the Companies Act 2006, where old and new regimes are set out in little-known regulations). Therefore, “any new regime should, in our view, apply both prospectively and retrospectively”.

5.28 They also thought, contrary to paragraph 5.14 of the Consultation Paper, that it was “highly unlikely that the legal structure for a charity is chosen on the basis of the powers of amendment available to it”.

5.29 The Institute of Chartered Secretaries and Administrators said the inconsistencies between corporate and unincorporated charities seemed incongruous, that trustees should not be subject to greater or lesser scrutiny depending on the charity’s structure, and that it would be sensible to “level the playing field”. This would “reduce confusion and empower trustees”. It noted the importance of respecting existing entrenched provisions, but did not think this should prevent existing charities from benefiting from the introduction of a consistent approach. It said that governing documents should be reviewed and amended regularly and that at each review trustees should “think long and hard about any entrenchments, and other powers, to decide whether updated legislation provides welcome flexibility in the administration or whether specific restrictions should remain”.

5.30 Stone King LLP thought alignment would be “extremely helpful”; it “would mean less confusion for lay trustees, and make it easier for all involved with charities”, but they did not want to see charitable companies’ “flexibility to operate within s 198 [concerning regulated alterations]… diminished in any way”.

5.31 The Charity Commission thought amendment procedures should be “as consistent as possible”. It suggested that the procedure for unincorporated charities to change their purposes should follow similar principles as the regime for charitable companies. It acknowledged the ancient provenance of the cy-près occasions, but said that it was usually possible to avoid having to seek a cy-près scheme:

1. the Charity Commission’s model governing document for unincorporated associations includes a power to amend the charity’s purposes;\(^\text{178}\) and

\(^{178}\) Charity Commission, Charitable Associations: Model Constitution (November 2013), cl 7. The Commission’s model trust deed includes a power to amend the charity’s purposes with the prior consent of the Commission: Charitable Trusts: Model Trust Deed (November 2013), cl 31(1)(a).
in any event, an unincorporated charity can wind up and transfer its unrestricted property to a charitable company with the same purposes. The charitable company will usually hold that property beneficially, and can then change its purposes using the regime for charitable companies.

“We consider this indicates it is sensible to align the procedures more closely.”

5.32 The Fellowship of Independent Evangelical Churches thought amendment powers should be aligned:

(1) if the governing document contains an express amendment power, corporate and unincorporated charities should be required to follow that procedure without needing to obtain Charity Commission consent;

(2) where there is no express power to amend objects, both corporate and unincorporated charities should have a power to change their objects with the Charity Commission’s consent, unless the section 275 exemption applies; and

(3) section 275 should be available to both corporate and unincorporated charities.

5.33 The Association of Church Accountants and Treasurers thought amendment powers should be aligned, but wanted charitable companies to have the benefit of an equivalent to the section 275 power; small charities should be able to file a provisional amendment of their articles with the Charity Commission, and the change would then become effective upon the charity certifying to the Registrar of Companies that the Charity Commission had not objected to the change.179

5.34 Stewardship said that “charities in the church sector do not make decisions about structure based on the differing powers available to amend the purposes of the charity. … it therefore appears to be purely a matter of chance as to which powers apply and as such aligning those two regimes would completely remove this anomaly.” It was, however, strongly opposed to the creation of a third regime for future charities, which would increase complexity. “On balance, accepting that any alignment will only apply to new charities, we do not see any merit in forming a third hybrid regime by aligning the two existing regimes.” Having said that, in considering non-purpose amendments to governing documents (under section 280 of the Charities Act 2011), it favoured alignment between corporate and unincorporated charities.

The CLA’s proposal

5.35 The CLA and Bircham Dyson Bell LLP proposed alignment of the two regimes for both existing and future charities. In respect of existing charities, they did not agree with the view expressed in the Consultation Paper that this would subvert settlors’ intentions.

(1) The omission of an express amendment power “does not tend to be a deliberate decision”, but rather flows from trusts being drafted by non-specialist charity solicitors or being drafted when charitable companies were not the norm. Nothing, therefore, should be assumed from the absence of an express amendment power.

179 It thought that CIOs could not avoid the need for prior consent since the Charity Commission is their registrar.
(2) Charity law changes over time, and previous reforms were not stymied by this concern, for example, the statutory power to release permanent endowment under section 281 and following of the Charities Act 2011; total return investment; the introduction of the section 275 and 280 powers of the Charities Act 2011; and the expansion of the cy-près occasions in the 1960 and 2006 Charities Acts. Bircham Dyson Bell said that the view in the Consultation Paper “would suggest that charity law could never change but be crystallised around a trust as at the time it was created”.

(3) Entrenched provisions can be overridden by a Charity Commission scheme.

(4) “Unincorporated charities can in any case ‘transfer’ to the companies/CIO regime by incorporating.”

5.36 Bircham Dyson Bell LLP concluded that the historical context actually supported, rather than pointed against, a move towards alignment. They said it was inconsistent for us to propose expanding the scope of section 275, which overrides trust provisions, yet to maintain the different regimes for the sake of respecting those trust provisions. Further, concerns about protecting the interests of third parties should not inhibit reform; third parties should not be assumed to have wanted such a stultifying effect. Instead, reform should provide appropriate safeguards for third party rights.

5.37 The CLA, with whom Bircham Dyson Bell LLP agreed, suggested a new regime for the amendment of unincorporated charities' governing documents that would closely follow that for charitable companies and CIOs. They made the following suggestions.

(1) Unincorporated charities should have a statutory power to make any amendment to their governing document under a reformed section 280, save for regulated alterations which would require the Charity Commission’s prior consent.

(2) Regulated alterations would be those in sections 198 and 226 (with some modification), with the addition of alterations that would authorise trustees to lift permanent endowment restrictions.\(^{180}\)

(3) Section 275 – which is more restrictive than the proposed power because it requires the new purposes to be “similar in character” – would be unnecessary so should be repealed.\(^{181}\)

(4) Conditions in express amendment powers requiring third party consent would continue to apply, unless the Charity Commission decides that it is unnecessary to obtain their consent.\(^{182}\) This might apply where it is impossible or highly impracticable to obtain consent.

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\(^{180}\) They thought that s 280 could not currently be used to lift restrictions on spending capital because s 280 permits the amendment of powers, whereas they considered the restriction on spending permanent endowment to be a duty.

\(^{181}\) The CLA had considered retaining s 275 for smaller charities, but they thought this unnecessary; they preferred one consistent and simple process for all charities.

\(^{182}\) Alternatively, the charity might be required to apply for a cy-près scheme.
(5) The power should not “circumvent any express requirements, statements or entrenched provisions”, thereby providing some consistency with companies which can make provision for entrenchment.

(6) The Charity Commission would issue guidance setting out the basis on which it would give consent to regulated alterations and setting out the steps that it would expect the charity to take before seeking consent.\textsuperscript{183} The Charity Commission would make its decisions on the same basis that it currently makes its decisions under section 198. The guidance should be clear and flexible, and would apply to all unincorporated charities, companies and CIOs.\textsuperscript{184}

(7) The Charity Commission could require a charity to obtain a cy-près scheme rather than giving consent under the new statutory power.

(8) The statutory power would be an alternative to any express powers of amendment, so charities could continue to use express powers (this might be particularly useful where an express power permits a charity to make a regulated alteration without requiring it to obtain the Charity Commission’s consent).

(9) If an unincorporated charity’s constitution expressly forbids amendment to the purposes (or any other provision), the charity would need a cy-près (or administrative) scheme.

5.38 The CLA did not think that permanently endowed charities (or special trusts) needed to be treated differently; the requirement to obtain Charity Commission consent to a change of purposes would provide a suitable safeguard for the wishes of the settlor.

5.39 The CLA said that this could be achieved by amending section 280 to:

280 Power to amend constitution of unincorporated charity

(1) This section applies to any charity which is not a company or other body corporate.

(2) Subject to subsections (3) and (4), the charity trustees of such a charity may resolve for the purposes of this section that the trusts of the charity should be amended in such manner as is specified in the resolution.

(3) A resolution made under subsection (2) containing an amendment which would:

\textsuperscript{183} Some CLA members thought the criteria should be set out in regulations, which could be amended and which should provide flexibility now and in the future. Otherwise, the Charity Commission’s guidance would become “de facto’ law, without Parliamentary scrutiny”. The majority view, however, was that such regulations would not be sufficiently flexible.

\textsuperscript{184} As an alternative to the approach in (4), Bircham Dyson Bell LLP said that the Charity Commission – when considering whether to consent to regulated alterations – would give effect to any conditions in an express amendment power that would have to be complied with were the charity making the amendment using that power.
(a) require the consent of any third party [(other than the Charity Commission)] if the charity trustees were exercising a power in the charity's trusts to make the amendment; or

(b) affect the rights under the trusts of the charity of any third party (whether named in the charity's trusts in person or by reference to the holding of an office) who is alive or in existence (as the case may be) at the date on which the resolution is made,

is to that extent ineffective unless:

(c) the prior written consent of the third party has been obtained to the making of the amendment; or

(d) the Commission has waived the need for such consent.

(4) A resolution made under subsection (2) containing an amendment which would make any regulated alteration is to that extent ineffective unless the prior written consent of the Commission has been obtained to the making of the amendment.

(5) The following are regulated alterations:

(a) any alteration of the charity's [objects][purposes],

(b) any alteration of any provision of the charity's trusts directing the application of property of the charity on its dissolution,

(c) any alteration of any provision of the charity's trusts where the alteration would provide authorisation for any benefit to be obtained by charity trustees or (where applicable) members of the charity or persons connected with them, and

(d) any alteration of any provision of the charity's trusts where the alteration would provide authorisation for the charity trustees to lift restrictions on spending capital.

(6) Subsection (7) applies if the charity is an unincorporated association with a body of members distinct from the charity trustees.

(7) Any resolution of the charity trustees under subsection (2) must be approved by a further resolution which is passed by written resolution or at a general meeting of the charity:

(a) by a majority of not less than two-thirds of the members entitled to attend and vote at a general meeting of the charity who vote on the resolution; or

(b) by a decision taken without a vote and without any expression of dissent in response to the question put to the meeting.

(8) Where:
(a) the charity trustees have passed a resolution under subsection (2), and

(b) (if subsection (7) applies) a further resolution has been passed under that subsection,

the trusts of the charity are to be taken to have been amended in accordance with the terms of the resolution.

(9) The trusts are to be taken to have been so amended as from the latest of:

(a) such date as is specified for this purpose in the resolution under subsection (2), or

(b) (if required) the date when any such further resolution was passed under subsection (7).

5.40 The CLA suggested that this would produce “a single, simplified and readily understood process for all (or most) charities, which would reduce the administrative steps and costs for both charities and the Charity Commission, whilst retaining (in our view) sufficient safeguards and oversight of changes to charitable objects”. It would:

1. simplify the procedure for amending the governing documents of unincorporated charities without an express power, who are currently “put off” amending their objects by the cost and/or complexity of a cy-près scheme and so have objects that are no longer suitable;

2. ensure appropriate oversight by the Charity Commission is retained;

3. reduce the demand on Charity Commission resources, because making cy-près schemes is more resource-intensive than providing consent under section 198; and

4. create consistency for charities seeking to amend their governing documents.

Cy-près schemes

5.41 This would “have the practical effect in most cases of removing the need for a cy-près scheme to amend the objects of unincorporated charities which do not have [an express] power of amendment”. However:

1. the statutory power to amend purposes would sit alongside the cy-près regime;

2. cy-près schemes would still be necessary in some cases;

3. the Charity Commission would have a discretion to require a cy-près scheme; and

4. as noted in paragraph 5.3 above, many CLA members expressed dissatisfaction with the cy-près regime; these problems would largely be overcome by applying the regulated alterations regime for charitable companies to unincorporated charities.
5.42 Requiring prior consent to regulated alterations would also overcome some of the concerns about the section 275 regime:

(1) charities may incur the cost of obtaining a resolution of the members of the charity only for those costs to have been wasted if an objection is subsequently raised;

(2) charities that have submitted resolutions to the Charity Commission have heard, at a later stage, that the Commission has no record of the application; and

(3) charities can be uncertain whether they can rely on silence after 60 days because Charity Commission response times can be 40 working days.

5.43 This proposal did not have unanimous support within the CLA working group; some thought it might be “a ‘light touch’ regime and would not balance donors’ intentions, in comparison with the cy-près regime”. But the majority thought that requiring Charity Commission consent, and the preservation of third party rights, would ensure proper oversight and preservation of entrenched rights.

Regulated alterations

5.44 The CLA highlighted some uncertainty and inconsistency in the current definitions of “regulated alterations” in sections 198 and 226 of the Charities Act 2011, which they suggested should be addressed:

(1) Objects: section 198 refers to “adding, removing altering a statement of the company’s objects” whereas section 226 refers to “any alteration of the CIO’s purposes”. The CLA suggested that:

(a) these provisions should be the same;

(b) they should not separately refer to “objects” and “purposes”;

(c) they should not include an alteration to the objects clause if no amendment is made to the substance of the objects;

(d) if the objects clause refers to the charity’s powers, any change to those powers (but not the objects) should not be covered.

(2) Dissolution: it is unclear whether an amendment power can override a dissolution provision, nor whether section 268 of the Charities Act 2011 can be used to defeat a dissolution clause.

185 Bircham Dyson Bell LLP reiterated these points; where there were inconsistencies between the regime for companies and CIOs, they preferred the CIO approach.

186 Francesca Quint noted an ambiguity in the definition of “regulated alteration” in section 198. It had been suggested that a change to the definition section of a governing document which would have the effect of altering the meaning, but not the wording, of the dissolution clause was not a regulated alteration under s 198. Francesca Quint considered this to be wrong, but if that is the result of s 198 it should be corrected.
Benefit: it is unclear whether this refers to the alteration itself (so an alteration that narrows the circumstances in which benefits can be authorised would not be regulated), or the provision as altered (in which case such an alteration would be regulated). The Charity Commission has also suggested that minor amendments are not regulated, but there are no criteria for assessing what might be minor.

Third party rights

5.45 As noted above, the CLA thought that third party rights under existing amendment provisions should be respected. “As the settlor may have chosen the trust structure in order to retain some element of control, it seems desirable to retain the need for settlor consent where it is set out in the governing document.” Accordingly, any amendment that would require third party consent if made under an express amendment power would still require their consent (see the CLA’s proposed section 280(3)(a) at paragraph 5.39 above). They thought that an exception to this might be a requirement under an express amendment power for Charity Commission consent where the amendment is not a regulated alteration. In the case of charitable companies, the Charity Commission will “routinely” allow charities to remove requirements for Charity Commission consent to amendments (safe in the knowledge that section 198 requires all regulated alterations to be approved by the Charity Commission).187

5.46 The CLA also considered the position of a third party who had rights under a provision in a governing document (such as the right to appoint trustees), but the governing document does not require that third party’s consent to amend that provision. They suggested that a charity should only be able to amend such a provision with that third party’s consent (see their proposed section 280(3)(b) at paragraph 5.39 above). They acknowledged that further consideration would have to be given to what amounts to a “right” for these purposes.

Other proposals for alignment

5.47 A similar approach was adopted by other consultees who suggested that section 280 should permit any amendment save for regulated alterations (for companies and CIOs) and possibly with some additional categories of regulated alteration principally to protect third party rights and permanent endowment restrictions: see Chapter 6.

5.48 If the CLA’s approach above were adopted, our consultation questions on section 275 would fall away. Nevertheless, in the event that section 275 is retained, the CLA and Bircham Dyson Bell LLP answered those questions.

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The continuing role of section 275

5.49 If amendment powers were aligned, some consultees commented that section 275 should be retained and extended to corporate charities.188 A minority thought that section 275 should be abolished.189

Consultation Question 24.

We provisionally propose that the power of unincorporated charities to amend their purposes under section 275 of the Charities Act 2011 should be extended to charities with a larger income.

Do consultees agree? [Consultation Paper, paragraph 5.32]

5.50 36 consultees answered this question.190

(1) 27 agreed;191
(2) 3 disagreed;192 and
(3) 6 expressed other views.193

Additional financial threshold based on capital value

5.51 Of the 27 consultees who agreed with this proposal, seven suggested that income should not be the only financial threshold and that account should also be taken of the

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188 Veale Wasbrough Vizards LLP; Francesca Quint (though she was happy with the alternative option of repealing s 275); Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Stone King LLP; and Bates Wells Braithwaite.

189 CLA (with whom Bircham Dyson Bell LLP agreed).

190 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; WCVA; Lord Hodgson; University of Durham; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Legacy Link; Lawyers in Charities; University of Oxford; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Law Society; HEFCE; NCVO; ACF; CFG; IoF.

191 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; WCVA; Lord Hodgson; University of Durham; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Church Growth Trust; UnLtd; Charity Commission; Independent Schools Council; Legacy Link; Lawyers in Charities; University of Oxford; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Veale Wasbrough Vizards LLP; Stewardship; Law Society; HEFCE.

192 Stone King LLP (though they considered it "may be appropriate" in response to the Supplementary Consultation Paper); Prof Gareth Morgan; RSPCA.

193 CLA; Bircham Dyson Bell LLP; NCVO; ACF; CFG; IoF.
market value of the charity’s capital. They said that some charities with a low income hold property and other assets of a much higher value, and such charities should not be able to use the section 275 power (see, further, paragraph 5.75 and following below).

5.52 Bates Wells Braithwaite said it was important to bear in mind that section 275 could be used to change the purposes of restricted funds and permanent endowment held by corporate charities, and that large funds can generate an income below £10,000 and so fall within section 275 currently. They suggested introducing an additional threshold based on the charity’s capital or the fund size. This is even more important if a large fund, were it better invested, would generate an income above the threshold.

Agreement: increasing the income threshold

5.53 Anthony Collins Solicitors LLP said “it seems appropriate that very small charities should have the opportunity to react more flexibly to what will almost certainly be the local area in which they operate. If the charity changes its purposes in a way which its donors consider inappropriate then they will discontinue funding and the charity will be unable to operate. This in itself should prevent trustees from making entirely inappropriate changes.”

5.54 Lord Hodgson said that he took “a regulatory minimalist view”; he agreed with the proposal to increase the section 275 threshold, saying “trustees generally should be encouraged to take on more responsibility”.

5.55 The University of Durham agreed with the proposal, which would allow it to make changes to separate trusts where changes are required to the original purposes of the donation. The Independent Schools Council said its members often hold funds on charitable trusts and it would be helpful to give them greater flexibility to amend their purposes in line with changes in educational practices and society. By increasing the availability of section 275, trustees would have the powers they need “to ensure that the charity’s purposes are best suited to the needs of its beneficiaries”.

5.56 The Charity Commission for Northern Ireland said that charities falling outside the section 275 regime must apply for a scheme instead “which is a more complex process”. It noted that section 275 retained a level of oversight by the Charity Commission and said that it would be helpful to increase the number of charities that can use section 275 instead of a scheme, provided the Charity Commission had sufficient resources.

5.57 Veale Wasbrough Vizards LLP said that the £10,000 threshold rendered the power “of limited use, except for the smallest of charities”. In their experience, “it tends only to be used in relation to special trusts and linked charities” and the need to obtain a cy-près scheme when the income exceeds £10,000 is disproportionate.

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194 Francesca Quint; Geldards LLP; the University of Liverpool CL&PU; Institute of Chartered Secretaries and Administrators; WCVA; Bates Wells Braithwaite; the CLA. Prof Gareth Morgan also referred to the possibility of charities with a low income having valuable assets.

195 See para 5.12 on the question whether s 275 can be used in respect of restricted funds.

196 See para 5.12 on the question whether s 275 can be used in respect of restricted funds.
Agreement: removing the income threshold altogether

5.58 Plymouth University thought the section 275 income threshold should be dispensed with altogether as part of aligning the amendment powers of corporate and unincorporated charities.

5.59 The Charity Commission thought the income limit could be removed altogether, with a simplified procedure: “The checks should be that the Charity Commission can stop the process if it considers that the requirements are not met or the proposed objects are not charitable.”

Disagreement

5.60 Prof Gareth Morgan thought £10,000 to be the appropriate threshold, mirroring that at which an Annual Return must be submitted to the Charity Commission. Stone King LLP said that amending purposes was not a simple task and required Charity Commission oversight because trustees run the risk of (unknowingly) changing to a non-charitable purpose. In addition, “if the power was extended, and the Charity Commission lost this regulatory oversight, it would mean an increase in the need for smaller charities to engage professional assistance, which they are unlikely to be able to afford”.

Other comments

5.61 The NCVO, ACF, CFG and IoF (in their joint response) had “strong reservations” about increasing the threshold and applying section 275 to charities with designated land. Purposes are fundamental and their amendment “should be carefully scrutinised”. They favoured amendment by cy-près scheme with proper Charity Commission oversight, regardless of the size of the charity; “indeed, the potential for the power to be used incorrectly is greater with small charities, since they are less likely to have access to legal advice”. They also said that extending section 275 would make it available to restricted income and permanent endowment funds held by corporate charities.

5.62 Bates Wells Braithwaite said that section 275 is more generous than the regime for companies with equivalent income. Whilst the Charity Commission considers similar factors, companies require express consent whereas section 275 only gives the Commission a power to object, which might not be exercised if the Commission has an excessive workload or overlooks the correspondence. Accordingly, extending section 275 to charities with a larger income “would be more attractive if it was coupled with a requirement for the Charity Commission to give express consent in order to provide the necessary level of scrutiny”.

5.63 The approach suggested by the CLA and Bircham Dyson Bell LLP would make section 275 unnecessary. If section 275 is retained, they queried the rationale for limiting the power to a limited class of charities. If it is “to provide an administratively easier mechanism” than a cy-près scheme,197 then they could see the merit of extending section 275 (though they thought that their proposal would be more likely to achieve this). They noted that section 275 only includes an income threshold, so can

197 Though they noted our comment in the Consultation Paper, p 71, n 18, that smaller charities may actually find this more expensive than a cy-près scheme.
include charities with large assets. They asked whether section 275 was “intended for charities which are 'small' or charities which are income poor (even if asset rich)?” If the former, they raised the possibility of introducing a further threshold based on the value of the charity’s assets, suggesting a threshold of around £500,000.

5.64 Bircham Dyson Bell LLP concluded that, “if the rationale is to introduce a special regime for smaller charities because the regime otherwise is too expensive and cumbersome for such charities, we think that that would demonstrate that the real issue to be addressed is not a widening of section 275 but the introduction of a better regime for unincorporated charities to amend their objects…”.

Consultation Question 25.

We invite the views of consultees as to the appropriate income threshold.

[Consultation Paper, paragraph 5.33]

5.65 28 consultees answered this question. Of those who agreed that the threshold should increase:

(1) 15 suggested an income threshold of £25,000, and

(2) 10 expressed other views.

Suggested thresholds

5.66 Most consultees thought that the threshold should fall somewhere between £25,000 and £100,000.

(1) Veale Wasbrough Vizards LLP thought £25,000 was the minimum, and that “it would be proportionate in securing an effective use of charitable and the [Charity] Commission’s resources for the threshold to be increased further”. They thought that, if the Commission’s power to object to a section 275...
resolution is retained (see paragraph 5.87 below), the threshold should be £100,000, this being a threshold for greater scrutiny elsewhere in the 2011 Act. If the Commission’s power to object is removed, the threshold should be £50,000. This “would strike an appropriate balance between ensuring that the power is available to a large proportion of smaller charities and ensuring appropriate Commission oversight where larger funds are involved”.

(2) The CLA agreed with a £25,000 threshold, saying that there were around 27,300 charities with an income between £10,001 and £25,000, many of which would be unincorporated.

(3) Francesca Quint and Anthony Collins Solicitors LLP thought that £25,000 was the minimum and that £50,000 would not be excessive.

(4) Lord Hodgson also thought that £25,000 should be the minimum threshold, with an inflation adjustment mechanism.

(5) The Institute of Chartered Secretaries and Administrators suggested an initial increase to £25,000 followed by incremental increases.

(6) The Association of Church Accountants and Treasurers favoured £25,000 to align with the filing threshold for registered charities’ annual accounts.\(^{202}\)

(7) The Church Growth Trust supported a £50,000 threshold.

(8) Stewardship also suggested £50,000, provided section 275 includes a triple safeguard (namely, (1) the new purposes must be similar to the old; (2) the members must agree the proposal; and (3) the Charity Commission is notified and has a power to object).

(9) The University of Oxford suggested an income threshold of £100,000, which “would allow additional flexibility in dealing with many of the University’s special trusts, and reduce administration costs”.

(10) The Fellowship of Independent Evangelical Churches suggested a threshold of £100,000 to mirror the income threshold at which excepted charities must register. “There are currently many religious charities that are excepted from registration with the Charity Commission whose objects need to be amended to reflect what the charity has been doing in practice for many years. For example, there are many churches whose objects refer solely to the maintenance of public worship within a particular building, but in practice the funds that are collected are used to advance religion around the country.”

5.67 Lawyers in Charities suggested a £15,000 threshold, except where the “amended objects fall within the same charitable purpose as the current objects” in which case the threshold should be £30,000.

\(^{202}\) Charities Act 2011, ss 163 and 164.
5.68 HEFCE thought the threshold should match the charity audit threshold for the time being. The current threshold is £1 million for an audit and £25,000 for an independent examination.\(^{203}\)

5.69 As noted above, Plymouth University and the Charity Commission suggested the income threshold should be removed altogether. Similarly, the Independent Schools Council thought it should be removed or “increased very significantly”.

Consultation Question 26.

We provisionally propose that the power of unincorporated charities to amend their purposes under section 275 should be extended to charities that hold designated land.

Do consultees agree?

[Consultation Paper, paragraph 5.34]

5.70 33 consultees answered this question:\(^{204}\)

(1) 21 agreed;\(^{205}\)

(2) 3 agreed subject to a further threshold based on the value of the charity’s assets;\(^{206}\)

(3) 3 disagreed;\(^{207}\) and

(4) 6 expressed other views.\(^{208}\)

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\(^{204}\) Institution of Civil Engineers; Francesca Quint; Anthony Collins Solicitors LLP; Geldards LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircharm Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Independent Schools Council; Legacy Link; Lawyers in Charities; University of Oxford; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; HEFCE; NCVO; ACF; CFG; IoF.

\(^{205}\) Institution of Civil Engineers; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Churches’ Legislation Advisory Service; Church Growth Trust; Stone King LLP; Charity Commission; Independent Schools Council; Legacy Link; Lawyers in Charities; University of Oxford; Fellowship of Independent Evangelical Churches (subject to qualification); Association of Church Accountants and Treasurers; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; HEFCE.

\(^{206}\) Francesca Quint; Geldards LLP; Institute of Chartered Secretaries and Administrators. As noted in para 5.51 above, 7 consultees suggested that a capital threshold should be introduced.

\(^{207}\) Action with Communities in Rural England; Bates Wells Braithwaite; Prof Gareth Morgan.

\(^{208}\) CLA; Bircharm Dyson Bell LLP; NCVO; ACF; CFG; IoF.
Agreement

5.71 The University of Liverpool CL&PU agreed with the proposal, saying that “if the use of the land closely relates to the charitable purpose, then section 275 should provide adequate protection to the donor’s intention” owing to the requirement in section 275(3)(b) that any change must, so far as is reasonably practicable, include purposes which are reasonably similar in character. Stewardship made similar comments.

5.72 The Church Growth Trust said that it was the trustee of various independent church charities with designated land (namely church premises) and it would be helpful for trustees to be able to amend the purposes under section 275, for example:

1. to remove prohibitions on showing films or other entertainments, even when this is in pursuit of the church’s charitable objects;

2. to permit women to be trustees or officers; and

3. provisions relating to doctrinal matters.

5.73 Stone King LLP agreed with the removal of the designated land exclusion, subject to the income threshold remaining at £10,000 and continued Charity Commission oversight of changes.

5.74 Veale Wasbrough Vizards LLP said that changing purposes of trusts of designated land “can be contentious, particularly in the case of land that is held for recreational purposes”. Whilst they agreed with the removal of this pre-condition, they thought additional safeguards should be retained including the Commission’s power to direct that public notice of the resolution be given, and its power to object to the resolution: “At the very least, Commission guidance could recommend that trustees carry out a public consultation exercise”.

Charities with high value assets

5.75 Francesca Quint pointed out that charities with designated land are currently excluded from section 275 because designated land (such as a recreation ground) is unlikely to provide a charity with an income that reflects its value. Accordingly, “it may in fact be unrealistic to regard a charity with such an asset as falling within the category of “smaller” charity which justifies [the] simplified [section 275] regime”. If the designated land was sold and the proceeds invested to produce an income, the charity’s income is likely to be significantly higher so as to take the charity outside the section 275 threshold. She therefore suggested that, if the section 275 power is extended to charities with designated land, the income threshold should be supplemented by a threshold based on the market value of the charity’s capital assets to ensure that the section 275 power applied only to truly small charities.

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209 The University of Liverpool CL&PU made other comments about designated land which would remove the need for this extension of the s 275 power (see ch 8).

210 Similar comments were made by Bates Wells Braithwaite; CLA (which suggested, but was not sure, that this was the reason); Fellowship of Independent Evangelical Churches.

211 The Institute of Chartered Secretaries and Administrators thought this even more important if the existing regime governing the disposal of designated land in s 121 is to be repealed (see Consultation Paper, ch 8).
5.76 Geldards LLP made the same point, but suggested that merely excluding charities with designated land did not solve the problem; they had encountered charities with an income below £10,000 but which held property – which was not “designated land” – worth millions of pounds.212 The section 275 power would currently be available to such charities, despite them not being “small” in terms of capital assets. Geldards LLP posited a charity with little income that wished to change its objects from providing land for a hospital to providing land for a school. “Without the designated land restriction and no other restriction relating to value of land the charity would be able to change its objects under section 275 and we do not think that this would be appropriate.”

5.77 Geldards LLP, like others,213 therefore suggested that the availability of the section 275 power should depend on both income and the value of the charity’s property. “This would then allow the designated land restriction to fall away.”

5.78 The Fellowship of Independent Evangelical Churches proposed an alternative solution to the problem.214 “A charity which holds designated land should be able to use the power to change the purposes for which the working funds of the charity can be used, but it should not be allowed to change the purposes for which designated land can be used.”

For example, many churches have trust deeds which say that the church building has to be used as a place of public worship in accordance with particular doctrines, and also go on to say that any funds collected by the trustees should be used to pay a minister of religion and for the maintenance of divine worship in the building. These charities should be allowed to use the power in section 275 to extend the purposes for which the funds can be used (e.g. using the funds to support similar religious charities elsewhere) but they should not be allowed to use the power to change the purposes for which the building can be used, because the building has usually been built at considerable expense funded by individuals who expect the building to be used only for the purposes set out in the trust deed.215

5.79 The effect would be that one charity would be left with two different purposes, one for its designated land and another for its other assets and funds.216

5.80 Anthony Collins Solicitors LLP agreed with this approach, but noted that “the ability to change purposes will be restricted if they must continue to encompass the purpose for which the land must be used. For many charities their overall purposes are dictated by

It said that extending s 275 to cover all designated land “could theoretically be used inappropriately by trustees wishing to divest themselves of the land”.

212 The CLA made similar comments.
213 See n 194 above.
214 Some members of the CLA made the same suggestion.
215 The Fellowship of Independent Evangelical Churches also referred to the case study in Fig 8 of the Consultation Paper, saying that if the charity had been unincorporated and the designated land restriction had been removed, the charity would have been able to use the section 275 power a year after it closed (assuming no income during that period): “This would be going too far.”
216 Indeed, the Fellowship of Independent Evangelical Churches noted that some churches have a property-holding charity, with the church meeting within the building being a separate charity. Such property-owning trusts have little or no income, but should not fall within the s 275 power.
restrictions on the use of the land and so significant change is not possible. The risk would be charities adopting wider or completely different purposes and thereby using designated land in breach of trust.”

Disagreement

5.81 Prof Gareth Morgan disagreed with the proposal on the basis that charities can have very significant buildings as designated land, yet an income of under £10,000, and Charity Commission consent should be required to change their purposes.

5.82 Action with Communities in Rural England disagreed owing to concerns about village hall charities falling within the section 275 power. It said that village halls were often donated by a local benefactor for a specific purpose and that amending those purposes “could result in village hall charities being taken over by individuals or misappropriated”. Such charities “should be required to consult the community and specifically those in the area of benefit” and take professional advice before changing their purposes. It noted the Localism Act 2011 and the Community Right to Bid, which demonstrates a need to consult. Whilst village hall charities might properly host community enterprises such as shops, it was concerned about such activities being added to their objects.

5.83 Bates Wells Braithwaite said that designated land “will usually be the mode through which the charity achieves its current purposes”. They acknowledged that the exclusion of designated land can be unhelpful, but on balance concluded that it should remain to ensure a higher level of protection. They might have taken a different view if section 275 required express consent from the Charity Commission and if section 275 required public notice or consultation.

Other comments

5.84 The CLA reported split views as to whether the restriction concerning designated land should be removed; some suggested removing the restriction; others thought it should remain; still others thought the restriction should be removed, but that any change under section 275 should not apply to the purposes for which the designated land is held. They concluded that the existence of these split opinions showed that their proposed regime (above) would be preferable.

5.85 Bircham Dyson Bell LLP repeated that the rationale for section 275 was unclear, and it was unclear why we thought that expanding section 275 (to include larger charities and those with designated land) was not objectionable in this context, but that aligning unincorporated charities with corporate charities generally was objectionable.

Professional advice

5.86 The Institute of Chartered Secretaries and Administrators noted that professional advice might be required on the value of the designated land, and suggested this be obtained from appropriate advisers in accordance with our proposals in chapter 8 of the Consultation Paper.

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217 They also noted that there is no inconsistency between corporate and unincorporated charities since corporate charities will usually hold designated land on separate trusts.

218 See para 5.36.
Consultation Question 27.

We invite the views of consultees as to whether trustees should continue to be required to notify the Charity Commission of a section 275 resolution and whether the Charity Commission should retain its power to object to the resolution.

[Consultation Paper, paragraph 5.35]

5.87 31 consultees answered this question:

1. 25 thought the existing requirements should continue;
2. 2 thought notification should continue but that the Charity Commission should not have a power to object;
3. 2 thought the requirement to notify the Charity Commission, and its power to object, should be removed;
4. 1 expressed other views.

Maintaining the existing requirements

5.88 The University of Oxford said the existing requirements were “not a particular burden” and “a good way of ensuring written record keeping, that the proper considerations have been addressed by trustees, and [are] likely to increase donor confidence in the process”.

Public confidence

5.89 The Charity Commission for Northern Ireland said “this level of oversight is important and should be retained … It is important to maintain public trust and confidence and it offers protection to trustees who could inadvertently make changes which cause the
organisation to stray from what is charitable”. The Institute of Chartered Secretaries and Administrators made similar comments; “whilst such scrutiny may not be as politically imperative as tackling fraud and abuse, the general public and individual donors might be dismayed to hear that charitable funds have not been spent on furthering the purposes promoted”.

5.90 The Association of Church Accountants and Treasurers said this was “a necessary legal protection against the risk of thwarting donors’ intentions through unjustified changes in the purpose for which they donated”.

Lack of expertise and ability to obtain professional advice

5.91 The Churches’ Legislation Advisory Service thought that the notification requirement and power to object should remain “given that trustees of small, unincorporated charities may have relatively little expertise in such matters”. Stewardship said “in many instances the changes may be proposed by lay trustees with a limited understanding or appreciation of the underlying legal principles”. The Charities’ Property Association made similar comments.

5.92 The Institute of Chartered Secretaries and Administrators said that “small charities are unlikely to have the same access to advice and professional expertise as larger charities”.

5.93 The University of Liverpool CL&PU thought this provided appropriate regulatory oversight. Some – often small – charities “may not be clear of their own objects, so really need Charity Commission oversight of any proposed changes”. Additionally, “the need for such authorisation can be used by trustees to successfully defend the long term interests of a trust against the pressures of immediate expediencies”.

Ensuring purposes remain charitable

5.94 The Charity Commission said it was common for “proposed amendments to not be exclusively charitable so there is some basis for requiring a checking mechanism”. Bircham Dyson Bell LLP thought Charity Commission oversight was important for this reason.

5.95 The RSPCA thought the Commission’s role was important to ensure that powers have been properly exercised and to ensure the charity’s assets are not in danger of being misapplied; the Commission might also consult with other interested parties such as members or umbrella bodies.

5.96 Anthony Collins Solicitors LLP thought the safeguard should be retained and charities “should be required to confirm that where they hold designated land or other restricted assets they are still able to comply with the relevant restrictions under their revised objects”.

Removing Charity Commission oversight

5.97 Veale Wasbrough Vizards LLP said “the decision over whether the Commission should continue to have the power to object needs to be made in conjunction with setting the income threshold. In our experience, provided a sufficiently clear case is made to the Commission for why the change is expedient in the interests of the charity and why the new purposes (which obviously need to be charitable) are similar in
character to those that are being replaced (which are matters the trustees need to satisfy themselves of in any event), the Commission rarely object. The 60 day "objection period" simply serves to add uncertainty and delay to the process of amending a charity's governing document. On balance, therefore, we think the Commission should no longer be able to object to the exercise of the section 275 power, accepting that this may imply a lower income threshold (say, £50,000) to maintain appropriate safeguards."

5.98 In terms of notification, the existing requirement to inform the Charity Commission of changes to governing documents (under section 35 of Charities Act 2011) would be sufficient; the online form could be updated to require charities to state whether the amendment was made pursuant to section 275, which would allow the Commission to monitor the use of the power.

5.99 The Law Society thought notification should continue but the Charity Commission should not have a power to object; “this places an unnecessary burden on the Charity Commission, [which] has considerable powers to hold trustees to account”.

Other comments

5.100 If section 275 is retained, Francesca Quint said that it would be helpful if trustees could send a proposed section 275 resolution to the Charity Commission and obtain advance approval. She also said it would be helpful if the trustees could specify the date when the resolution takes effect (as under section 280). Similarly, the Fellowship of Independent Evangelical Churches suggested that – if Charity Commission oversight is retained – the requirement should be to obtain the Commission’s prior written consent.

**Consultation Question 28.**

We invite the views of consultees as to whether the power of unincorporated charities to amend their purposes under section 275 should be subject to a requirement that the members of the charity (if any) agree to the trustees’ resolution.

[Consultation Paper, paragraph 5.36]

5.101 25 consultees answered this question:

(1) 22 thought a section 275 resolution should be subject to approval by the members;

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224 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; HEFCE.
(2) 2 thought it should not;\textsuperscript{226} and
(3) 1 expressed other views.\textsuperscript{227}

A requirement for a members’ resolution

5.102 Various consultees noted the inconsistency between the need for a members’ resolution to make administrative changes under section 280 and the absence of such a requirement for more fundamental changes to a charity’s purposes under section 275.\textsuperscript{228} Prof Gareth Morgan described it as a “serious omission” from the 2011 Act. Anthony Collins Solicitors LLP described it as “illogical”.

5.103 Plymouth University and Lawyers in Charities also noted the inconsistency with amendments by corporate charities, which require approval by the members.

5.104 The Charity Commission said “many disputes involving unincorporated charities with a membership arise from amendments to purposes to which a section of that membership does not agree”. A members’ resolution would therefore “give the trustees a clear mandate to proceed”.

5.105 The Charity Commission for Northern Ireland thought this “would ensure trustees take steps to consider whether the change is in the best interest of the charity”. Stone King LLP said a charity’s members, who are there “to ensure that the trustees are acting in the interests of the charity and provide accountability” should be part of a decision to make this fundamental change to a charity.

5.106 The Fellowship of Independent Evangelical Churches said “most members of church charities would be disturbed to learn that section 275 currently gives the charity trustees the power to amend the objects of the charity without first having to obtain members’ consent”.

Increased costs

5.107 The CLA noted that this would create an additional administrative burden for small charities, but thought that for consistency (with section 280 and charitable companies and CIOs) and to reflect how fundamental a charity’s objects are, a members’ resolution should be required.

5.108 The Institute of Chartered Secretaries and Administrators said that “this will cause additional administrative costs and impact timings on changes, but done constructively and in partnership with members could mean that any changes have an increased

\textsuperscript{225} Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA and Bircham Dyson Bell LLP (if section 275 is retained); Church Growth Trust; Stone King LLP; Charity Commission; Lawyers in Charities; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Stewardship; RSPCA; Charities’ Property Association; HEFCE.

\textsuperscript{226} Veale Wasbrough Vizards LLP; Independent Schools Council.

\textsuperscript{227} Action with Communities in Rural England.

\textsuperscript{228} For example, Anthony Collins Solicitors LLP; Charity Commission for Northern Ireland; Stewardship; Bates Wells Braithwaite.
legitimacy within the charity’s stakeholders”. The current system, under which members can make representations to the Charity Commission after the resolution, “is a more adversarial approach which can have a negative impact on the reputation and work of the charity”.

The meaning of “members”

5.109 The Church Growth Trust said it was important that “member” was defined as a person who had some formal status in relation to the charity. The Churches’ Legislation Advisory Service noted that in some denominations, the members of the charity are all adult members of the congregation (giving the Quakers as an example, though noting that most Area Quaker Meetings have now incorporated). Comments about the uncertain meaning of members were also made above; see paragraphs 4.36 to 4.38.

Majorities

5.110 Stone King LLP suggested a simple majority. Geldards LLP thought that at least 75% of members present at a meeting should agree to the trustees’ resolution. Bircham Dyson Bell LLP favoured general rationalisation of the various majorities required by different statutory provisions.

No requirement for a members’ resolution

5.111 Veale Wasbrough Vizards LLP acknowledged the inconsistency with section 280 and with corporate charities, which require members’ resolutions, and the safeguard that this can provide. They noted, however, that trustees are subject to clear duties, whereas members are not, and they thought trustees were best placed to make a judgment about what is in the charity’s best interests. Additionally, “involving a separate membership in decision-making often adds significantly to the cost and complexity of implementing decisions”. Adding this requirement “may negate some of the benefits of extending the scope of the section 275 power”. On balance, they preferred section 275 not to include this requirement. The Independent Schools Council made the same comments.

Public consultation

5.112 Action with Communities in Rural England said that village hall charities did not have members, but that all people in the area of benefit can vote at the AGM. It suggested that “all changes to purposes whether there are members or not should be subject to public advertisement and scrutiny”.

Procedure

5.113 Bircham Dyson Bell LLP said that the Charity Commission notification procedure should be completed before any members’ resolution has to be obtained to save unnecessary costs if an objection is made.
Consultation Question 29.

We invite the views of consultees as to whether trustees should be given the power to make cy-près schemes in light of the availability of the section 275 power and the loss of Charity Commission oversight that would be involved.

[Consultation Paper, paragraph 5.37]

5.114 28 consultees answered this question:

(1) 21 did not think that trustees should be given the power to make cy-près schemes;

(2) 4 thought that they should; and

(3) 3 expressed other views.

5.115 As noted above, various consultees thought that the law of cy-près should be reformed, or at least reviewed.

Disagreement with extending the power to charity trustees

5.116 Bircham Dyson Bell LLP said that, as objects are fundamental to an organisation’s status as a charity, any change should always be subject to Charity Commission oversight. The CLA noted that Charity Commission oversight ensured that charities did not inadvertently change their objects so as to cease to be charitable. Action with Communities in Rural England noted that trustees are volunteers and “they do not generally have the skills to ensure this type of change would be undertaken correctly”. The Churches’ Legislation Advisory Service made similar comments.

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229 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Legacy Link; Lawyers in Charities; University of Oxford; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society.

230 Institution of Civil Engineers; Francesca Quint; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; University of Oxford; Imperial College London; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association.

231 Legacy Link; Lawyers in Charities; RSPCA; Law Society.

232 Geldards LLP; Charity Commission; Prof Gareth Morgan.

233 See paras 5.2 to 5.8.
5.117 Stone King LLP thought “regulatory oversight is required to ensure that the provisions are applied in appropriate cases, but also to prevent unnecessary costs of professional advisors for smaller charities”.

5.118 Francesca Quint was “opposed to the suggestion that the trustees should be empowered to make cy-près schemes themselves as opposed to applying for such schemes to the Charity Commission or the Court. The making of a cy-près scheme is essentially a judicial or quasi-judicial function involving the exercise of jurisdiction which is incompatible with the functions of trustees. It is one of the distinguishing features of charity law. In practical terms, such a power would be likely to lead to error, short term decisions and poor drafting and hamper the giving of advice and the proper interpretation of schemes whether by professional advisers or by the Charity Commission. Valuable expertise and a beneficial degree of consistency would be lost to the charity sector.”

5.119 The Charity Commission for Northern Ireland thought that the Charity Commission’s oversight provided essential protection. It acknowledged that processing schemes can be time-consuming and wondered whether there was an alternative option “whereby the trustees would carry out the preparatory work and present the Charity Commission with evidence that all requirements have been met together with a draft scheme for approval”.

5.120 Veale Wasbrough Vizards LLP said “the Commission is likely to be better placed than trustees to draft schemes because of its significant expertise and the bank of precedents it has at its disposal”. They suggested, as an alternative, that the Commission publish precedent schemes which can be adopted by trustees and their advisers, with the Commission only having to approve them.

**Extending the power to charity trustees**

5.121 The Law Society thought trustees should be given a power to make cy-près schemes; “generally, cy-près schemes are not that controversial, and there is already a requirement on trustees to take legal advice where necessary and consult with the Charity Commission when appropriate.” Lawyers in Charities thought charities should have a power to make cy-près schemes “up to a threshold of £5,000”.

5.122 The Charity Commission thought trustees should, in principle, be given the power to make cy-près schemes provided it retained the power to object to proposed changes before they came into effect (as under section 275). Similarly, Geldards LLP suggested that “there should be a similar procedure [to section 275] for larger unincorporated charities to amend their charitable objects”.

5.123 Prof Gareth Morgan and the RSPCA thought that the section 275 power should be available in respect of an individual restricted fund of a charity, including permanent endowment.\(^{234}\) Prof Morgan said: “At present it seems that section 275 can be engaged by a smaller charity to amend its overall objects, but a small restricted fund/special trust in a large charity cannot be applied to new purposes without the full cy-près process. This is disproportionate.” He thought that the section 275 power should be available in respect of restricted funds of larger charities, based on the

\(^{234}\) See para 5.12 on the question whether s 275 can be used in respect of restricted funds.
capital value of the fund, not its income. He suggested “allowing trustees the right to take cy-près decisions for any fund whose total assets are (a) less than £25,000 or (b) less than 2.5% of the charity’s total assets as at the last year end, whichever is the greater”. He said Charity Commission guidance would be necessary “to prevent funds being applied to totally different ends from the original intention”. He also referred to the Scottish regime for charity reorganisation and restricted funds reorganisation “which is much more straightforward”.

5.124 The RSPCA said that charities and the Charity Commission see a scheme “as a last resort” so it would be helpful if trustees could make these decisions themselves.

**Consultation Question 30.**

We invite consultees to share with us their experiences of changing charities’ purposes under section 275 of the Charities Act 2011 and under cy-près schemes, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 5.39]

5.125 11 consultees answered this question.235

**General comments**

5.126 Action with Communities in Rural England said that charities often do not have the resources to obtain legal advice, yet making changes without it “can lead to future problems”.

5.127 Stewardship said that it had submitted proposed wording to the Charity Commission for schemes which had been accepted with minimal amendment; the process was “very straightforward and we found the Commission to be very helpful and efficient”. Similarly, Stone King LLP said the Charity Commission “applies a practical and sensible approach” to applications for cy-près schemes.

5.128 Imperial College London said “changing charities’ purposes under section 275 via Governing Body resolution works well and we feel provides suitable scrutiny”.

**Differences between cy-près schemes and section 275**

5.129 Francesca Quint said section 275 was easier than seeking a scheme because there is no need for Charity Commission approval nor (normally) to publicise the change, so trustees have greater control of the process. Similarly, the Independent Schools Council reported that obtaining a scheme is “a more time consuming and expensive process” than section 275.

5.130 Veale Wasbrough Vizards LLP said “it will usually be more straightforward for trustees to use the section 275 power than apply to the Commission for a scheme”. They said

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235 Francesca Quint; Action with Communities in Rural England; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Independent Schools Council; Imperial College London; Fellowship of Independent Evangelical Churches; Veale Wasbrough Vizards LLP; Stewardship.
that trustees still often need legal advice on using section 275, and the costs are inevitably disproportionate to the value of funds. They said that the Commission rarely objected, so the 60-day objection period “simply adds to the length of the process and creates a degree of uncertainty”. They said that schemes are often more complex, take longer and the need for legal advice is often greater.

5.131 The CLA (as noted above) did not think that the cy-près regime worked well, and obtaining a scheme can be a long and expensive task. They thought that the section 275 power was preferable to having to apply for a scheme, but the threshold causes problems. Some members of the CLA working party suggested that the section 275 requirement for the new purposes to be “similar in character” limited the usefulness of the provision; others thought it important.

Charity Commission practice

5.132 Geldards LLP has been involved in obtaining several cy-près schemes from the Charity Commission. They said that, prior to the introduction of new online forms, the process was relatively straightforward and it was possible to correspond directly with an experienced member of staff at the Charity Commission. “Now, we have found that making an application online is a time consuming and frustrating process not aided by the fact that the Commission’s initial response times are approaching eight weeks (40 working days), it seems that the first response is by staff who are not sufficiently experienced and who simply reply with generic information telling you how to apply for consent rather than addressing the facts provided in the application already submitted.” Obtaining recent schemes to convert Church of England schools to academies were therefore “significantly delayed”.

5.133 The Fellowship of Independent Evangelical Churches had found section 275 to be “straightforward”, but said that dealing with the Charity Commission to obtain schemes “is often frustrating” owing to the case officers being insufficiently experienced and being engaged in unnecessary correspondence which increases the legal costs. It suggested that a solicitor appointed by the charity “ought to be able to deal directly with a solicitor at the Charity Commission rather than dealing with a non-legally qualified case officer”.

5.134 Bates Wells Braithwaite said the section 275 process “is simple, straightforward and cost effective”. “But, given the current lack of resources at the Charity Commission, obtaining a scheme is now taking much longer and, as a result, has become more expensive.”

5.135 Veale Wasbrough Vizards LLP said the Commission’s online notification form did not cater for linked charities, which should be addressed. They also said that the Commission’s policy was not to make cy-près schemes to modernise the wording of a charity’s objects, so unincorporated charities outside section 275 have no way to achieve this (in contrast to corporate charities which can use the statutory amendment power).

RESPONSES TO SUPPLEMENTARY CONSULTATION PAPER

5.136 As can be seen above, the majority of consultees suggested that the powers of amendment should be aligned as between (a) charitable companies and CIOs
"corporate charities") and (b) unincorporated charities. In the Supplementary Consultation Paper, we asked 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.

5.137 Two major themes emerged from the responses to the Supplementary Consultation Paper on the topic of changing a charity’s purposes. These were that consultees were generally in favour of aligning the amendment regime for corporate and unincorporated charities; but they were concerned with balancing deregulation against maintaining confidence in charities.

(1) Alignment of the amendment powers

5.138 In the Supplementary Consultation Paper we set out our current view that the amendment regimes for corporate and unincorporated charities should, as far as possible, be aligned.

5.139 The University of Liverpool CL&PU, the Institute of Chartered Secretaries and Administrators, Bircham Dyson Bell LLP and Anthony Collins Solicitors LLP, among others, were in favour of aligning the amendment regimes for corporate and unincorporated charities. They noted that alignment would make the legislation clearer, provide a uniform and consistent approach, and increase efficiency in the handling of change of purpose cases. The ICSA argued that trustees have specific fiduciary duties and that the structure of the charity should not imply that one group of trustees should be subject to any greater or lesser scrutiny than another. Prof Janet Ulph noted the benefits of an aligned regime for charities that operate both trusts and companies.236

5.140 There was some disagreement as to the reasons why charities choose a particular legal form. The University of Liverpool CL&PU argued that a difference in legal structure should not hamper flexibility to change purposes because charities and donors do not necessarily choose a legal form based on powers of amendment. Similarly, Stone King LLP said that the more restrictive amendment regime was rarely “a driver for choosing the unincorporated form these days”. The Charity Commission and Bates Wells Braithwaite disagreed with this view and argued that the trust structure is often chosen precisely for its more restrictive amendment regime.

5.141 Those consultees who did not support alignment raised concerns as to the structural differences between corporate and unincorporated charities, with specific reference being made to permanently endowed charities.237 They also noted that some changes of purpose can be particularly controversial, in particular those involving land, and a more stringent regime is therefore justified.238 Bates Wells Braithwaite drew attention to donations for a specific purpose which are generally held on charitable trusts and the risk of a detrimental impact on donations if those purposes can be amended too easily.

236 Similarly, the Charity Commission for Northern Ireland said that an aligned approach would be particularly beneficial for Industrial and Provident Societies (IPSS) which are required to register with the CCNI and to whom neither the provisions governing charitable companies nor the statutory powers available to unincorporated organisations apply.

237 For example, the CLA.

238 For example, Bates Wells Braithwaite.
(2) Balancing deregulation against confidence in the sector

5.142 Many consultees were in favour of deregulation which would enable charities to keep up with societal changes. Lord Hodgson expressed a desire to enable trustees to rely on their own judgement instead of strict legal rules where appropriate.

5.143 On the other hand, a number of consultees stressed the importance of protecting the wishes of donors and founders so as not to discourage donations. However, Lord Hodgson pointed out that an overly strict legal regime can in itself frustrate a donor’s wish that their donation be put to good use.

A new statutory amendment power for unincorporated charities

5.144 In the Supplementary Consultation Paper we considered various options for aligning the amendment powers of corporate and unincorporated charities and the consequences for the doctrine of cy-près. We proposed a middle ground whereby unincorporated charities would have a statutory power to change the charity’s purposes without having to establish a section 62 cy-près occasion, subject to a requirement that the obtain the consent of the Charity Commission. This consent would be determined based on the section 67 similarity considerations.

Supplementary Consultation Question 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?

[Supplementary Consultation Paper, paragraph 2.31]

5.145 22 consultees responded to this question.²³⁹

5.146 The vast majority of consultees agreed with our proposed statutory power. There was some concern as to how best to strike the balance between charities having the flexibility to adapt their purposes to societal changes and the need for safeguards to protect the wishes of donors and founders and ensure continued confidence in the sector. Most agreed that our proposals struck the right balance between these

²³⁹ Francesca Quint; Plymouth University; University of Liverpool CL&PU; Prof Janet Ulph; Church Growth Trust; Independent Schools’ Council; Overseas Development Institute; the Colleges of the University of Cambridge; CLA; Anthony Collins Solicitors LLP; Stone King LLP; Lord Hodgson; the Institute of Chartered Secretaries and Administrators: Institute of Chartered Secretaries and Administrators (“ICSA”); Bircham Dyson Bell LLP; Law Society; Charity Commission; Charity Commission for Northern Ireland (CCNI); Chancery Bar Association; Action with Communities in Rural England (ACRE); Dr John Picton; Welsh Government; and Bates Wells Braithwaite.
competing aims. Some felt our proposals did not go far enough and favoured complete alignment with the regime for corporate charities, others felt that additional safeguards may be needed.

(1) Should trustees of an unincorporated charity 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?

5.147 22 consultees answered this question:

(1) 18 agreed; 
(2) 2 disagreed; and 
(3) 2 expressed other views.

In favour of the proposed power

5.148 18 consultees agreed with our proposed power. They said it would increase flexibility, allow for strategic planning, and simplify the amendment process while maintaining sufficient safeguards.

*Increasing flexibility for unincorporated charities*

5.149 The CLA said that our proposal “would enable unincorporated charities to refocus their objects in a strategic manner should the trustees deem this to be in the best interests of the charity”. The Charity Commission for Northern Ireland (the CCNI) described having to establish a cy-près occasion as too “too difficult and restrictive”. Prof Ulph explained how, in order for a charity’s mission to be sustainable, it needs to be able to evolve, and charities therefore need flexibility to change their purposes.

5.150 An example was provided by the Church Growth Trust which explained how some trusts governing the use of church property contain restrictions imposed in the 19th Century under very different social conditions, for example, a prohibition against women holding any church leadership office. This would not necessarily give rise to a cy-près occasion under the current law, as it would still be possible for the charity to operate in compliance with the prohibition, but amendment would nonetheless be desirable.

5.151 Similarly, Plymouth University noted that the current two-stage test is artificial and that the fundamental question for the Charity Commission ought to be whether the proposed change is a good thing for the charity in question. The CLA agreed that our

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240 For example, Stone King LLP.
241 For example, the Charity Commission.
242 Francesca Quint; Plymouth University; University of Liverpool CL&PU; Prof Janet Ulph; Church Growth Trust; Independent Schools’ Council; Overseas Development Institute; Colleges of the University of Cambridge; CLA; Anthony Collins Solicitors LLP; Stone King LLP; Lord Hodgson of Astley Abbots; Institute of Chartered Secretaries and Administrators: ICSA; Bircham Dyson Bell LLP; Law Society; Charity Commission and Charity Commission for Northern Ireland (CCNI).
243 Chancery Bar Association; and ACRE.
244 Dr John Picton; and Bates Wells Braithwaite.
proposed new power would enable charities to refocus their objects in the best interests of the charity, rather than waiting for a cy-près occasion to occur.

5.152 On the other hand, Dr John Picton argued that, on a literal interpretation, section 62 is in fact very liberal. He suggested that the complaints from practitioners in fact relate to the Charity Commission’s interpretation of the statute rather than its wording.

Simplifying the amendment process

5.153 The CLA described the convoluted and costly process of establishing a cy-près occasion and obtaining a cy-près scheme. They argued that our proposal would be in the sector’s interest and result in the saving of time and money. The Charity Commission agreed that the proposed power would reduce regulatory burdens on charities and on the Commission leading to time and cost savings. They estimated that prior written consent to a proposed change of purposes would require 2-3 hours of staff time whereas by contrast a short cy-près scheme would require one day of more experienced staff time and a longer or more complex scheme could take up to 5 days over several weeks or even months.

5.154 The Charity Commission explained that greater consistency between the processes for corporate and unincorporated charities would simplify matters for trustees and make it easier for them to understand and comply with the legal requirements. It would also assist the Commission in introducing more user-friendly digital processes.

Maintaining sufficient safeguards

5.155 Plymouth University, the Charity Commission, the CCNI, Stone King LLP, Bates Wells Braithwaite and Prof Janet Ulph stressed the importance of the Charity Commission maintaining a supervisory role. The Overseas Development Institute agreed that our proposal was a sensible “middle ground” between sweeping away cy-près entirely and leaving some controls in place to prevent charity trustees spending gifts in ways which are very far from the donor’s wishes.

Against the proposed power

5.156 Two consultees opposed our proposed power. They did not view the cy-près process as particularly problematic and argued that it strikes the appropriate balance between flexibility for charities and respect for the wishes of donors and founders. The Chancery Bar Association added that the current regime has the advantage of familiarity.

5.157 Action with Communities in Rural England (ACRE) expressed a preference that the section 62 preconditions be retained. However, they said that if section 62 no longer applied, trustees must be made aware of and carefully consider relevant factors, even if they appear in guidance rather than legislation. They noted that the trustees of village hall charities change regularly and come from a wide range of backgrounds and therefore due diligence checks are needed to ensure an active committee does not change the charity’s purpose in a way that is controversial within the community.

5.158 Bates Wells Braithwaite were supportive of the introduction of a power, in principle, for charities which do not currently have an express power to change their purposes in their governing document. However, they would impose restrictions on such a power,
including that regard must be had to the section 62 occasions on the basis that it strikes a good balance between the changing needs of a charity and the intentions of the donor (their other proposed restrictions are set out at paragraphs 5.164 to 5.167 below). However, they supported an expansion of section 62 to make it clear that a cy-près occasion could arise under section 62(1)(c) where the purposes are achievable but a change to the purposes would allow funds to be applied more suitably or effectively.

5.159 In addition, the Charity Commission anticipated that a new power would be resisted by the majority of founders of, or donors to, existing trusts, who “would be disconcerted to learn that the trustees of their gift have the flexibility to change its purposes.”

Avoiding cy-près through incorporation

5.160 The CLA noted that it was now possible for unincorporated charities to convert to a corporate structure and that cy-près is not required in that process. However, the Charity Commission cautioned that this point should not be overstated because incorporation can be a time consuming and costly process. They expressed a view shared by the Chancery Bar Association that a desire to avoid the cy-près regime would not be a sufficient justification for incorporation. The Chancery Bar Association argued that for an unincorporated charity to transfer assets to a corporate charity for the purpose of circumventing cy-près restrictions would be a fraud on the power, the purported exercise of which would then be void and would render the trustees liable to compensate the charity for its loss.

5.161 The Charity Commission also said that any permanent endowment or special trust property will continue to be held on trust by the corporate charity following the incorporation.

Operation of the new power

5.162 Several consultees raised queries and made suggestions as to how the new power should operate and interact with existing amendment powers.

Additional safeguards

5.163 The Charity Commission, while supportive of our proposed new power, said certain limitations and safeguards were essential.245 It was concerned that the proposed new power may discourage some founders and donors from establishing, or making donations to, charitable trusts. It cited research showing that one of the key drivers of public trust in the charitable sector is certainty about where donated money ends up. It said that the policy goal of alignment should not “be pursued to the detriment of public trust and confidence in charities”.

5.164 The Commission suggested the following limitations.

(1) The power should only be exercised where the trustees are satisfied that the proposed amendment is in the best interests of the charity. While this reflects the duty of all trustees at common law, the Commission believed it should be

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245 The Commission also emphasised the importance of our proposal that the Charity Commission should always have to consent to a change.
expressly included in the legislation so that it is absolutely clear that trustees cannot make changes to their charity’s purposes unless they have good reasons for doing so.

(2) The power should only be exercisable by resolution of a majority of at least 75% of the charity trustees. Where the charity has a separate membership a resolution of at least 75% of the charity’s members should also be required, as with companies and CIOs. Bates Wells Braithwaite suggested a similar restriction with at least a two-thirds majority.

(3) The power should not be exercisable in any way which would result in the charity ceasing to qualify for charitable status.

(4) The requirement in section 88 of the Charities Act 2011 for the Charity Commission to give public notice before making a scheme unless they deem it unnecessary should apply to the new power. The Charity Commission noted that this is particularly important where a scheme raises more controversial issues, such as the disposal of designated land. They would like a power both to require trustees to give public notice of a proposed change and for the Commission to give public notice itself, prior to granting prior written consent. Bates Wells Braithwaite also supported such a power.246

Excluding, restricting and modifying the new power

5.165 The Charity Commission suggested that the proposed power should only apply to the extent that it has not been expressly excluded or modified in the charity’s governing document. Similarly, Bates Wells Braithwaite thought that charities should have the ability to disapply the statutory power in the governing document or to impose restrictions on the exercise of it (similar to entrenched provisions of charitable companies and CIOs). The CLA and Dr John Picton also sought confirmation that charities will be able to exclude the new statutory power in their constitutions.

5.166 Some members of Stone King LLP also suggested that the power could be excluded, so amendments would continue to be possible only by a cy-près scheme. But they identified a problem with that approach: “logically it suggests that existing trusts should be dealt with on the same basis, and not subject to the new regime”. We considered and rejected the notion of a dual regime for existing and future charities in the Consultation Paper, and Stone King agreed that that should be avoided.

5.167 The CLA, Bates Wells Braithwaite and the Charity Commission all said that the power should not be permitted to override any existing restrictions in the governing document, for example a requirement to obtain the consent of a third party or stakeholder group. They drew an analogy with entrenchment of provisions in companies’ and CIOs’ governing documents.

5.168 The National Trust questioned how our proposals would impact on situations where restrictions on purpose related not to a charity in its entirety but to a restricted fund or special trust within a charity.

246 The Charity Commission also suggested extending this safeguard to companies and CIOs for consistency.
Existing powers

5.169 The CLA said that the new power should be in addition to any express amendment powers.

Other considerations

Section 61 duty to apply for a cy-près scheme

5.170 The Charity Commission suggested that the duty on trustees to apply for a cy-près scheme under section 61 if one or more of the section 62 cy-près occasions has arisen ought to be maintained. The Commission noted that it is a useful provision in encouraging trustees to take action in appropriate cases. It wanted section 61 to be retained in respect of unincorporated charities whose governing documents exclude the proposed new power, and amended in all other cases so that trustees have a duty to amend their purposes using the proposed new power.247

Application to particular charities

5.171 Francesca Quint asked whether an alternative was proposed in place of cy-près schemes for the amalgamation of permanently endowed charities under section 62(1)(c) since they do not fall within the merger provisions in the 2011 Act. She also asked whether the power would extend to unincorporated charities governed by Act of Parliament.

5.172 The Church Growth Trust suggested that it would be helpful to make clear that designated land and permanent endowment are included within the new amendment power.248

Freshly created will trusts

5.173 Dr John Picton disagreed that the section 62 cy-près occasions are redundant in the context of failed testamentary gifts as suggested at paragraph 2.43 of the Supplementary Consultation Paper. He said that the current statute restricts the modification of freshly created will trusts and a potential problem under our proposed power is that the section 67 requirements are highly discretionary and would potentially enable greater modification of such trusts. He recommended either maintaining a statutory gateway for the modification of freshly created will trusts or keeping a strict “as near as possible” principle in place which would limit the modification of these trusts as “a special element of the section 67 procedure”.

Need for codification

5.174 The CLA could see the benefits of a clear and accessible framework for developing charitable purposes and use of funds but while some members thought this would be best achieved through clear statutory provision, others felt it was enough for the principles to be clear, without the need for legislation.

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247 The Charity Commission also suggested extending this safeguard to companies and CIOs for consistency.

248 They explained how they often hold church property as permanent endowment but because it is often held for an ultimate purpose any general funds invested in repairing or maintaining the property would not come back to the Trust. It would therefore be beneficial for them to be able align the objects of the trust with the Trust’s own objects thus enabling them to invest in the permanent endowment.
(2) Should the section 67 similarity considerations apply when the Charity Commission decides whether or not to give its consent?

5.175 21 consultees answered this question:

(1) 16 agreed;\(^{249}\)

(2) 2 disagreed;\(^{250}\) and

(3) 3 expressed other views.\(^{251}\)

Benefits to retaining section 67

5.176 The majority of consultees favoured retaining the section 67 similarity considerations in relation to the new power. They said that the section 67 considerations help to protect the original spirit of the gift and provide clarity to the reasoning of the Charity Commission in deciding whether or not to consent. They are also familiar to charities and practitioners.

Protecting original spirit of the gift

5.177 Anthony Collins Solicitors LLP noted the nature of unincorporated charities as often having been established by way of an original gift or funds raised for a particular purpose. They, like other consultees,\(^{252}\) agreed that section 67 enables the Charity Commission to take into account the founder’s intentions but change the objects to better suit current social and economic circumstances.

5.178 The CLA added that the section 67 considerations would provide a safeguard to the increased flexibility caused by the removal of the need to demonstrate a cy-près occasion and would thereby give donors and founders assurance. The Chancery Bar Association agreed that, if the balance between flexibility and respect for donor intention was not to be struck by retaining section 62, then it should at least be struck by retaining section 67.

Clarifying Charity Commission reasoning

5.179 The University of Liverpool CL&PU and the Law Society agreed that the section 67 similarity conditions should form part of the Charity Commission’s approval process. They said that the considerations in section 67 are fundamental and core to any decision-making around changing purposes, and provide “a welcome clarity” to the Charity Commission’s decision making.

\(^{249}\) University of Liverpool CL&PU; Prof Janet Ulph; the Chancery Bar Association; the Independent Schools' Council; the Overseas Development Institute; the Colleges of the University of Cambridge; the CLA; Anthony Collins Solicitors LLP; Lord Hodgson of Astley Abbotts; ACRE; the ICSA; Bates Wells Braithwaite; the Charity Commission; the Law Society; the Welsh Government and the CCNI.

\(^{250}\) Stone King LLP; and Plymouth University.

\(^{251}\) Dr John Picton; Bircham Dyson Bell LLP; and Francesca Quint.

\(^{252}\) CNNI; Charity Commission; Bates Wells Braithwaite; ICSA; Prof Janet Ulph; the Church Growth Trust.
Familiarity

5.180 The CLA noted that the section 67 considerations embody key principles of charity law and that, in keeping them, the existing case law would continue to assist charities in making sense of what is required from them.

Against retaining section 67

5.181 Stone King LLP favoured a complete alignment of the regimes for corporate and unincorporated charities such that neither section 62 nor section 67 would apply. They argued that this would be welcomed by unincorporated charities as they would be given the same flexibility as corporate charities as well as making the processes easier to understand and apply. They described the proposed regime as “an attempt at a compromise” that in effect “is trying to shoe-horn a new power for unincorporated charities to amend objects into the conditions for a cy-près scheme.” They argued that the wider regulated alterations test for corporate charities should apply to the proposed new power instead of section 67. They said that this test is “more flexible and imaginative”.

5.182 They argued that the Charity Commission has a policy of adopting a cautious approach to section 67, giving greater weight to the spirit of the gift (which is often hard to discern clearly) than to the prevailing social and economic circumstances. They suggested that the underlying question should be based on the needs of the beneficiaries in the present day.

5.183 Plymouth University was also in favour of the Commission extending its policy for corporate charities to unincorporated charities, which was more flexible and therefore preferable to section 67.

5.184 By contrast, the Chancery Bar Association criticised the Commission’s current approach for corporate charities: see paragraph 5.204 below.

Other considerations

Application to other powers of amendment

5.185 The Charity Commission also noted that, in the interest of further alignment, the section 67 considerations could be incorporated into other existing statutory powers of amendment. Bates Wells Braithwaite expressed the view that the section 67 considerations should not be extended to existing express powers of amendment.

Freshly created wills trusts

5.186 Dr John Picton raised concerns that the highly discretionary nature of the section 67 requirements made them unsuited to the modification of freshly created will trusts (see paragraph 5.173 above).

253 It gave the example of the Reverter of Sites Act 1987, s 2 (which already contains similar though not identical requirements) and the School Standards and Framework Act 1988, s 82.
Supplementary Consultation Question 2.

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

[Supplementary Consultation Paper, paragraph 2.35]

5.187 19 consultees answered this question:

(1) 17 thought that the section 67 similarity considerations (often with minor modification) were appropriate for a new amendment power;\(^{254}\) and

(2) 2 did not.\(^{255}\)

5.188 The majority of consultees agreed that the section 67 similarity considerations were beneficial for the reasons set out in response to Question 1(2) above. A few consultees suggested ways to improve section 67 and Bircham Dyson Bell LLP recommended a new test based on a combination of section 67 and the regulated alterations test.

5.189 Two consultees disagreed. Plymouth University, as set out above, argued that the more flexible test used for corporate charities should apply to the proposed new test. Stone King LLP agreed that it seems strange to apply the more conservative regime of section 67 to corporate charities rather than applying the more permissive regime of regulated alterations to unincorporated charities.

Improving section 67

5.190 The Colleges of the University of Cambridge and the Institute of Chartered Secretaries and Administrators agreed with the changes to the wording of section 67 proposed at paragraph 2.34 of the Supplementary Consultation Paper. Francesca Quint agreed that the second consideration under section 67 should be made simpler.

5.191 Consultees suggested various other wording changes.

(1) The CLA suggested that the reference in section 67(b) to “original” purposes should be amended to make reference to “current” purposes which would reflect the requirement in section 275. It would also avoid the need to go too far back through historical documents where purposes may already have been subject to change and may already not be in their “original” form.

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\(^{254}\) Francesca Quint; University of Liverpool CL&PU; Prof Janet Ulph; Chancery Bar Association; Church Growth Trust; Independent Schools’ Council; Overseas Development Institute; Colleges of the University of Cambridge; CLA; Anthony Collins Solicitors LLP; Lord Hodgson; ACRE; ICSA; Bates Wells Braithwaite; Bircham Dyson Bell LLP; Charity Commission; and Law Society.

\(^{255}\) Plymouth University; and Stone King LLP.
(2) The CLA also criticised the use of “close” in subsection (b) as unclear. They also argued that subsection (b) was unnecessary, so long as the Charity Commission has regard to the spirit of the gift and the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

(3) Bircham Dyson Bell LLP argued that the words “in character” were unnecessary and that “similar” alone would suffice.

(4) The Charity Commission suggested that the phrase “spirit of the gift” in section 67(3)(a) could be replaced with a more modern, accessible alternative, such as “the basic intention underlying the original gift”.

5.192 The Church Growth Trust called for clarification that none of the three considerations held more weight than the others. The CCNI argued that the “spirit of the gift” requirement should be paramount. By contrast, Stone King LLP and Dr John Picton thought that the social and economic circumstances should outweigh the spirit of the original gift.

5.193 Dr John Picton described the section 67 considerations as highly discretionary and suggested that we consider whether the law should better guide the exercise of this discretion. He suggested that if the thrust of our Consultation Paper was towards liberalisation then perhaps the efficiency ground for modification ought to be prioritised over preservation of original intention. Better directing the Commission’s discretion might also limit unnecessary cases in the Charity Tribunal appealing the basis of its decision-making. He suggested that section 67 should presumptively establish that efficiency is, by itself, a sufficient ground for Charity Commission consent with that presumption being overcome in circumstances where the donor’s original intention is particularly pertinent.

A new test

5.194 Bircham Dyson Bell LLP viewed this question as a choice between the two existing tests applied by the Charity Commission: the section 67 similarity conditions and the regulated alterations test. They examined the benefits and disadvantages of both tests. They suggested that section 67 is drafted in favour of purposes which are similar to and in line with the original intentions. They said this is illustrated by the Charity Commission’s operational guidance which says that the Commission should apply “caution” where a proposed change might be a significant departure from the founder’s intentions or might exclude existing beneficiaries. They argue that in the regulated alterations test the emphasis is reversed so that a significant change is permitted unless there is a reason not to. However, they go on to suggest that, based on the Charity Commission’s operational guidance, its approach under the two tests might not be so different with “rationality” (in the regulated alterations test) being determined on the basis of whether the new purposes are “broadly consistent” with what they are replacing (which is closer to the section 67 test). They concluded that it is not clear whether, or to what extent, the two tests substantially differ in practice and that this in itself indicates that neither test is especially clear.

5.195 They suggested that it would be better to identify the considerations which should be relevant to the Commission’s decision and for those to be set out in a clearer, more
objective test. They recommended the following relevant (but non-exhaustive and unweighted) considerations:

(1) the reasons why the charity trustees consider the change is in the best interests of the charity;
(2) the intention or “spirit” of the original gift;
(3) the similarity or otherwise to the purposes to be replaced;
(4) the suitability and effectiveness of the proposed new purposes in the light of current social and economic circumstances; and
(5) the impact on beneficiaries.

**Supplementary Consultation Question 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).

[Supplementary Consultation Paper, paragraph 2.41]

5.196 20 consultees answered this question:

(1) 13 thought that the section 67 similarity conditions should apply when the Charity Commission decides whether to consent to a company of CIO changing its purposes;

(2) 5 did not; and

(3) 2 expressed other views.

5.197 This question, as anticipated, caused the most divergence of opinion between consultees, despite there still being a majority in favour of applying the section 67 similarity considerations to corporate charities. The CLA Working Group was divided on this proposal and listed a number of arguments both in favour of and against applying section 67 to corporate charities.

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256 Francesca Quint; University of Liverpool CL&PU; Prof Janet Ulph; Chancery Bar Association; Church Growth Trust; Overseas Development Institute; Colleges of the University of Cambridge; Lord Hodgson; ACRE; ICSA; Charity Commission; Law Society; and CCNI.

257 Plymouth University; Independent Schools’ Council; Anthony Collins Solicitors LLP; Stone King LLP; and Bates Wells Braithwaite.

258 The CLA; and Bircham Dyson Bell LLP.
In favour of applying section 67 to corporate charities

5.198 Those in favour said that this approach would provide greater transparency as to how the Charity Commission decides whether or not to grant consent to amendments by corporate charities and that these benefits outweighed the slight increase in regulation.

Providing grounds for the Charity Commission’s consent decisions

5.199 Francesca Quint welcomed the proposal to introduce statutory guidelines, based on section 67, to the granting of consent to a change in purposes for a corporate charity. She explained that the width of the Commission's discretion under the current rules and the fact that the Commission changes its policy from time to time makes it difficult to advise corporate charities about proposed amendments. The University of Liverpool CL&PU, the Law Society, the CLA and the Chancery Bar Association agreed that this change would bring a welcome clarity to the law and make it easier to understand how decisions are reached. The CCNI saw a benefit to enshrining the considerations for making such decisions in legislation and felt that the primary consideration should remain the best interests of the charity.

The benefits of section 67 outweigh the notional increase in regulation

5.200 The University of Liverpool CL&PU believed that the increased clarity and transparency would outweigh any perceived over-reach of the Charity Commission. Similarly the Institute of Chartered Secretaries and Administrators felt that the notional increase in the regulatory bar that corporate charities have to meet would be a marginal inconvenience when weighed against the public's lack of understanding why two different approaches are merited (as between corporate and unincorporated charities).

5.201 The Charity Commission appreciated that the proposed change may be perceived by some as an increase in regulation for corporate charities but emphasised that the steps that a corporate charity needs to take to change its purposes would not change. They agreed that any perceived disadvantage was outweighed by the benefits of the proposal, primarily, consistency between corporate and unincorporated charities and increased clarity for both charities and case workers.

5.202 The CLA added that application of the section 67 considerations to corporate charities would give comfort to founders and donors and make the prospect of incorporating more attractive for donors still involved in unincorporated charities.

5.203 The CCNI also agreed that similar considerations ought to be applied regardless of the legal status of the organisation. It felt that this approach would provide a true compromise, allowing further flexibility for unincorporated charities whilst providing clearer guidelines for charitable companies. It did not see section 67 as being any more onerous for corporate charities than for unincorporated charities.

Criticisms of the current test for corporate charities

5.204 The Chancery Bar Association criticised the Charity Commission’s current policy concerning corporate charities. It said there was little, if any, legislation or case law that endorsed the Commission’s current approach (summarised in paragraph 2.12 of the Supplementary Consultation Paper). It suggested that asking whether the trustees’
decision was rational was confusing, since it is generally the members of a company (not the directors) who can amend the governing document. Further, that being the case, there are currently insufficient constraints to ensure that members exercise that power in the best interests of the charity, adding further support to applying the section 67 considerations to a change of purposes by a corporate charity.

Against applying section 67 to corporate charities

5.205 In contrast to the Chancery Bar Association, some consultees preferred the Charity Commission’s approach for corporate charities, and either wanted to retain it for corporate charities or extend it to unincorporated charities. Bates Wells Braithwaite thought consistency would remove confusion, be logical, and give statutory backing to the test to be applied. However, they felt that the section 67 considerations were stricter than those currently used by the Charity Commission for corporate charities and that this would impose a new burden on such charities which is not justified. They favoured a reduction, rather than an increase in bureaucracy and red tape for charities and therefore concluded that it would be best to maintain the status quo. They recognised that this would mean that the regimes would not be completely aligned but they did not think that alignment ought to be regarded as an end in itself. Similarly, Anthony Collins Solicitors LLP did not favour alignment and argued that the nature of unincorporated charities is often different and therefore it seems appropriate for them to have a more restrictive process.

5.206 The CLA argued that section 67 places greater importance on similarity of purposes than the current regulated alterations system. They also thought the proposed change may make it harder for corporate charities to make wider changes to their purposes such as to introduce a “general charitable purpose” and make the Charity Commission more reluctant to allow corporate charities to widen their purposes after incorporation.

5.207 Stone King LLP argued that no case has been made for the need to impose a stricter regulatory regime on corporate charities by imposing section 67 considerations. They were concerned that, rather than simply setting out three compulsory statutory considerations, applying the section 67 considerations would, inadvertently, make it more difficult for charitable companies and CIOs to change their purposes. They said that while the two tests are quite similar in practice the regime for corporate charities focuses far more on the charity’s beneficiaries and is more flexible. As noted above both Stone King LLP and Plymouth University would prefer that the test for corporate charities be applied to unincorporated charities instead of the other way around.

5.208 Bircham Dyson Bell LLP agreed that the test should be the same for corporate and unincorporated charities but that it should be a new test, as set out in their response to Question 1(2) above. They believed that this would be seen as less of a retrograde step as it would simply be a means of a clarifying the test which is, in practice, applied currently.

Further regulation of corporate charities

5.209 In the interests of alignment, the Charity Commission argued that some of their suggested additional safeguards for unincorporated charities (set out at paragraphs 5.164 above) should be extended to corporate charities as well.
The continuing role of the section 62 cy-près occasions

5.210 We proposed 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. We noted an argument that, on that basis, there was no continuing need for section 62 as a gateway to the Charity Commission making a scheme. Nevertheless, we concluded that there was a continuing role for section 62, and we proposed that it be retained.

Supplementary Consultation Question 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?

[Supplementary Consultation Paper, paragraph 2.49]

5.211 21 consultees answered this question:

(1) 17 agreed; 259

(2) 1 disagreed; 260 and

(3) 3 expressed other views. 261

5.212 Lord Hodgson described section 62 as creating another hurdle inhibiting change which should therefore be removed. Other consultees recognised the continued (if reduced) need for section 62 in certain contexts. Some suggested ways in which it could be amended.

The role of section 62 in other contexts

5.213 Plymouth University noted that if our proposals were adopted traditional cy-près would no longer be of interest to trustees wishing to change their purposes, but section 62 may continue to have a role in the context of third party applications. Anthony Collins Solicitors LLP agreed that the power to make a cy-près scheme will be required on an application from a third party or on the motion of the Charity Commission. They also noted the situation where a charity needs to wind-up and pass its assets to a charity with slightly different purposes and that in such circumstances applying for a cy-près scheme may be more appropriate than the dissolving charity making an application to amend its purposes before the transfer.

259 Plymouth University; University of Liverpool CL&PU; Prof Janet Ulph; Dr John Picton; Chancery Bar Association; Church Growth Trust; Independent Schools' Council; Colleges of the University of Cambridge; Anthony Collins Solicitors LLP; Stone King LLP; ACRE; Bates Wells Braithwaite; Bircham Dyson Bell LLP; Charity Commission; Law Society; Welsh Government and CCNI.

260 Lord Hodgson.

261 Francesca Quint; CLA; and ICSA.
5.214 The Charity Commission agreed that the section 62 occasions should be maintained and noted that, even if our proposals were implemented, any unincorporated charity which prohibited use of the new power in its governing document would still need to rely on cy-près and therefore section 62 would have a continuing role. The CCNI agreed.

5.215 The CLA had mixed views. They saw the need for a higher bar where a change is requested by a third party. On the other hand, the CLA thought that in the few remaining cy-près scheme applications the section 67 similarity considerations could be sufficient without retaining the additional layer of section 62.

Suggested improvements to section 62

5.216 Dr John Picton argued that section 62 is very badly drafted and its meaning is far from intuitive. He said that while most of the provisions are a codification of the common law section 62(1)(e)(iii) was an expansion of the common law and is so broad it encompasses all of the other gateways. He therefore argued that there is a case for removing the other provisions and maintaining only section 62(1)(e)(iii). This should continue to bind the Charity Commission when making a cy-près scheme. He also suggested changing the wording of section 62 to an “inexpediency” criteria.

5.217 Bates Wells Braithwaite argued that section 62 should be amended to make it clear that a cy-près occasion could arise under section 62(1)(e) where the purposes are achievable but a change to the purposes would allow funds to be applied more suitably or more effectively.

Other considerations

5.218 Dr John Picton noted that compulsory use of the section 62 gateway is extremely rare. He argued that there was a case for restricting the compulsory use of the modification power of the Charity Commission by requiring it to justify use of the power.

5.219 Dr Picton also suggested that this may also be a rare opportunity to review and abolish prerogative cy-près.
Chapter 6: Other charities: amending governing documents

INTRODUCTION

6.1 22 consultees commented on the issues discussed in Chapter 6 of the Consultation Paper. Before setting out their responses to the individual consultation questions, we set out the additional comments raised by some consultees.

GENERAL COMMENTS

Inconsistencies between CIOs and charitable companies

6.2 Bircham Dyson Bell LLP provided a detailed explanation of inconsistencies between the provisions that apply to companies and CIOs, which we summarise below. Bircham Dyson Bell LLP, the CLA and Prof Gareth Morgan, argued that these inconsistencies should be removed. Only the first four fall within our terms of reference.

(1) Constitutional amendments other than at a general meeting

6.3 Constitutional amendments for both companies and CIOs agreed at a general meeting require a resolution of 75% of the members. Constitutional amendments agreed in writing or by any other means require unanimity in the case of CIOs, but only a 75% majority in the case of companies. There is a similar anomaly for companies resolving to convert to CIOs. Bircham Dyson Bell LLP suggested that this anomaly might have arisen as the position in company law was changed by the Companies Act 2006 at the same time as the provisions for CIOs were introduced in the Charities Act 2006 and the change in respect of companies might not have been noticed.

6.4 In our view, however, this difference between companies and CIOs is justified. In the case of companies, prior notice of a proposed written resolution must be given to all members. There is no similar universal requirement for written resolutions of CIOs. The rules governing companies are detailed but they provide safeguards

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262 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; OSCR; University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; University of Oxford; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

263 Charities Act 2011, s 224(2)(b) for CIOs; Companies Act 2006, s 21(1) and Pt 13 for companies.

264 Charities Act 2011, s 228(4)(b). Registered societies resolving to convert to CIOs must also secure unanimous agreement: s 229(4)(b).

265 Companies Act 2006, ss 291 and 293.

266 If a CIO’s constitution permits its members to make decisions otherwise than at a general meeting, the constitution must explain that process: Charitable Incorporated Organisation (General) Regulations 2012 SI No 3012, reg 13(8). In such cases, the Charity Commission’s model constitution for CIOs includes a requirement that prior notice of proposed written resolutions be given to all members: cl 10(3)(a). However,
which can justify permitting written resolutions to be made by a 75% majority. The statutory provisions for CIOs avoid those detailed rules about giving members prior notice of proposed written resolutions, but in consequence any written resolution must have the unanimous agreement of the members.

(2) Date on which amendments take effect

6.5 Constitutional amendments for CIOs do not take effect until they are registered by the Charity Commission268 whereas this limitation only applies to companies if the amendment changes its objects.269 Bircham Dyson Bell LLP and Prof Gareth Morgan said that this was unhelpful, unduly limiting and caused confusion. Prof Morgan said:

Whilst the Commission can only refuse registration of an amendment in [specified circumstances]270 there is a period of uncertainty as to how long it will take the Commission to register an amendment. Moreover, current Charity Commission procedures do not seem to include a clear process of notifying the applicant of the exact date when a CIO constitutional change has been registered so there can be real confusion on the implementation date of a constitutional change.

Moreover this framework means that the members of a CIO can never pass a constitutional amendment and put it into effect immediately, no matter how minor the change. This is an unhelpful limitation and should be changed.

For unregulated alterations, the 15 day notice requirement in section 227(1) is sufficient – section 227(2) [which provides that amendments only take effect once registered] should only apply to regulated alterations.

6.6 We address this issue in paragraphs 4.11 to 4.13 of the Report.

(3) Contents of a CIO constitution

6.7 Bircham Dyson Bell LLP said that the statutory requirements for the contents of a CIO’s constitution271 are “unhelpfully prescriptive”. Reform to these requirements would require further consultation. Moreover, as it only became possible to create CIOs in January 2013,272 they are still a new body and we think it would be sensible to let the dust settle before considering changes to these provisions.

the inclusion of a power for members to make decisions otherwise than at a general meeting is optional. By contrast, the power for members to amend the constitution otherwise than at a general meeting is compulsory, since it is set out in statute (s 224(1) and (2)(a) Charities Act 2011). Accordingly, the statutory power of amendment otherwise than at a general meeting under s 224 is available even in cases where there is no requirement (in the CIO’s constitution) for members to be informed of proposed written resolutions.

267 Companies Act 2006, Pt 13, Ch 2.
268 Charities Act 2011, s 227(2).
269 Companies Act 2006, s 31(2)(c).
270 Charities Act 2011, s 227(3) and (4).
271 Charities Act 2011, s 206. Additional requirements are set out in the CIO (General) Regulations 2012, reg 13.
272 When the 2012 Regulations came in to force.
(4) Charity names

6.8 Bircham Dyson Bell LLP said that the power to refuse registration of a CIO owing to its name is anomalous and should be removed. We address this point in Chapter 13 of the Report.

(5) Applicants for the creation of a CIO

6.9 The legislation assumes that the prospective members of a CIO will apply for its registration (just as the subscribers to the memorandum become a company’s first members) and property held by those members for the charity automatically vests in the CIO.\(^{273}\) In the charity context, however, it is the charity trustees, not the members, who will apply for registration and hold property to become vested in the CIO. The automatic vesting of property on the creation of a CIO falls outside our terms of reference.

(6) Creation of CIOs by registration

6.10 A CIO does not exist until it is registered,\(^{274}\) which ensures that a CIO’s purposes are charitable before it exists. This requirement causes difficulty when a charity incorporates. It was suggested that the difficulty would be ameliorated if there was a “same day” process for registration when the CIO’s purposes are the same as the unincorporated charity’s purposes. The suggestion for an expedited registration process is an operational matter for the Charity Commission and falls outside our terms of reference.

(7) Declaring names

6.11 It was suggested that the statutory requirement for CIOs to declare their names in particular circumstances\(^{275}\) is unnecessary. The requirement falls outside our terms of reference.

Scotland

6.12 OSCR said that section 280 of the Charities Act 2011 “is not applicable in Scotland. All unincorporated charities must make only those changes permitted under the constitution and must seek OSCR consent for change to purposes and charity name. There is no distinction made in the 2005 Act for different types of charity: unincorporated charities may give themselves a power of amendment, as may companies and SCIOs. Trusts in Scotland can apply to OSCR for a “reorganisation scheme” to make certain changes where no powers exist currently.”

RESPONSES TO INDIVIDUAL QUESTIONS

6.13 We now consider consultees’ responses to the individual questions in this chapter of the Consultation Paper.


\(^{274}\) Charities Act 2011, s 210.

\(^{275}\) Charities Act 2011, s 211.
Consultation Question 31.

We invite the views of consultees as to whether the power to make administrative amendments to unincorporated charities' governing documents under section 280 of the Charities Act 2011 is helpful and whether its scope is sufficiently clear.

[Consultation Paper, paragraph 6.15]

6.14 21 consultees answered this question.276

A helpful power

6.15 10 consultees commented that the section 280 power was helpful.277

6.16 The University of Oxford said it had used the procedure “without difficulty” and that it was a "relatively straightforward process". Anthony Collins Solicitors LLP said it was used widely, allowing charities “to “tidy up” out-of-date, ambiguous provisions”, particularly procedures for appointment and removal of trustees and members, and to appoint a trust corporation to hold legal title (where it currently only has power to appoint individual property holding trustees).

6.17 Bircham Dyson Bell LLP said “it is helpful to have a statutory power to make amendments. Many constitutions do not have a suitable power to amend and such constitutions similarly often lack other powers which would be appropriate and useful for the administration of the charity. A suitable statutory power in these circumstances can enable the charity to proceed without undue administrative upheaval and expense.”

6.18 Francesca Quint noted that section 280 can sometimes be used where an administrative scheme is not available: “A quirk of s 280 worth pointing out is that, whereas the Charity Commission as a public authority considers itself unable to remove by scheme the power of a person or body (e.g. a local authority) to appoint trustees without the consent of that person or body on the ground that this would breach the Human Rights Act, it is perfectly possible for section 280 to be interpreted as allowing the trustees to make such a change by majority vote since the charity will in all or virtually all cases not be a public authority itself.”

276 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; University of Oxford; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

277 Geldards LLP; Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; University of Oxford; Fellowship of Independent Evangelical Churches; Association of Church Accountants and Treasurers; Veale Wasbrough Vizards.
Lack of clarity

6.19 15 consultees said that there were uncertainties about the scope of the section 280 power, and that clarification would be helpful; only 1 consultee thought the scope of section 280 was clear.

6.20 Veale Wasbrough Vizards LLP said that there is a lack of clarity which “may cause trustees to seek legal advice where they would otherwise be capable of using the power without advice”. Action with Communities in Rural England said that trustees of village hall charities “rarely understand the implications and processes of making changes”. The Institute of Chartered Secretaries and Administrators noted that, even where the words of legislation are debatable, “trustees of smaller charities will rely to a greater extent on the guidance of the Charity Commission”.

6.21 The Church Growth Trust found section 280 “difficult to apply”, saying there was “no clear definition of what is an administrative matter” and it is difficult to ascertain whether powers fall within section 280 or whether they are part of the purposes of the charity.

6.22 Bircham Dyson Bell LLP said the uncertainty can lead to long correspondence with the Charity Commission when a revised constitution is lodged under section 35 of the Charities Act 2011. “It is unsatisfactory generally to have a different (and unclear) regime applicable for unincorporated charities than is in place for companies and CIOs. This is especially so when it is often a matter of luck, or lack of resources, as to which regime applies.”

The Charity Commission’s interpretation

6.23 The Charity Commission said that, in its view, section 280 permits most changes other than: to a charity’s purposes (and, similarly, to application of funds on dissolution); the release of permanent endowment (as there is a specific regime in sections 281 and 282); and remuneration of trustees (based on Re French Protestant Hospital). It said there was uncertainty about whether it permitted amendments to third party rights to appoint or remove trustees. It urges caution before trustees (purport to) use section 280 to change such provisions owing to the possibility of challenge, but “if the charity has taken proper advice and concludes that it can make the amendment, we do not take issue with this”.

6.24 Stone King LLP thought the Charity Commission construed section 280 very broadly, permitting “quite sweeping changes to provisions which are extremely close to the objects”. They said further guidance on its interpretation would be helpful.

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278 Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Fellowship of Independent Evangelical Churches; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA.

279 Association of Church Accountants and Treasurers.

280 [1951] Ch 567.

281 The CLA queried whether the Charity Commission’s guidance concerning provisions that require third party consent (Charity Commission, CC36 Changing your charity’s governing document (August 2011) para C3) reflected the wording of section 280.
Examples of uncertainties

6.25 Three uncertainties recurred in consultees’ responses:

(1) whether the ability to “modify” powers allowed charities to add altogether new powers;\(^\text{282}\)

(2) the extent to which rights and power of third parties (such as founders or “protectors”) can be overridden;\(^\text{283}\) and

(3) whether section 280 can be used where the governing document includes an express power of amendment which is subject to more onerous conditions.\(^\text{284}\)

6.26 Other uncertainties were raised by consultees; can section 280 be used:

(1) to change the criteria that individuals must meet in order to be appointed as a trustee or member (such as religious beliefs or gender)?\(^\text{285}\)

(2) to insert conflicts of interest provisions\(^\text{286}\) or to incorporate references to benefits the trustees are entitled to receive under sections 185 and 189 Charities Act 2011?\(^\text{287}\)

(3) to amend provisions of a charity’s scheme which are not part of the purposes but which are fundamental to what the charity does (for example, the criteria relating to qualification as beneficiaries of an almshouse charity)?\(^\text{288}\)

(4) to amend the clause specifying what happens to the charity’s assets on dissolution\(^\text{289}\) or the procedure to be followed on dissolution?\(^\text{290}\)

(5) to insert a power to transfer which could be used to override an express dissolution clause?\(^\text{291}\)

(6) to give the charity trustees an express power to amend the governing document?\(^\text{292}\)

6.27 We set out consultees’ proposals as to how section 280 should be reformed in our analysis of responses to the next question.

\(^{282}\) Charity Commission for Northern Ireland; Bates Wells Braithwaite; Bircham Dyson Bell LLP.

\(^{283}\) Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP.

\(^{284}\) Anthony Collins Solicitors LLP; Fellowship of Independent Evangelical Churches; CLA.

\(^{285}\) Anthony Collins Solicitors LLP.

\(^{286}\) CLA.

\(^{287}\) Veale Wasbrough Vizards LLP.

\(^{288}\) Veale Wasbrough Vizards LLP.

\(^{289}\) Veale Wasbrough Vizards LLP.

\(^{290}\) CLA.

\(^{291}\) CLA.

\(^{292}\) CLA.
Consultation Question 32.

We invite the views of consultees as to the types of provision that should be included within, or excluded from, the section 280 amendment power.

[Consultation Paper, paragraph 6.16]

6.28 19 consultees answered this question.293

1) 8 thought section 280 should permit any amendment save for regulated alterations (for companies)294 and possibly some additional matters;295

2) 3 thought the exclusion of matters in paragraph 6.6 of the Consultation Paper, and inclusion of matters in paragraph 6.9 of the Consultation Paper, was broadly appropriate;296

3) 8 expressed other views.297

Consultees’ proposals

Alignment and regulated alterations

6.29 As noted in paragraph 5.15 above, many consultees thought amendment powers of unincorporated charities should be aligned with companies. Francesca Quint said this would “avoid a good deal of technical argument and uncertainty for charities, their advisers and the Charity Commission”. Some consultees endorsed the approach of permitting any amendment save for a defined list of protected matters.298 The CLA said that they did “not support an attempt to itemise what is permitted within a section 280 power – we think there is too big a risk that useful permitted activity could be omitted”.

6.30 The University of Liverpool CL&PU said “definitive wording of the power, either in terms of inclusion or exclusion, would be extremely difficult to achieve. We believe that a compromise might be to suggest that the operation of the new power needs to be underpinned by a principle, enshrined in the wording of the Act. By way of

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293 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Fellowship of Independent Evangelical Churches; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

294 Under Charities Act 2011, s 198.

295 Francesca Quint; Anthony Collins Solicitors LLP; CLA; Bircham Dyson Bell LLP; Fellowship of Independent Evangelical Churches; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship.

296 Geldards LLP; Institute of Chartered Secretaries and Administrators; Church Growth Trust.

297 Plymouth University; University of Liverpool CL&PU; Charity Commission for Northern Ireland; Action with Communities in Rural England; Bates Wells Braithwaite; Stone King LLP; Charity Commission; RSPCA.

298 Plymouth University; Action with Communities in Rural England.
example, allowed changes under this provision could be limited to ‘non-purposive changes in the best interests of the charity.’

Matters to fall within section 280

6.31 Consultees made various suggestions as to the matters that should fall within section 280:

(1) the powers exercisable by members, for example, the power to appoint trustees; these powers “can be outmoded and ambiguous with no power to alter them”;\(^{299}\)

(2) the criteria to be satisfied, and procedures to be followed, for the appointment of trustees or members;\(^{300}\)

(3) provisions about the Official Custodian holding the charity’s property.\(^{301}\)

(4) the provisions relating to the proceedings of trustees;\(^{302}\)

(5) notice provisions;\(^{303}\)

(6) accounting and reporting requirements;\(^{304}\)

(7) amendments to the powers exercisable by the trustees, such as investment powers, borrowing powers, power to employ an agent, power to change the charity’s name and powers of amendment which are limited to administrative purposes;\(^{305}\)

(8) “purely procedural” amendments that do not have an impact on the charity’s purposes, name or legal structure.\(^{306}\)

Matters to fall outside section 280

Regulated alterations

6.32 There was general agreement that regulated alterations should fall outside section 280.

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\(^{299}\) Anthony Collins Solicitors LLP.

\(^{300}\) CLA; Anthony Collins Solicitors LLP (provided the criteria do not relate to the objects of the charity, for example, where a church with the objects of promoting the Christian faith that requires its charity trustees to be a Christian, or a charity for the promotion of vegetarianism that requires its members to be vegetarians, those criteria should not be subject to amendment under section 280).

\(^{301}\) Anthony Collins Solicitors LLP; Church Growth Trust.

\(^{302}\) CLA; for example, the minimum number of meetings to be held each year, quorum, voting, written resolutions, attendance at meetings by suitable electronic means, appointing and removing a chair and other honorary officers, delegating to committees, and/or power to make rules and regulations not inconsistent with the charity’s governing document.

\(^{303}\) CLA.

\(^{304}\) CLA.

\(^{305}\) CLA.

\(^{306}\) RSPCA.
The lists in the Consultation Paper

6.33 Some consultees thought the matters listed in paragraphs 4.52 or 6.6 of the Consultation Paper should fall outside section 280.\(^{307}\)

Third party rights

6.34 Francesca Quint thought that section 280 should exclude “non standard obligations of an administrative nature”, “entrenched safeguards”, or “fundamental conditions”, such as “an obligation to appoint a protector or an internal audit committee to provide an additional safeguard for the charity, such as for example may be imposed by scheme after a breach of trust has occurred or a formal inquiry held.”\(^{308}\)

6.35 The CLA’s proposal included protections for third party rights: see paragraph 5.45. Similarly, Bates Wells Braithwaite thought that section 280 should not be available to “make changes which affect third party rights and powers (so long as the third party is still in existence) without their consent”. Anthony Collins Solicitors LLP agreed, subject to a requirement that their consent is not to be unreasonably withheld (together with a mechanism for resolving any disputes about the withholding of consent).

6.36 Not all consultees wanted to provide this protection to third parties’ rights. Plymouth University thought that section 280 should permit trustees to amend provisions for third parties to appoint trustees where they do not consent to the change. Veale Wasbrough Vizards LLP took a different approach. They saw no reason to exclude from section 280 provisions that required third party consents. Instead, they thought that it should be possible to exclude the amendment power in the charity’s governing document to protect such rights.

Entrenchment

6.37 Francesca Quint thought it ought to be possible for founders to be able to entrench certain (negative) provisions (for example, a limitation on the exercise of the trustees’ investment powers, such as preventing investment in tobacco or alcohol where the purposes of the charity are health-related). Anthony Collins Solicitors LLP noted that the donor’s wishes should be carefully balanced against the charity’s best interests; conditions “ought not to be capable of being completely disregarded by the trustees unless there are good reasons for doing so”.

6.38 Bircham Dyson Bell LLP thought that certain entrenched provisions should also be safeguarded.\(^{309}\) They favoured “making provision for entrenchment (perhaps with

\(^{307}\) Plymouth University (save that powers for a third party to appoint trustees should not be excluded); Charity Commission for Northern Ireland; Bates Wells Braithwaite (save for their concerns about third party rights and express amendment powers); Church Growth Trust (save that provisions concerning the Official Custodian should fall within the power).

\(^{308}\) Francesca Quint gave an example of a charity where the Charity Commission appointed a protector by scheme to supervise the administration of the charity and report to the Charity Commission if concerns arose. There was some uncertainty as to whether section 280 would have permitted the charity to remove this provision; she suggested that such a change should not have been possible without the Charity Commission’s consent.

\(^{309}\) They said that any restrictions on the statutory power based on entrenched provisions “should be made clear on the face of the legislation” to avoid the current uncertainties that arise from s 280.
some transitional provisions to provide for automatic entrenchment of existing "entrenched" provisions, unless released with Charity Commission consent).

**Express amendment powers**

6.39 Bates Wells Braithwaite thought it odd that section 280 should apply when the trust deed contains an express power of amendment which is tailored to suit the charity; they referred by analogy to our comments about Royal Charter charities with an express power of amendment (see paragraph 4.29 of the Consultation Paper) and suggested that section 280 should be subject to the process and restrictions in any express amendment power.

6.40 The Fellowship of Independent Evangelical Churches thought that if a governing document included more stringent requirements for amendment, they should be followed. The CLA made similar comments.

**Permanent endowment restrictions**

6.41 Some consultees commented that changes to permanent endowment restrictions should fall outside section 280.310

**The need for a members' resolution**

6.42 The Institute of Chartered Secretaries and Administrators thought it was “unduly burdensome for unincorporated charities to gain approval for administrative changes by members” as such changes “are less likely to cause an adverse reaction from members”.

**Recording changes**

6.43 Action with Communities in Rural England thought it important that there is a system for recording changes; administrative changes can be recorded in various places and are not necessarily reflected in the governing document. “Managing trustees change regularly over the years and information is not always passed on.” It suggested the Charity Commission could record all changes on the charity’s web entry.311

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**Consultation Question 33.**

We invite consultees to share with us their experiences of amending administrative provisions under section 280 of the Charities Act 2011, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 6.18]

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310 CLA; Bircham Dyson Bell LLP; Fellowship of Independent Evangelical Churches.

311 There is an existing requirement for registered charities to notify the Charity Commission of changes to their governing documents: Charities Act 2011, s 35(3).
6.44 13 consultees answered this question.

Examples of section 280 proving helpful

6.45 The CLA said the power was helpful and used fairly regularly. The Fellowship of Independent Evangelical Churches said it found “the process straightforward because there is no need to involve the Charity Commission”. Geldards LLP had recently used section 280 to amend a charity’s procedures and trustee appointment provisions; “this was dealt with quickly and efficiently and at a reasonable cost to the charity”. Stone King LLP said the provision had been useful when they acted as interim manager for a charity with only three trustees but whose constitution required a minimum of five trustees. They used section 280 to reduce the quorum which meant that the trustees could make decisions, reducing the time and costs that would otherwise have been involved in administering the charity.

6.46 Bates Wells Braithwaite said section 280 “was most welcome in resolving the previous difficulty faced by numerous charities without an express power of amendment. We find the process very straightforward, quick and cost-effective, although it is unhelpful that there are currently grey areas in relation to its scope, which can cause difficulties.”

The need for legal advice

6.47 Anthony Collins Solicitors LLP said the procedure “is straightforward and easy to administer”, though “charities are still reluctant to draft resolutions themselves on the basis that what might appear at first to be a simple alteration can have a “knock on” effect”. For example, if section 280 is used to allow a trust corporation to be sole property holding trustee, other provisions in the governing document that automatically appoint property holding trustees as charity trustees would also need to be amended.

6.48 The Institute of Chartered Secretaries and Administrators said the process of amendment can be particularly difficult and take considerably longer for unincorporated charities with few resources, given the limited availability of professional advice. Action with Communities in Rural England provides support to village hall trustees who wish to make changes to their governing documents, but noted that there is no financial assistance to help trustees obtain legal advice. It said that trustees often lack an understanding of what is required to make changes, and that “simplifying the law is not the answer – trustees need access to support to understand their responsibility in making changes”.

Additional costs caused by uncertainty

6.49 The CLA said the current ambiguity and “fear of ‘getting it wrong’” can deter trustees from using section 280. “The ambiguity of the section can mean that it is frequently necessary to engage with the Charity Commission, often at disproportionate time and expense (for all concerned), before relying on the power.”

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312 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; University of Oxford; Fellowship of Independent Evangelical Churches; Veale Wasbrough Vizards LLP; RSPCA.
6.50 Bircham Dyson Bell LLP said the current position “undoubtedly causes additional administration and costs, due mainly to lack of clarity in section 280, combined with a lack of suitable powers and administrative provisions in the charity’s constitution”.

6.51 The RSPCA reported having wasted legal costs owing to confusion amongst charity lawyers and the Charity Commission as to whether section 280 could be used to make amendments to a will trust that included permanent endowment; ultimately it was decided that the change had to be made under section 282.
Chapter 7: Cy-près schemes and the proceeds of fundraising appeals

INTRODUCTION

7.1 In Chapter 7 of the Consultation Paper, we examined the current regime governing the application of the proceeds of failed fundraising appeals in sections 63 to 66 of the Charities Act 2011. We asked consultees whether the requirement to advertise and make inquiries of donors in order to offer a refund should be removed in respect of small funds or small donations. We also asked how the procedures in sections 63 to 66 could be simplified. Finally, in respect of small funds, we asked whether trustees should be given the power to decide how the proceeds of failed appeals should be applied, without having to obtain a Charity Commission scheme.

7.2 33 consultees commented on the issues discussed in this chapter.313

Avoiding the problems of failed appeals

7.3 The CLA314 said that failed appeals can be “easily avoided” by appropriate wording, and this should be publicised more, for example through the Institute of Fundraising. Lawyers in Charities wanted the regulators and Institute of Fundraising “to promote inclusion of information in appeal literature about what will happen to their donations if an appeal fails, or exceeds its target”. NCVO, ACF, CFG and IoF (in their joint response) noted that the Institute of Fundraising Code of Practice requires fundraisers to include a statement setting out what will happen if total funds raised are insufficient or exceed the target.

7.4 The Institute of Chartered Secretaries and Administrators said that “much has been done to resolve the situation by the use of the appropriate wording within fundraising literature” and thought that the primary approach should be better promotion of guidance considering appeals so as to reduce the number of failed appeals. Similar comments were made by Lord Hodgson, Cancer Research UK and the Society for Radiological Protection.

Scotland

7.5 The Scottish Charity Regulator ("OSCR") said:

313 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; OSCR; the University of Liverpool CL&PU; WCVA; Lord Hodgson; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF.

314 With whom Bircham Dyson Bell LLP agreed.
In Scotland there is provision under the Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 for OSCR to approve a scheme in relation to a restricted fund. A restricted fund is a fund of property (which may include money) which has been given to a charity for a specific purpose. A scheme under these regulations covers only those restricted funds where the wishes of donors cannot be ascertained.

The regulations set out the process for application by charities to OSCR and for decisions by OSCR which apply regardless of the size of fund. Where the fund is very large a higher level of publicity is needed and where it is very small OSCR may dispense with the requirement to publicise.

RESPONSES TO INDIVIDUAL QUESTIONS

Consultation Question 34.

We invite the views of consultees as to whether the requirement for a general charitable intention, as a precondition for a cy-près scheme in respect of the proceeds of a failed appeal, should be removed:

(1) generally; or

(2) in respect of small funds or small donations and, if so, what size of fund or donation.

[Consultation Paper, paragraph 7.38]

7.6 30 consultees answered this question.315

(1) 12 thought the requirement should be removed generally;316

(2) 16 thought the requirement should be removed in respect of small funds and small donations;317 and

315 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; WCVA; Lord Hodgson; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Lawyers in Charities; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG; IoF.

316 Institution of Civil Engineers (although its response was unclear); Francesca Quint; Plymouth University; Institute of Chartered Secretaries and Administrators; Lawyers in Charities; the National Trust; Stewardship; RSPCA; NCVO; ACF; CFG; IoF.

317 Institution of Civil Engineers (although its response was unclear); Geldards LLP; Anthony Collins Solicitors LLP; the University of Liverpool CL&PU; WCVA; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Cancer Research UK; Society for Radiological Protection; Association of Church Accountants and Treasurers; Veale Wasbrough Vizards LLP.
Removing the requirement generally

7.7 A significant minority of consultees thought that the requirement for a general charitable intention (before the proceeds of a failed fundraising appeal can be applied cy-près) should be removed, subject to any express intentions of the donor.

7.8 The Institute of Chartered Secretaries and Administrators thought removing the requirement generally “would be of more benefit to charities while not unduly adversely affecting the donor. For those donors that wish for their donation to be used in a specific way, there should still be that opportunity”. Plymouth University thought the proceeds of both failed appeals and surplus cases should be applied for the charity’s general purposes “in all cases unless the donor is identified and expressly stipulates otherwise”.

7.9 The Charity Commission thought it should be easier for charities to apply funds from failed appeals, and surplus funds, to the charity’s general purposes. “Prospective donors could have the right to opt in to a more restrictive approach to their donation but in general if the appeal fails or raises excess funds, the proceeds should be applicable for charitable purposes.”

7.10 The National Trust thought that there should be a presumption of a general charitable intention, subject to evidence to the contrary such as an express request for the return of the donation if the appeal fails. It thought that this should extend beyond fundraising appeals and apply to gifts by will. Presuming a general charitable intention “would simplify the process considerably”.

7.11 NCVO, ACF, CFG and IoF thought the requirement should be removed generally, as recommended by Lord Hodgson. They noted that the requirement was based on the belief that donors intend their gift to be devoted to a particular charitable object. “However, the culture of giving is changing – now, more often than not, people make donations without imposing restrictions because they are motivated by the end cause, rather than the particular project.” So if a donation has been given as an outright gift (with no restriction or conditions attached), “donors are unlikely to object to their donations being applied to purposes which are, so far as is reasonably practicable, similar in character to the original purposes”. If there is no clear restriction on the gift, then there should be no need to find a general charitable intention as a precondition to a cy-près scheme. This would remove the need for sections 63 to 66. They thought there was no reason why the position for NHS charities should not apply universally.

Distinguishing between failed gifts by will and failed appeals

7.12 Francesca Quint thought “the requirement for a general charitable intention should not apply to inter vivos gifts which are out and out gifts, i.e. not subject to an express (or possibly an implied) condition that if unapplied they must be returned. In the case of initial failure of a gift by will, by contrast, I consider that the existence of a general charitable intention should still be a requirement for a cy-près scheme. … it is reasonable to retain the rule to respect the intentions of the testator, who by definition

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318 Charity Commission for Northern Ireland; Charity Commission; Prof Gareth Morgan.
is absent and unable to clarify his wishes, and to protect the material interests of those entitled in the event of an intestacy.”

7.13 We do not agree that there is a conceptual distinction between the two; removing the requirement for a general charitable intention in failed appeal cases would mean that the wishes of the donor to a failed appeal would be ignored, which is equally as inappropriate as ignoring the wishes of a testator. Moreover, the donor to a failed appeal might have just as good a use for the money as the disappointed beneficiaries on intestacy.

*Sufficiently similar alternative uses*

7.14 Stewardship thought the requirement should be removed generally. It said that, while it is difficult to generalise, “we believe that once a donation is made there is an expectation on the part of the donor that these funds will not be returned in the event of a failed appeal but will be used for some other purpose similar to the original purpose described in the appeal, assuming that such a similar purpose is a practically available option to the trustees.” It therefore suggested that there should be a presumption of a general charitable intention where there is a sufficiently similar alternative use of the funds, with a mechanism to deal with the position where there is no sufficiently similar use of the funds. Donors would have the option to restrict their donations for a specific purpose, but in most cases the procedures in sections 63 to 66 would not have to be followed.

7.15 Stewardship’s suggestion is attractive in principle, but it would require a very different approach. At present, trustees must follow procedures to seek to return donations, and if donations cannot be returned then they can be applied cy-près. On Stewardship’s suggestion, these considerations would be reversed. It would be necessary to consider potential cy-près uses of the funds before deciding (and to assist the decision as to) whether the donation should be returned. It would be necessary to devise a test for whether the alternative use is sufficiently similar to avoid the need to return donations. Such a test would involve a question of judgment and might be difficult to devise and to apply, particularly if it fell to trustees to make the decision. We suspect that, in practice, if a very similar project was possible, the trustees might in any event be able to persuade the Charity Commission that it would be unreasonable to require them to seek to return the donations under section 64(2), though much would depend on the facts.

*Removing the requirement for small funds and/or small donations*

7.16 The majority of consultees thought that the requirement for a general charitable intention should be retained, but that the proceeds of failed appeals should be applicable cy-près (without requiring a general charitable intention) in the case of small funds and/or small donations.319

7.17 The requirement for a general charitable intention was seen as an important protection of donor autonomy.

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319 We noted in the Consultation Paper that the same result could be achieved by seeking an order from the Charity Commission, but NCVO, ACF, CFG and IoF agreed with us that “it would be much more efficient to allow trustees to independently make the cy-près scheme and direct the fund to other purposes without the Charity Commission’s involvement”.
1. The University of Liverpool CL&PU said that removing the requirement generally “may deter some donors from making gifts” as they would be aggrieved if their donation was used for other purposes, but they could see merit in removing the requirement for smaller donations as “the donor is unlikely to care about the specific charitable purpose, as long as the funds are used for a recognised charitable purpose”.

2. Anthony Collins Solicitors LLP thought that “it is unfair on the donor to assume a general charitable intention at all levels. However, given that the costs of dealing with a failed appeal can be entirely disproportionate, applying a statutory presumption of general charitable intent in relation to small donations would appear to be an appropriate compromise”.

3. Stone King LLP said that donors to appeals “are more likely to have a personal and/or emotional connection which leads them to make a donation, and it is entirely possible that they would not want the funds to go to a general charitable pot”; this should be respected and protected.

4. The CLA\(^{320}\) thought that the requirement for a general charitable intention “is as relevant to failed fundraising appeals as it is to gifts by will which are/become impossible”.\(^{321}\)

7.18 There was a range of views as to whether there should be a small fund threshold, a small donation threshold, or both. Similarly, there was a range of views as to the appropriate financial thresholds.

### Small funds only

7.19 Geldards LLP thought that funds of up to £25,000 should be applicable cy-près.

### Small donations only

7.20 Four consultees suggested that small donations should be applicable cy-près, and that there should be no threshold based on the size of the fund.\(^{322}\)

7.21 Anthony Collins Solicitors LLP suggested a threshold of £100. The Society for Radiological Protection and Stone King LLP suggested thresholds of £50, beyond which donors “will have thought more carefully about what they are giving to, and how the money might be used if the appeal fails”.\(^{323}\)

7.22 Stone King LLP also queried the need for a threshold based on the size of the fund, because even small funds may include large donations. “For example, you could have

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\(^{320}\) Bircham Dyson Bell LLP expressed their agreement with all of the CLA’s responses to the questions in this chapter.

\(^{321}\) They noted that the exception for NHS charities necessarily involves funds being used for other purposes that relate to the NHS, so the alternative use will be similar to the original appeal. They thought this was different from an appeal to provide facilities at a local playground being used instead to help the elderly in the local area.

\(^{322}\) Anthony Collins Solicitors LLP; the University of Liverpool CL&PU; Stone King LLP; Society for Radiological Protection.

\(^{323}\) Stone King LLP.
a fund of £10,000 which contains only donations of £10 or less, and a fund of £5,000, that contains two donations of £1,000 each. We would submit that the individuals who gave the £1,000 are far more likely to have views on whether the donation should be used for general charitable purposes than the individuals giving £10, and the aim of the legislation is to protect that donor intention where it exists, and so we would only have a limit on the size of donations.”

Small donations and small funds

7.23 Five consultees suggested that there should be a small fund and a small donation threshold and that they should operate cumulatively; accordingly, small donations would only be applicable cy-près if the total fund also fell below a financial threshold.324

7.24 Bates Wells Braithwaite suggested a donation threshold of £10 or £20.325

7.25 Veale Wasbrough Vizards LLP thought the donation threshold should be closer to £100 than £500, and the fund threshold should be closer to £1,000 than £5,000.

7.26 Lord Hodgson suggested a donation threshold of £100 and a fund threshold of £100,000, as figures “at which some serious financial commitment will have taken place”.326

7.27 Stewardship suggested a donation threshold of £250 and a fund threshold of £10,000.327

7.28 Cancer Research UK and the Association of Church Accountants and Treasurers suggested a donation threshold of £500328 and a fund threshold of £5,000.

Small donations or small funds

7.29 The CLA and Bircham Dyson Bell LLP thought that a small fund and a small donation threshold should operate as alternatives. They thought that small donations of less than £100 should be applicable cy-près (regardless of the total fund value), and that

324 Lord Hodgson, Association of Church Accountants and Treasurers, Bates Wells Braithwaite, Cancer Research UK and Veale Wasbrough Vizards LLP. In addition, Stone King LLP favoured just one threshold based on donations, but agreed that if there was an additional threshold based on the size of the fund, they should operate cumulatively. Similarly, Stewardship favoured removing the requirement for a general charitable intention, but if it were retained, they agreed that there should be two cumulative thresholds based on size of the fund and size of the donation.

325 They said £100 or £500 “is not a small donation for many people and instead a sum of £10 or £20 might more generally be considered a ‘small’ donation”.

326 He said “the issue surely is not only the size of the failed appeal but the size of the donation. For example to spend time and money to see if I wish to be repaid the £10 I subscribed to a failed appeal cannot be a sensible way to proceed”.

327 But only including donations from identifiable donors that are within the small donation threshold.

328 ACAT pointed out that the donation threshold should be on the total donations from an individual donor.
small funds of less than £5,000 should be applicable cy-près (regardless of the size of the constituent donations).\textsuperscript{329}

**Level of the financial thresholds**

7.30 Veale Wasbrough Vizards LLP wondered whether the fund threshold should be linked to the charity’s turnover because, in some circumstances, a threshold of – say – £1,000 would be too small. Similarly, Bates Wells Braithwaite thought that the fund threshold should depend on the size of the charity as £5,000 “might be a very small or very large fund depending on the particular charity and its overall resources and income”. They suggested a threshold in proportion to the charity’s funds, or its income during the appeal period.

**Disagreement**

7.31 The CCNI did not agree that the precondition should be removed as this would create a distinction between fundraising appeals and other instances of failure.

**Other comments**

7.32 Prof Gareth Morgan agreed with our proposals, but said they “would be better framed [as] a cy-près power for any type of restricted fund, not just a failed appeal. Provided the body concerned is a charity I feel charitable intent can be presumed.”

7.33 The NCVO, ACF, CFG and IoF (in their joint response) said it would be helpful to have guidance from the Charity Commission and HMRC regarding the application of Gift Aid income cy-près following failed appeals and surplus cases.

7.34 Action with Communities in Rural England noted that funds are sometimes spent on professional fees before an appeal fails and it would be useful to have clarity that those fees can be paid before the surplus is applied cy-près.

**Consultation Question 35.**

We invite the views of consultees as to whether the procedures governing the distribution of the proceeds of failed appeals under sections 63 to 66 of the Charities Act 2011 could be improved, and in particular whether:

(1) the advertisement and inquiry procedure could be simplified; and

(2) the disclaimer and declaration procedures remain of use.

[Consultation Paper, paragraph 7.44]

7.35 24 consultees answered this question.\textsuperscript{330}

\textsuperscript{329} NCVO, ACF, CFG and IoF (in their joint response) agreed, if (contrary to their principal suggestion), the requirement for a general charitable intention is retained. They suggested thresholds of £5,000 for the fund and £500 for the donation.
(1) In respect of the advertisement and inquiry procedure (“Case (1)“):
   (a) 1 thought it could be removed;\(^{331}\)
   (b) 19 thought it could be improved;\(^{332}\)
   (c) none thought it should be retained;

(2) In respect of the disclaimer procedure (“Case (2)“) and the declaration procedure (“Case (3)“):
   (a) 12 thought they could be removed;\(^{333}\)
   (b) 6 thought they could be improved;\(^{334}\)
   (c) 3 thought they should remain;\(^{335}\) and

(3) 5 expressed other views.\(^{336}\)

**Case (1): advertisement and inquiry procedure**

**Simplification**

7.36 There was universal agreement that the advertisement and inquiry procedure could be simplified. The Institute of Chartered Secretaries and Administrators said simplification would prevent charitable funds being “spent on a procedural matter that does not provide sufficient positive results for the expense”. Similarly, the RSPCA wanted the procedures to be “significantly simplified or removed altogether”. It said that “altering

\(^{330}\) Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Law Society; NCVO; ACF; CFG; IoF.

\(^{331}\) Plymouth University thought the requirement for a general charitable intention should be removed so that, unless a donor expressly stipulates otherwise, the donation should be available for the charity’s general purposes.

\(^{332}\) Geldards LLP; Anthony Collins Solicitors LLP; Churches’ Legislation Advisory Service (though did not have specific suggestions); Institute of Chartered Secretaries and Administrators (though did not have specific suggestions); Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK (though did not have specific suggestions); Society for Radiological Protection (though did not have specific suggestions); Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; NCVO; ACF; CFG; IoF.

\(^{333}\) Anthony Collins Solicitors LLP; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed) (in relation to the declaration procedure); Stone King LLP (disclaimer procedure only); the National Trust; Veale Wasbrough Vizards LLP (declaration procedure only); NCVO; ACF; CFG; IoF.

\(^{334}\) Churches’ Legislation Advisory Service (though did not have specific suggestions); CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Prof Gareth Morgan; Veale Wasbrough Vizards LLP (disclaimer procedure).

\(^{335}\) Geldards LLP; Charity Commission; Law Society.

\(^{336}\) Francesca Quint; Society for Radiological Protection; Stewardship; RSPCA; Law Society.
the purposes of a trust created by a failed appeal could be achieved through use of [section 275] – or parallel – provisions”.

Existing requirements disproportionate

7.37 Consultees thought that the existing advertisement requirements were disproportionate.337 Some went further, suggesting that they are ineffective and should be removed.338 The NCVO, ACF, CFG and IoF339 said “the level of specificity … is disproportionately costly and onerous, as well as being an ineffective process that is unlikely to succeed in identifying the individual”. Anthony Collins Solicitors LLP thought the requirement to advertise should be completely removed since it “can create significant additional cost and delay and [we] would anticipate that in practice it generates very few responses”.

Existing requirements out of date

7.38 A number of consultees said that the advertisement requirements did not reflect the present day; many appeals are carried out online, and adverts and inquiries could properly be made online.340 Stone King LLP said the current regime “simply is not geared up for the ‘digital age’, where the ability to use notices on websites and email rather than using newspapers and post could be a significant advantage”. Similarly, Veale Wasbrough Vizards LLP said “today, when a number of appeals are made online through Twitter, Facebook and online publications, it may be difficult to ascertain (a) which newspaper or periodical the advertisement should be placed in and (b) which area the appeal was made.”

7.39 Consultees suggested various alternative means of advertising and inquiring:

   (1) notices could be placed on charities’ websites;341

   (2) a note could be placed on (a registered) charity’s entry on the register;342

   (3) inquiries could be made by email and text.343

7.40 Whilst Veale Wasbrough Vizards LLP thought that the advertisement requirements could be simplified, they wanted to retain the prescribed form of advertisement. “This area of law remains complex and it is essential that the correct information is given in an advertisement under section 63. If the requirement to advertise was removed entirely, this may lead to a situation where anonymous donors of significant sums of money are not given proper opportunity to request a refund or disclaim.”

337 NCVO; ACF; CFG; IoF; CLA; Stewardship; Prof Gareth Morgan.
338 Anthony Collins Solicitors LLP; NCVO; ACF; CFG; IoF; Stewardship.
339 Their principal suggestion was to remove the requirement for a general charitable intention, and hence also the section 63 to 66 procedures, but they commented on those procedures in the event that they were to be retained.
340 Veale Wasbrough Vizards LLP; CLA.
341 CLA; Bates Wells Braithwaite; Stone King LLP.
342 Bates Wells Braithwaite.
343 CLA; Stone King LLP.
Suggestions for reform

7.41 There were broadly four suggestions for reform.

(1) Remove the requirement to advertise

7.42 As noted above, some consultees thought that the requirement to advertise was ineffective and should be removed. Most consultees thought that inquiries were appropriate.

(2) Leave to trustee discretion and Charity Commission guidance

7.43 The most common suggestion by consultees was that trustees should be given the freedom to decide on the appropriate advertisements and inquiries, rather than the requisite steps being set out in detail in regulations. Bates Wells Braithwaite thought that trustees could simply be required to take “reasonable steps to contact donors”. Stone King LLP said the approach could then be tailored to the particular appeal; donors who have donated online could be contactable by email and through advertising on the website through which they donated; donors to a fund for the local church roof might be better contacted through an advertisement in the local paper. “In either case, the trustees are best placed to decide”.

7.44 Stewardship and NCVO, ACF, CFG and IoF said that Charity Commission guidance would assist trustees in deciding what steps would be reasonable. Francesca Quint also favoured relying on Charity Commission guidance “which can be more flexible than specific statutory provisions – which in my experience are not generally followed in any event”.

7.45 Bates Wells Braithwaite said that the reasonable steps taken by trustees would be policed by the Charity Commission which would assess those steps before making a cy-près scheme.

(3) Charity Commission decision

7.46 The National Trust thought reasonable steps for identifying and tracing donors should be agreed with the Charity Commission to ensure that steps taken were proportionate and protected charity reputations. Similarly, the Association of Church Accountants and Treasurers suggested that the Charity Commission should have “the power to prescribe appropriate procedures”.

(4) Expanding the permitted advertisements and inquiries

7.47 Other consultees thought that the 2008 Regulations could be brought up to date by permitting other forms of advertising and inquiries, such as advertising online or on the charity’s website.

344 CLA; NCVO; ACF; CFG; IoF; Bates Wells Braithwaite; Stone King LLP; Stewardship.

345 Francesca Quint principal suggestion was to remove the requirement for a general charitable intent, in which case the Charity Commission could make a cy-près scheme and publication of notices about the proposed scheme would provide donors with an opportunity to claim that their gift was conditional.

346 See the suggestions set out above. This was also suggested by the CLA as an alternative to giving trustees the freedom to decide on the appropriate steps.
Post-scheme claims

7.48 NCVO, ACF, CFG and IoF thought that the current time-frames (three months to make a claim, then a further six months after the scheme is made) were appropriate. By contrast, the CLA thought that section 63(4) – which permits donors to make claims up to six months after a scheme has been made – was onerous and unnecessary when communication with donors is “generally far simpler and quicker than it has ever been”. They thought that when a donor cannot be identified or found within the three-month time period, the funds should be applied cy-près without any further redress. Anthony Collins Solicitors LLP went further and thought that failed appeals should be applicable cy-près if the charity hears nothing from donors within one month.

Cases (2) and (3): Disclaimer and declaration procedures

Remove both procedures

7.49 Some consultees thought that both procedures could be removed. Anthony Collins Solicitors LLP said that “the same result can be achieved (more transparently) by appropriately worded appeal literature”. Similarly, Bates Wells Braithwaite said they were “overly complicated” and if donors want to retain control over their donation, “they are more likely to put in place bespoke arrangements … around restricted uses for the funds, rather than rely on these statutory procedures”. NCVO, ACF, CFG and IoF said the disclaimer procedure is irrelevant since in those circumstances a general charitable intention can be inferred in any event; and the administrative costs of recording the documentation mean that neither procedure is likely to be used in practice.

7.50 The Institute of Chartered Secretaries and Administrators thought the disclaimer and declaration procedures may be redundant, but thought it important for donors to have a procedure to make a donation for a specific purpose and for that desire to be respected.

Retain one or other procedure

7.51 Stone King LLP thought that the disclaimer procedure (Case (2)) could be removed, but that the declaration procedure (Case (3)) still had some use. They suggested declarations could be incorporated “onto Gift Aid forms, and as a tick box on websites such as MyDonate and JustGiving, so that individuals can expressly opt out of their donation being used for general purposes if a specific appeal fails, or raises too much”.

7.52 Conversely, the Charity Commission and Veale Wasbrough Vizards LLP thought that disclaimer procedure (Case (2)) should be retained and that the declaration procedure (Case (3)) could be removed. The Charity Commission said that the declaration procedure is less likely to be useful as “it is within the control of the charity making the appeal to protect the funds raised against becoming failed appeals”. It thought the disclaimer procedure was likely to have more practical application.

7.53 Veale Wasbrough Vizards LLP said “we agree that the disclaimer and declaration procedures are not likely to be used in practice. That said, we consider that identifiable donors should be given the opportunity to disclaim. We would suggest, however, that if a donor does not respond with the signed disclaimer within a set time
period, they should be deemed to have properly disclaimed. Not receiving a properly signed disclaimer should not prevent the charity which has done everything it could have from re-applying the funds.”

**Improve declaration procedure (Case (3))**

7.54 The CLA thought that the declaration procedure was “very cumbersome” and that it could be removed. If it is retained:

1. they suggested it should be streamlined to reflect developments in technology;
2. they suggested that section 65(2)(b) should stipulate that the statement must be in writing;
3. they suggested that section 65(3) be amended so that a relevant declaration is defined as a declaration in writing by the donor to the effect that, in the event of the specific charitable purposes failing, the donor wishes the property to be returned, rather than being given the opportunity to request the return of the property; and
4. they queried whether a donor who receives value should be able to request the return of property (under section 65(8)(b)).

7.55 The CLA thought that their proposed changes would “reduce the number of people making the relevant declarations unless they feel very strongly that their funds should be returned to them in the event that the appeal fails”.

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### Consultation Question 36.

We invite the views of consultees as to whether trustees should be given the power – in place of the Charity Commission – to apply small funds or small donations (from a failed appeal or a surplus case) cy-près, and the size of fund or donation for which the power should be available.

[Consultation Paper, paragraph 7.49]

7.56 31 consultees answered this question.

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347 The Charity Commission’s Operational Guidance notes that the solicitation statement could be made orally, but that it would be more difficult to prove that the statement had been made: Charity Commission, *Charitable appeals: avoiding and dealing with failure* (OG53), para 2.3.

348 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; WCVA; Lord Hodgson; Charity Commission for Northern Ireland; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF.
(1) 28 thought that trustees should have a power to apply small funds or small donations cy-près;\textsuperscript{349}

(2) 2 did not think that trustees should have any such power;\textsuperscript{350} and

(3) 2 expressed other views.\textsuperscript{351}

**Consultation Question 37.**

We invite the views of consultees as to whether trustees should be given any broader power – in place of the Charity Commission – to apply funds (from a failed appeal or a surplus case) cy-près.

[Consultation Paper, paragraph 7.50]

7.57 27 consultees answered this question.\textsuperscript{352}

(1) 12 thought that trustees should be given a broader power;\textsuperscript{353} and

(2) 15 did not.\textsuperscript{354}

**Failed appeals: small funds and small donations**

7.58 Most consultees thought that, if small funds and small donations are to become applicable cy-près without having to take steps to contact the donors, the trustees should be able to decide on the cy-près application of those funds without the involvement of the Charity Commission.

\textsuperscript{349} Institution of Civil Engineers; Francesca Quint partially agreed; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; WCVA; Lord Hodgson; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF.

\textsuperscript{350} The University of Liverpool CL&PU; Charity Commission for Northern Ireland.

\textsuperscript{351} Francesca Quint; Charity Commission.

\textsuperscript{352} Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Plymouth University; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Charity Commission; Cancer Research UK; Society for Radiological Protection; Legacy Link; Lawyers in Charities; Association of Church Accountants and Treasurers; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG; IoF.

\textsuperscript{353} Geldards LLP; Plymouth University; Charity Commission; Society for Radiological Protection (though made no specific proposals); Lawyers in Charities; Association of Church Accountants and Treasurers; Prof Gareth Morgan; RSPCA; NCVO; ACF; CFG; IoF.

\textsuperscript{354} Francesca Quint; Anthony Collins Solicitors LLP; the University of Liverpool CL&PU; Lord Hodgson; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Cancer Research UK; Legacy Link; the National Trust; Veale Wasbrough Vizards LLP; Stewardship.
Many consultees repeated their comments about small fund and small donation thresholds, and thought that the financial thresholds for such a power should be the same (see paragraph 7.16 and following above).\textsuperscript{355} The Society for Radiological Protection proposed different figures, saying that trustees should be able to decide on the cy-près application of donations of less than £1,000 and funds of less than £5,000. It also said that notification to the Charity Commission would allow it to monitor such schemes. Similarly, the Association of Church Accountants and Treasurers thought that the Charity Commission should also be notified by the trustees “in case of any regulatory objections”.

Disagreement

A minority of consultees disagreed with giving the trustees any power to decide on the cy-près application of funds without the involvement of the Charity Commission. The University of Liverpool CL&PU thought the power should remain with the with Charity Commission as “trustees may not be properly equipped or advised to make these decisions” and that the current ability to challenge a decision of the Charity Commission to make a cy-près scheme in the First-tier Tribunal (Charity) would be lost. The CCNI thought that the Charity Commission’s involvement in making schemes provided protection that was essential for public trust and confidence in charities. It suggested an alternative possibility of trustees carrying out all preparatory work and presenting the Commission with a scheme for final approval.

Allowing trustees to decide how to apply the proceeds of any failed appeal or in any surplus case

At the other end of the spectrum, a minority of consultees thought that trustees should have a general power to decide on the cy-près application of the proceeds of failed appeals, and the proceeds from surplus cases, without the involvement of the Charity Commission.\textsuperscript{356} Plymouth University said that any regime based on the size of a donation would require drawing a line which “is bound to be arbitrary”.

Disagreement

Most consultees did not think that trustees should be given a power to decide on the cy-près application of such funds without Charity Commission oversight. Stone King LLP said failed appeal and surplus cases are rare and therefore not a significant burden on the Charity Commission, whose oversight “means that trustees are far more focused on getting the process right, and this should be maintained”. Similarly, the CLA thought the Charity Commission’s involvement in failed appeals and surplus cases was valuable because the law is complicated; “pushing decision-making in these cases onto trustees is likely to create issues that will be more costly and complicated for a charity to sort out in the long run”.

Failed appeals and surplus cases: a power for smaller funds

Whilst most consultees did not think that charities should be given a general power to apply proceeds from failed appeals and surplus cases cy-près without oversight from

\textsuperscript{355} Lord Hodgson; Stone King LLP; Cancer Research UK; Association of Church Accountants and Treasurers; CLA; Bates Wells Braithwaite; Veale Wasbrough Vizards LLP.

\textsuperscript{356} Geldards LLP; Plymouth University; Charity Commission.
the Charity Commission, they did support conferring on trustees a power to apply smaller funds cy-près. Those consultees generally thought that the Charity Commission should have oversight of such a power, by having a power to object to a decision by the trustees (akin to the Commission’s power to object to resolutions under sections 275 and 282).

7.64 The CLA noted that the Charity Commission already permits failed appeals of less than £1,000 from unidentifiable donors to be applied cy-près without a scheme, and it would be sensible to formalise this approach in legislation.

7.65 The RSPCA and Veale Wasbrough Vizards LLP suggested a procedure similar to section 275, with a power for the Charity Commission to object. Similarly, Francesca Quint said that in surplus cases, the fund “should be treated in every way as an ordinary charitable fund. Thus in the case of smaller funds section 275 should apply. If this is wrong I think there should be an express provision enabling small funds rising from an appeal which for any reason cannot be applied for the intended purpose to be applied for similar purposes by resolution of the trustees under s 275 or the equivalent”. She also suggested that there be a power (similar to section 280) to make non-regulated alterations to the trusts of such funds, whatever their size.

7.66 Anthony Collins Solicitors LLP agreed, saying this would reduce the workload on the Charity Commission and avoid unnecessary delays and costs for the charity. They suggested a figure of £10,000. They also suggested a requirement that the charity file a declaration with the Charity Commission setting out the nature of the appeal, the amount raised, and how the funds have been applied cy-près. The Commission could then object to any inappropriate application of funds.

7.67 The NCVO, ACF, CFG and IoF thought that trustees should have a broad power to apply funds cy-près without the Charity Commission’s involvement; this would remove an administrative burden for charities and the Commission and give trustees “ownership and responsibility for deciding on the application of funds in line with their overall objective of furthering the best in interests of the charity”. They suggested a power similar to section 275 that only required trustees to notify the Charity Commission, with a power for the Commission to object. If deregulation only applies to small funds and donations, they suggested thresholds of £5,000 and £1,000.

7.68 Whilst Stewardship thought the requirement for a general charitable intention should be removed generally (see paragraph 7.14 above), it thought that trustees should only be given a power to apply such funds cy-près up to certain amounts, so that Charity Commission oversight was retained for larger funds. In respect of failed appeals, it suggested financial thresholds of up to £250 for individual donations, and up to £10,000 for the total fund. In respect of surplus cases, it suggested that trustees should be able to apply cy-près “surpluses of up to the lower of (a) £10,000, and (b) a specified multiple of the appeal funds actually applied for the original purpose. This is to guard against large surpluses relative to the original appeal target being applied cy-près without the oversight of the Charity Commission.”

Lawyers in Charities thought trustees should have a power to apply proceeds of failed appeals cy-près up to the value of £20,000, provided they are satisfied that the cy-près conditions have been fulfilled. They also thought that trustees should have the power to delegate this function to the executive.

The National Trust thought that for small donations, trustees should try to apply the funds for similar purposes before applying them to general purposes, and that the definition of “small” donations should depend on the charity’s fundraising levels and average value of donation so that it is tailored to the charity.

Other comments

The RSPCA suggested that donors to appeals who feel they have been misled might have recourse under consumer protection legislation.

Consultation Question 38.
We invite consultees to share with us their experiences of administering the proceeds of failed fundraising appeals, including the procedures under sections 63 to 66 of the Charities Act 2011, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 7.52]

12 consultees answered this question.

Prof Gareth Morgan said that the 2011 Act procedures “are not often followed”. Cancer Research UK said that failed appeals had not caused it difficulties as it tends to secure gifts against projects for which it has already committed funding, or alternatively it uses appropriate wording in the literature as recommended by the Charity Commission. Similarly, the National Trust said it had not sought a cy-près scheme for a failed appeal since 2001 as “compliance with Charity Commission and Institute of Fundraising best practice in drafting fundraising literature has prevented the need for doing so. We afford supporters the opportunity to indicate whether they wish to have their donation returned”.

Anthony Collins Solicitors LLP said that “the greatest concerns arise in relation to relatively small funds where the costs of dealing with the cy-près process can often use the majority or all of the available funds. Simplifying processes (particularly for smaller funds) will greatly assist in this regard.”

The experience of Geldards LLP was that the procedures were “lengthy, wearisome and somewhat disproportionate to the funds raised”. In one case, £45,000 was raised by a charity at a conference where it was announced that the fund would be used for a specific project. The project could not proceed and the funds therefore had to be returned. Some donors were known, others were not. “Considerable time was spent in

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358 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); Stone King LLP; Cancer Research UK; the National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA.
administration (including liaising with accountants, financial analysis, issue of circulars and publications) and the associated costs were in the region of £8,000. Our view is that it would be better use of monies received by a charity if failed appeals or surpluses could automatically be used as general charitable funds.”

7.76 Stone King LLP said “the time and cost involved … is disproportionate and the requirements are impractical in a modern society”. They also said the guidance was not easy to find, and not easy to follow. They suggested it should be improved and awareness of it raised.

7.77 The CLA said that sections 63 to 66 “are cumbersome and excessively onerous”. They are “rarely used as trustees are reluctant to go back to donors in the case of failed appeals and instead lawyers tend to advise on the parameters within which funds of failed appeals may be properly used rather than on the return of funds to donors.” They thought that sections 63 to 66 were more likely to be used by smaller charities without access to proper advice.

7.78 Veale Wasbrough Vizards LLP said that, as the law is complex, trustees usually have to obtain legal advice whether or not they proceed with tracing donors and applying for a cy-près scheme, so costs are incurred. However, “these situations are fairly rare and therefore there may be less of an issue in terms of the Commission’s own resources for it to retain oversight”.

7.79 Bates Wells Braithwaite said “charities and practitioners alike find the rules complicated and confusing and they are not generally well understood”. 
Chapter 8: Acquisitions, disposals and mortgages of charity land

INTRODUCTION

8.1 57 consultees responded to the questions in Chapter 8 of the Consultation Paper.

8.2 Consultees expressed a wide range of views, and that diversity of views was also reflected within some of the organisations that responded to the consultation. For example, members of the CLA working group did not agree how the law should be reformed. There were strongly held views that:

(1) de-regulation should go further than that proposed in the Consultation Paper;

(2) there should be de-regulation along the lines proposed in the Consultation Paper;

(3) there should be some regulation, but along different lines from those proposed in the Consultation Paper; and

(4) the current regime should be retained, with some minor amendments.

GENERAL COMMENTS ABOUT REGULATION

8.3 NCVO, ACF, CFG and IoF did not comment on charity land transactions, but made a general comment that "the policy and regulatory agenda has considerably shifted" since Lord Hodgson’s review; “current debates see fewer charities raising concerns about excessive red tape with regards to charity law requirements. On the contrary, there is an increasing awareness of the need for safeguards to protect charities and ensure trustees make the right decisions.”

8.4 The Institute of Legacy Management ("ILM") said that it is important that legacies can be administered efficiently and effectively; “whilst a degree of regulation is necessary, the last thing the public wants is for charities to waste the funds they are left complying with unnecessary legislation”.

359 Monsignor Nicholas Rothon; Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; United Reformed Church, Yorkshire Synod; University of Liverpool CL&PU; Guy’s and St Thomas’ Charity; WCVA; Lord Hodgson; University of Durham; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Cluttons LLP; Stone King LLP; RICS; Charity Commission; Cancer Research UK; Independent Schools Council; Withers LLP; Society for Radiological Protection; Trowers and Hamilins LLP; Central Association of Agricultural Valuers ("CAAV"); Legacy Link; University of Cambridge; Lawyers in Charities; Wellcome Trust; University of Oxford; Gerald Eve LLP; ACAT; Canal & River Trust; National Trust; Prof Gareth Morgan; Veale Wadsbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Val James; Institute of Legacy Management; Methodist Church; Law Society; HEFCE; HM Land Registry; Welsh Government;
THE BENEFITS OF OBTAINING ADVICE

8.5 RICS explained the professional standards to which its members must adhere, as well as its regulatory function in respect of its members. It has 118,000 qualified members who are “property professionals who adhere to strict professional and ethical standards”.

8.6 Consultees agreed that professional advice concerning land disposals was very often beneficial for charities. Indeed, the value of professional advice extends beyond just disposals; Gerald Eve LLP explained that it provided holistic advice on various property matters including valuation, lease consultancy, estate strategy, planning, development, and other areas such as building consultancy and enfranchisement.

THE PROBLEM OF GENERALISING

8.7 Stone King LLP, like many consultees, noted the inherent problem of creating a proportionate regime that adds value which has to cover a huge range of charities and a huge range of land transactions. They said that regulation for larger, well-funded, charities was often an extra cost, but smaller and less property-savvy charities might benefit from regulation.

CONNECTED PERSONS

8.8 In Chapter 8 of the Consultation Paper, we asked about the role of the connected persons provisions in Part 7 of the Charities Act 2011.

Consultation Question 39.

We provisionally propose that the provisions of Part 7 of the Charities Act 2011 relating to dispossession to connected persons be repealed.

Do consultees agree?

[Consultation Paper, paragraph 8.68]

8.9 In the Consultation Paper we argued that the general law already deals with dispossession to connected persons, and therefore the connected persons provisions are arguably unnecessary. They could also be misleading, as they suggest that any disposition outside of those provisions is lawful, when in certain circumstances such a disposition could still constitute a breach of fiduciary duty.\(^{360}\)

8.10 42 consultees answered this question.\(^{361}\)

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\(^{360}\) See paras 8.43 to 8.45 of the Consultation Paper.

\(^{361}\) Institution of Civil Engineers; Francesca Quint; Landmark Trust; Sustrans and Railway Paths; Colleges of the University of Oxford; University of Birmingham; Colleges of the University of Cambridge; United Reformed Church, Yorkshire Synod; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Bircham Dyson Bell LLP; Church Growth Trust; Trowers and Hamlin LLP;
8.11 The CLA effectively summarised the issues which must be considered under this proposal:

We think the central question is whether it is considered necessary to have a separate “alert” to charity trustees in particular circumstances and, if so, how such “alert” process should be effected, without detracting from the usual duties applicable to charity trustees.

8.12 Bircham Dyson Bell LLP agreed that this proposal required consultees to take a view on how conflicts can best be managed.

Agreement

8.13 The majority of the consultees who answered this question agreed with our proposal. Whilst the Charity Commission could see arguments for and against the repeal of the connected persons provisions, it agreed that “gaps in the statutory regime” where, although a person is not specified as a “connected person”, a dealing with them would constitute a breach of fiduciary duty, are not “sensible”. Withers LLP was concerned that the current system could lead trustees to ignore other circumstances which would amount to a breach of fiduciary duty, and could “encourage in some trustees a ‘tick box’ mentality”. Those in the CLA who agreed with the proposal thought that a separate, statutory regime alongside the common law is not desirable. HEFCE and the Wellcome Trust considered that land, as opposed to other transactions where conflicts might arise, did not need such statutory special treatment.
8.14 These consultees agreed that the general law on fiduciary duties, so long as it is accompanied by adequate Charity Commission guidance, should be sufficient to ensure that conflicts do not occur. For example, Stewardship thought that “this matter is best dealt with under the fiduciary duty of the trustee” and the Wellcome Trust thought that “the general law ... provides sufficient protection”. Veale Wasbrough Vizards LLP agreed that explaining the possibility of conflicts in Charity Commission guidance is sensible, given that in their experience trustees are more likely to consult the guidance than statute or case law. Veale Wasbrough Vizards LLP, Stewardship, the Wellcome Trust and the Yorkshire Synod of the United Reformed Church all emphasised the importance of clear, understandable guidance dealing with transactions and conflicts, which would ensure that trustees were not encouraged to breach their fiduciary duties because of a lack of statutory prohibition. Similarly, the RSPCA was in support of reform “provided that advice is taken by the trustees prior to such disposals”.

8.15 The National Trust, despite disagreeing with the proposed repeal of the connected persons provisions, made suggestions as to what the Charity Commission guidance on connected persons and conflicts should contain:

Charity Commission’s guidance should deal carefully with the subject and remind practitioners of the general prohibition and the authorisation procedure under section 105. The guidance should relate to all dealings, not just those involving land and should include advice on the need for the charity trustees or person making the decision to be satisfied that the transaction is on the best terms reasonably obtainable (having taken professional advice where appropriate) and is in the charity’s best interests; that conflicts of interest have been identified and managed; that the decision maker has no personal interest in the matter and has not been involved in making the proposal; and that charities have a robust and transparent process to meet these requirements. This would provide assurance to trustees that they were complying with such requirements.

8.16 Conversely, Bircham Dyson Bell LLP thought that there should be guidance specific to land transactions. Whether land should be regarded a special asset is discussed further at paragraphs 8.23 and 8.24 below.

8.17 HEFCE thought that, if the connected persons provisions are repealed, transactions need to be reported in detail in the charity’s annual report and financial statements.

8.18 The Institute of Legacy Management supported our proposal on the ground that “the important question is whether property and land is being sold for full value”, regardless of who it is being sold to.

Disagreement
Clarity and an increase in conflicts

8.19 Most of the consultees that disagreed with our suggestion did so on the grounds that a lack of clear statutory provisions on dealings with connected persons would be problematic, as trustees would not understand the general law sufficiently. The Canal & River Trust considered that our proposals would be of most help to smaller charities which do not carry out many land transactions. It thought that larger charities which have to carry out numerous transactions would benefit from clear guidance in statute,
as opposed to “having to be aware of the nuances of the general law”. Anthony Collins Solicitors LLP and the University of Plymouth also thought that the provisions in statute brought clarity.

8.20 Consultees feared this lack of clarity would lead to an increase in transactions where there is a conflict that is not properly managed. The Charity Commission said that it found it easier to refer trustees to statute. Cluttons LLP and the Association of Church Accountants and Treasurers were concerned that the absence of such provisions might lead to an increase in conflicts. This is especially so given that, according to Val James, “trustees can find it hard to recognise conflicts of interest”. 49% of respondents to the Institute of Legacy Management’s survey did not take steps to verify that a transferee is not a “connected person”; this leads to a “significant number of compliance and inquiry cases” according to Anthony Collins Solicitors LLP. Bates Wells Braithwaite argued that the legislation provided the necessary “trigger” for trustees to get advice, without which many “inappropriate transactions” would take place which would be difficult and costly to unravel. By contrast, according to Bates Wells Braithwaite, the costs of obtaining Charity Commission approval are low.

8.21 The CLA explained the situations in which such concerns might become manifested (although only some members of its working party opposed our proposal):

The perceived risk in [certain] circumstances is that the charity trustees and their charity’s executives (who may in practice have conduct of the matter) may regard the property as an administrative headache and may welcome an opportunity to “offload” it to someone connected with the charity, as a matter of convenience, without properly addressing or appreciating conflict of interest issues.

8.22 However, as we said in the Consultation Paper, it is possible for the danger of conflicts to be brought to charity trustees’ attention through Charity Commission guidance, as opposed to statute. We consider that trustees are more likely to be aware of Charity Commission guidance than statutory provisions or case law. The Charity Commission recognised this despite its fears of an increase in conflicts. Bates Wells Braithwaite thought that “guidance would not seem sufficient based on the enquiries we often receive even after charities have already reviewed the relevant Charity Commission guidance on this”. However, this was in the context of the existing guidance; if the guidance were to be updated on repeal of the section it could be made clearer when conflicts could arise and could ensure that trustees sought advice.

Land as a special asset

8.23 The University of Liverpool CL&PU supported the current connected persons provisions on the basis that they ensure that particular care is taken to avoid conflicts in land transactions.

8.24 Similarly, Stone King LLP argued that the public are likely to see land as a special case, and to be supportive of such transactions going through the Charity Commission.

366 See para 8.67 of the Consultation Paper.
The functioning of the connected persons provisions

8.25 The CLA noted that generally its working party found that the connected persons provisions “work well”. Bircham Dyson Bell LLP agreed and added that “we would hope that a similar process would be implemented for those transactions for which approval would still be expected to be obtained”.

8.26 Conversely, the Canal & River Trust found that the procedure for gaining Charity Commission authorisation was too slow, and that this often means that transactions take longer than they should.

Other suggestions for reform

8.27 Some consultees proposed altogether different reform of the connected persons provisions relating to charity land. Withers LLP suggested that the connected persons provisions could be preserved, but the guidance could make clear that the current statutory provisions concerning connected persons are mere examples of situations in which conflicts can arise. The CLA agreed that “either the regime is designed to address something else, or it should be clear that it is part of a regime for managing conflicts of interest/loyalty effectively”. The National Trust, in disagreeing that guidance would be sufficient to ensure trustees do not place themselves in situations of conflict, suggested that the statutory provision on connected persons should instead contain “a broader definition which is consistent with the general law subject to certain categories being excluded”.

8.28 The CLA referred to section 190 of the Companies Act 2006, which provides that substantial property transfers to connected persons must be approved by a resolution of the members of the company. The CLA thought that an equivalent provision could perhaps be introduced for charity land transactions, whereby there was a specific procedure in the case of “substantial” land transactions where the transaction is with a connected person. The CLA considered that “it may be that this could be achieved with a simplified statutory reference (and the certificate requirement noted above) and a structure/process identified in guidance”.

8.29 Geldards LLP suggested that there should be a “de minimis level”, below which a charity would be able to transact with connected persons. This would be subject to “a comprehensive appraisal of the transaction by the trustees”.

8.30 The CLA thought that the Part 7 certificate should specify that there had been no conflict in that particular transaction; this was because “a requirement to certify that conflicts of interest and loyalty had been managed appropriately may provide a useful safeguard”.
Consultation Question 40.

If, contrary to our proposal in paragraph 8.68 above, the provisions concerning connected persons are retained, we provisionally propose that the definition of “connected person” should exclude:

1. a charity’s wholly-owned subsidiary company; and
2. a trustee for a charity who is not also a “charity trustee”, as defined by the Charities Act 2011.

Do consultees agree?

[Consultation Paper, paragraph 8.70]

8.31 41 consultees answered this question.367

8.32 The answers to this question concerned the definition of “connected persons” in section 118 of the Charities Act 2011 (relating to charity land). However, given that the definition of “connected persons” is very similar across the Charities Act 2011, some of the proposals below are also relevant to the other provisions concerning connected persons in the Act.

(1) Exclusion of a charity’s wholly-owned subsidiary company

8.33 In the Consultation Paper we argued that it seems unnecessary for a wholly-owned trading subsidiary to be included within the definition of a “connected person”, given that any benefit to the disponee will be enjoyed by the charity as the owner of the subsidiary. We proposed that it be explicitly excluded from the definition.

8.34 38 consultees answered part (1) of this question:368

367 Institution of Civil Engineers; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Colleges of the University of Cambridge; United Reformed Church, Yorkshire Synod; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Cluttons LLP; RICS; Cancer Research UK; Independent Schools Council; Withers LLP; Trowers and Hamlins LLP; Crispin Ellison; Lawyers in Charities; Wellcome Trust; Association of Church Accountants and Treasurers; Canal & River Trust; National Trust; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; HEFCE; University of Liverpool CL&PU; Francesca Quint; Stone King LLP; Charity Commission; Church Growth Trust; Prof Gareth Morgan; Val James.

368 Institution of Civil Engineers; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Colleges of the University of Cambridge; United Reformed Church, Yorkshire Synod; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Cluttons LLP; RICS; Cancer Research UK; Independent Schools Council; Withers LLP; Trowers and Hamlins LLP; Crispin Ellison; Lawyers in Charities; Wellcome Trust; Association of Church Accountants and Treasurers; Canal & River Trust; National Trust; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property
34 agreed; \(^{369}\)

1 disagreed; \(^{370}\) and

3 expressed other views. \(^{371}\)

8.35 The majority of consultees agreed with our proposal. \(^{372}\) The Churches’ Legislation Advisory Service thought that the inclusion of a wholly-owned subsidiary within the definition of connected persons was a “pointless restriction”. Bates Wells Braithwaite considered a sale to a wholly-owned subsidiary is better seen as an “internal transaction”. Anthony Collins Solicitors LLP explained that, because the asset remains in the control of the charity “there is no real risk to the charity”.

8.36 The exclusion is especially unjustifiable, according to the Independent Schools Council, because the current procedure for gaining Charity Commission authorisation is “time consuming and expensive”. Veale Wasbrough Vizards LLP thought that spending money on such a procedure is “inefficient use of charitable resources”.

8.37 There was, however, concern that the exclusion of subsidiaries could lead to abuse. For this reason Stewardship supported our proposal only “tentatively”. Veale Wasbrough Vizards LLP thought it important that guidance on this area cross-referred to the Charity Commission guidance, *Trustees trading and tax: how charities may lawfully trade* (CC35) to ensure that transactions with subsidiaries were on “open-market terms”. Similarly, the Charity Commission considered that:

> We are not convinced that a charity should be able to transfer assets to a non-charity without carefully considering the justification for doing so. If the value of the land in question is a proper investment decision of the charity, we see no objection. However, the transaction should be seen as being full value. We are not convinced that a specific statutory regime is required to set this out.

8.38 Francesca Quint also emphasised that this proposal would allow a charity to transfer all of its assets to a non-charity without requiring Charity Commission authorisation; this explains why full consideration is required. However, Stone King LLP was not convinced that such a requirement will always be adhered to - in the context of smaller

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\(^{369}\) Institution of Civil Engineers; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; Plymouth University; University of Birmingham; Colleges of the University of Cambridge; United Reformed Church, Yorkshire Synod; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Cluttons LLP; RICS; Cancer Research UK; Independent Schools Council; Withers LLP; Trowers and Hamlins LLP; Crispin Ellison; Lawyers in Charities; Wellcome Trust; Association of Church Accountants and Treasurers; Canal & River Trust; National Trust; Veale Wasbrough Vizards LLP; Stewardship (“tentatively”); RSPCA; Charities’ Property Association; HEFCE.

\(^{370}\) University of Liverpool CL&PU.

\(^{371}\) Francesca Quint; Stone King LLP; Charity Commission.

\(^{372}\) Bircham Dyson Bell LLP did not think that the definition applied to wholly-owned subsidiaries under the current law.
8.39 The University of Liverpool CL&PU, the only consultee expressly to disagree with our proposal, was concerned that “there may be unintended consequences (e.g. reputational) in taking this forward”.

Partly-owned subsidiaries

8.40 The Wellcome Trust thought our proposed reform should be wider – it suggested that partly-owned subsidiaries, where no trustee had a personal interest in the subsidiary, should also be excluded from the definition. The National Trust agreed with this proposal, so long as no owner of the subsidiary was a connected person and the interest in the subsidiary is still “very substantial”.

Social investment

8.41 Stone King LLP recognised the link between this proposal and our social investment reform:

If mixed motive investment is to be enabled then a natural potential area is the putting of property as an asset into a vehicle which was not a charity (“trading subsidiary” at least to begin with?) and not at full market value, having a social premium as well as financial. Perhaps though that can be dealt with specifically anyway, again possibly under Statutory Instrument, to enable the class to be broadened as they develop and are approved?

(2) Exclusion of “trustees for a charity” who are not also “charity trustees”

8.42 In the Consultation Paper we also proposed the exclusion of “trustees for a charity” who are not also “charity trustees”. This was on the ground that trustees for a charity have little control over the decisions to dispose of property and are subject to the direction of charity trustees.

8.43 36 consultees answered part (2) of this question:

(1) 26 agreed;
(2) 4 disagreed;\textsuperscript{375}
(3) 2 were undecided;\textsuperscript{376} and
(4) 4 expressed other views.\textsuperscript{377}

8.44 The majority of consultees who answered this part of the question agreed with our proposal. Stewardship thought it is wholly inappropriate that “a trustee for the charity that has no part in the day-to-day operation of the charity and no part in its governance or decision-making should be considered to be a connected party for this purpose”.

\textbf{Disagreement}

8.45 However, most of the consultees who provided detailed responses disagreed with our proposal. The Cambridge Colleges and Val James noted that holding trustees often have significant influence. Similarly, the CLA pointed out that a holding trustee may have an almost managerial role, and that the line is often not clear between charity trustees and trustees of a charity. Bates Wells Braithwaite and the Charity Commission also thought that trustees of a charity will often have links with that charity; Bates Wells Braithwaite gave the example of “where a national charity acts as holding trustee for properties for local charities”.

8.46 Moreover, the Cambridge Colleges thought that we had been wrong to assume in the Consultation Paper\textsuperscript{378} that “trustees for a charity” will always be subject to the charity trustees’ direction. The Association of Church Accountants and Treasurers warned of situations where a trustee of a charity may be holding the charity’s property against the trustees’ wishes and not complying with their instructions.

8.47 Despite Stone King LLP seeing the “logic” to our proposal, it was concerned about the consequences of the exclusion:

If the connected person voiding legislation does not apply, then the landowner may readily (be it by accident or design), pass legal title without necessarily having thought the proper legal thoughts and without the correct charity trustees necessarily having known about it at all. This might especially be the case (counter intuitively) where the holding trustee is itself holding on trust for another.

8.48 Stone King LLP emphasised that in certain situations, such as where trustees of wills also have a personal interest under a will, the “extra layer” of Charity Commission consent is useful to stop transfers which cannot be easily unwound.

\textsuperscript{375} Colleges of the University of Cambridge; Bates Wells Braithwaite; Charity Commission; Association of Church Accountants and Treasurers.

\textsuperscript{376} CLA; Val James.

\textsuperscript{377} Stone King LLP; RICS; Independent Schools Council; Church Growth Trust.

\textsuperscript{378} See para 8.47 of the Consultation Paper.
**Other changes and clarifications to the definition of “connected persons”**

**Donors of land**

8.49 The CLA and Bircham Dyson Bell LLP both suggested that donors of land, included as a “connected person” under section 118(2)(b), should also be excluded from that definition. The CLA was unsure why donors of land are included in that definition, and suggested it might be to prevent “potential abuse of tax reliefs”. However, it thought that “such concerns should now be addressed through tax legislation”, whilst “specific guidance” on conflicts can help to avoid them. Bircham Dyson Bell LLP thought the inclusion of donors of land was probably to prevent a series of transactions whereby a charity receives a favourable deal on another piece of property.

8.50 The Institute of Legacy Management’s survey revealed a lack of understanding of the provisions relating to donors of land. Whilst 68% of Institute of Legacy Management respondents understood that a donor of land and his or her “spouse, civil partner, child, parent, grandchild, grandparent, brother or sister” count as “connected persons” only 37.5% appreciated that this included the testator who had left the property (and those related to him or her). This is, according to the Institute of Legacy Management, a particular area of confusion, and should be made clearer (along with the connected persons provisions in general).

**Employees**

8.51 The Independent Schools Council, the Association of Church Accountants and Treasurers and Veale Wasbrough Vizards LLP questioned the provisions counting employees as connected persons. This arises particularly, according to the Association of Church Accountants and Treasurers and Veale Wasbrough Vizards LLP, through the provision of accommodation to employees. The Independent Schools Council thought that the requirement for Charity Commission authorisation in such circumstances was “disproportionate”. The Association of Church Accountants and Treasurers proposed that in situations where the provision of accommodation to the employee facilitates their work for the charity (for example, in the context of a school), then this should not count as a transaction with a connected person under section 118.

**Transactions on full commercial terms**

8.52 The Charities’ Property Association thought that any transaction with a connected person “on full commercial terms” should not trigger the provisions requiring Charity Commission authorisation.

**Step-siblings**

8.53 The CLA considered that, in line with modern family arrangements, the “connected persons” provisions should be expanded to include step-siblings.379

**Amendment by secondary legislation**

8.54 Stone King LLP thought that the definition of connected persons should be capable of amendment by secondary legislation.

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379 Stepchildren are already included under Charities Act 2011, s 350(1).
Other comments about the connected persons provisions in Part 7 of the Charities Act 2011

Sections 242 and 249 of the Charities Act 2011

8.55 Section 242 provides that the Charity Commission may refuse to authorise a transfer from one CIO to another if that transfer is (essentially) seen to benefit a connected person. The Church Growth Trust thought that:

We would propose that where charity trustees are transferring for nil consideration to themselves or any of them, as in connection with a transfer by trustees to a CIO or charitable company (a type of merger), of which they or some of them are themselves the trustees or directors, then the connected persons provisions should not apply.

Differing definitions of “connected persons”

8.56 7 consultees raised the concern that there are differing definitions of “connected persons” in the law.380

Within the Charities Act 2011

8.57 The University of Liverpool CL&PU argued that “there are four different definitions” of connected persons in the Charities Act 2011. Prof Gareth Morgan thought that “the different definitions of “connected persons” in different parts of the 2011 Act need to be aligned”. However, as the Institute of Chartered Secretaries and Administrators noted, the only definition of connected persons which is materially different is that in section 118.

8.58 Prof Gareth Morgan also suggested that, in the course of alignment, “the Act should include over-arching conditions on when transactions with connected persons can be approved by the other trustees and when Charity Commission consent is needed, along the lines of section 185”.

Across legislation

8.59 However, as pointed out by consultees, the definition of “connected persons” does vary across legislation. Anthony Collins Solicitors LLP and Cancer Research UK thought that the different definitions of “connected persons”, including those in the Companies Act 2006, should be “consolidated and aligned”. The Charity Law Association and Bircham Dyson Bell LLP pointed out that there is also a different definition in tax legislation. The Institute of Chartered Secretaries and Administrators similarly called for consistency across legislation; the Charity Law Association thought that where there is a different definition, different phrases should be used.

380 Anthony Collins Solicitors LLP; Institute of Chartered Secretaries and Administrators; CLA; Bircham Dyson Bell LLP; Cancer Research UK; Prof Gareth Morgan; University of Liverpool CL&PU.
ADVICE REQUIREMENTS CONCERNING LAND TRANSACTIONS

Consultation Question 41.

We provisionally propose that:

(1) the general prohibition on trustees disposing of charity land should be removed; and

(2) in its place should be a duty on trustees, before disposing of charity land, to obtain and consider advice in respect of the disposition from a person who they reasonably believe has the ability and experience to provide them with advice in respect of the disposal; but

(3) the duty to obtain advice should not apply if the trustees reasonably believe that it is unnecessary to do so.

Do consultees agree?

[Consultation Paper, paragraph 8.85]

8.60 50 consultees responded to this question.\(^{381}\)

(1) 2 consultees did not think that our proposal went far enough and favoured further de-regulation;\(^{382}\)

(2) 23 consultees agreed with our proposal to reduce the advice requirements;\(^{383}\)

(3) 14 consultees thought that the existing advice requirements should be reduced, but not to the extent that we had proposed;\(^{384}\)

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\(^{381}\) Monsignor Nicholas Rothon; Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; United Reformed Church, Yorkshire Synod; University of Liverpool CL&PU; Guy’s and St Thomas’ Charity; WCVA; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Cluttons LLP; Stone King LLP; RICS; Charity Commission; Cancer Research UK; Independent Schools Council; Withers LLP; Trowers and Hamilins LLP; CAAV; Legacy Link; Lawyers in Charities; Wellcome Trust; Gerald Eve LLP; ACAT; Canal & River Trust; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Val James; Institute of Legacy Management; Methodist Church; Law Society; Welsh Government.

\(^{382}\) Bircham Dyson Bell LLP; Cancer Research UK.

\(^{383}\) Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; Guy’s and St Thomas’ Charity; WCVA; Lord Hodgson; Church Growth Trust; Charity Commission; Independent Schools Council; Trowers and Hamilins LLP; Legacy Link; Lawyers in Charities; Wellcome Trust; Canal & River Trust; Veale Wasbrough Vizards LLP; Institute of Legacy Management (89% of respondents to the survey); RSPCA.
7 consultees thought that the existing advice requirements should remain (perhaps with minor modification).\(^{385}\)

9 consultees thought that there should be a de minimis requirement, such that trustees should not be required to take advice in respect of transactions of a small value;\(^{386}\) 2 consultees disagreed with that suggestion;\(^{387}\)

27 consultees agreed that the general prohibition on disposing of land should be removed, and that the advice requirements (whatever they are) should apply by way of duties on trustees;\(^{388}\) and

4 consultees expressed other views.\(^{389}\)

### Criticisms of the existing regime

Consultees made various criticisms of the existing regime, which are set out below. Lord Hodgson said “probably no part of my enquiry attracted more adverse criticism than the regulatory regime for land disposals”.

#### General criticisms

WCVA described the current processes as “slow, complex, inconsistent and costly”. The ILM thought that Part 7 was “complex, inconsistent and costly to comply with”.

Bircham Dyson Bell LLP’s experience was that the current regime “is more often than not seen as interfering with, rather than enabling, the proper management of a land transaction”, and is “bureaucratic and unnecessary”. Well-advised charities have to obtain a report simply to “tick the box”, even where it is unnecessary in order for the trustees to make a decision on the transaction. The provisions are burdensome for large charities with multiple properties, involving “a series of procedural hoops offering no safeguards”.

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\(^{384}\) United Reformed Church, Yorkshire Synod; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; Cluttons LLP; RICS; Withers LLP; CAAV; ACAT; Prof Gareth Morgan; Stewardship; Charities’ Property Association; Val James; Methodist Church.

\(^{385}\) Monsignor Nicholas Rothon; University of Liverpool CL&PU; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Stone King LLP (though their view was tentative); Gerald Eve LLP; National Trust.

\(^{386}\) Geldards LLP; Churches’ Legislation Advisory Service (which tentatively suggested it); Bates Wells Braithwaite; Church Growth Trust; RICS; Gerald Eve LLP (“arguably”); Charities’ Property Association; Methodist Church; Anthony Collins Solicitors LLP.

\(^{387}\) Monsignor Nicholas Rothon; Val James.

\(^{388}\) Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; Guy’s and St Thomas’ Charity; WCVA; Lord Hodgson; CLA; Bircham Dyson Bell LLP; Church Growth Trust; RICS; Charity Commission; Cancer Research UK; Independent Schools Council; Trowers and Hamlins LLP; CAAV; Legacy Link; Lawyers in Charities; Wellcome Trust; Stewardship.

\(^{389}\) Landmark Trust; CLA; Law Society; Welsh Government.
The Institute of Chartered Secretaries and Administrators thought “there is a pressing need to update the law in order to reflect the contemporary practices of charities”, for example, the increasing number of leases of charity shops.

Unnecessary costs

Consultees made various comments about Part 7 imposing unnecessary costs on charities, particularly in the case of low value transactions for which compliance costs can be disproportionate or render a transaction of no benefit. By contrast, Cluttons LLP said that charities can obtain the advice inexpensively, or it is included with an agent’s fee in a straightforward disposal.

Sustrans and Railway Paths said:

We find the current rules often simply put bureaucratic obstacles in our way without adding value or providing additional protection. They can sometimes make it more difficult to protect our property interests and achieve our charitable objectives. They can certainly add to our costs with no commensurate benefit.

The Wellcome Trust owns property worth around £1.6 billion, predominantly as investment assets. It takes advice from various agents on a disposal, but often the formal report will only be obtained at the end of process; the procedure is therefore “often viewed as a formal compliance or ‘box-ticking’ exercise that adds little more than delay”. Although the Trust’s relationship with various property managers means it incorporates the Part 7 reports into its wider retainers, it said that many smaller charities could not do so. And when the Trust has to obtain a report outside these retainers, it “can add delay and incur additional costs of thousands of pounds each year for no additional benefit”.

The National Trust agreed with us that a surveyor’s report is often obtained “once a deal has all but been agreed and in such cases can become an expensive box ticking exercise”. In the legacy context, the National Trust deals with over 200 property sales each year and over five years there have been “only a few instances where the … surveyor came to a very different valuation or gave marketing advice that differed from the local estate agents. Only two or three of those resulted in significant added value.”

The National Trust spends £12-15,000 per annum on qualified surveyors’ reports.

The Independent Schools Council thought the regime was “an additional layer of cost without (in our view) any tangible benefit for our members’ beneficiaries and wider charitable purposes in return”.

The ILM asked its respondents about their costs of complying with Part 7. It is difficult to estimate costs since (a) the costs of reports are often paid by executors from estate funds, and (b) the process takes staff and trustee time. The highest figure was £100,000. One charity thought its internal compliance costs were £80,000 and “on the whole charities suggested that the internal costs exceeded the cost of the reports themselves”. There was a range in the time charities said they devoted to ensuring

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390 Churches’ Legislation Advisory Service; Anthony Collins Solicitors LLP; Canal & River Trust; Bircham Dyson Bell LLP; Veale Wasbrough Vizards LLP; Church Growth Trust.
compliance; one charity said it spent 3 hours per report ensuring compliance, another said 15 minutes.

8.71 Withers LLP said the requirement for a surveyor’s report “is almost invariably dealt with as an after-thought and generally regarded as a last minute bureaucratic nuisance (and expense) long after the executive decision to dispose has been taken”.

8.72 RICS agreed that there are cases where the professional fees are “disproportionate to the value of the property being sold”, particularly in respect of the sale of low value land, such as village greens, amenity land and allotments. There are other cases, however, where the cost of a surveyor’s report is proportionate.

Figure 1: The problem of small value transactions requiring a report

Consultees gave various examples of charities having to incur unnecessary costs under the Part 7 regime.

- The Landmark Trust’s neighbours asked to extend their septic tank soakaways across charity land, and were willing to pay a fee of around £2,000. They “felt that the additional £500 for our surveyor’s report was unreasonable especially as they had both been hugely supportive of our charity”.

- The Landmark Trust’s neighbour leased an area of garden land for more than 7 years. The cost of the report exceeded the first five years’ rent.

- The Landmark Trust’s neighbour purchased charity land to create a new access. The charity was able to use the new access, which improved access to the charity’s own land, but the cost of the report exceeded the value of the access land.

- Sustrans and Railway Paths said that many of their transactions were of low value, for example where a neighbour wishes to purchase a small piece of disused railway land to extend their garden. One report costing £300 established that the land was worth £100. “It is clearly disproportionate, and preparing these reports is time-consuming and distracts the professional staff from attending to situations where real value can be achieved”.

- Lawyers in Charities reported that the costs of obtaining a surveyor’s report “sometimes leads to charities continuing to rent or occupy land that provides little benefit to their charitable purposes.”

Charity Commission order

8.73 Some consultees commented that, where the costs of obtaining a report would be excessive, the Charity Commission is nevertheless reluctant to grant an order that removes the need for a report.\textsuperscript{391} Val James said that in one case the Charity Commission refused to grant an order permitting a charity to surrender a non-
assignable lease, and instead said the charity should default on its obligations to force the landlord to forfeit. The Charity Commission’s reluctance to grant an order led her to advise charities subsequently that they should obtain a surveyor’s report, even if it was disproportionate to the costs of the transaction, because the legal costs of trying to persuade the Commission to grant an order would be greater.

Delays

8.74 Consultees commented that Part 7 can cause delay, which can jeopardise transactions. Withers LLP said it causes delay “at a critical moment in the transaction”. Ongoing negotiations often result in changes to the terms of a transaction, but the surveyor’s report cannot be prepared until those terms are settled. It had experience of reports being obtained too early, so “the procedure has had to be repeated” causing further delay and expense. Legacy Link said the delays “[lead] to prospective purchasers withdrawing”.

8.75 By contrast, Bates Wells Braithwaite said that delays to transactions caused by the Part 7 advice requirements “are very rare”. “Such advice can easily be included as part of the conveyancing process from the very outset.” Delays can, however, occur when an order is required from the Charity Commission.

8.76 Val James said that, whilst the Part 7 regime can delay transactions, that can be an advantage. On “several occasions” she had been able to “withstand a late attempt by the buyer to reduce the price paid for charity land by arguing that the trustees could not agree without seeking further professional advice and considering that advice together”.

Inflexible and indiscriminate

8.77 Consultees commented that the regime was inflexible. The Charity Commission said the current regime “can be too rigid and inflexible and impose requirements which are not helpful”. Bircham Dyson Bell LLP said the current regime encourages box-ticking and rubber-stamping, rather than putting trustees in control.

8.78 Veale Wasbrough Vizards LLP said the regime was indiscriminate by applying to all disposals, regardless of the manner of disposal and the value of the land. Similarly, the Canal & River Trust criticised Part 7 for requiring the same form of advice “regardless of the size or nature of the disposal”; it includes minor transfers to correct boundaries or grant rights, all the way to substantial investment disposals.

8.79 Lawyers in Charities thought it was unnecessary that a surveyor’s report had to be obtained for certain transactions, such as sale of a residential property left to charity by will, sale of an office lease, or termination of a lease where the charity has no need for the property and gains no benefit from continuing to rent it.

The Charities (Qualified Surveyors’ Reports) Regulations 1992

8.80 We noted above consultees’ comments about the problems of the Part 7 regime seeking to generalise for all land transactions. Consultees commented that the
Charities (Qualified Surveyors' Reports) Regulations 1992 ("the 1992 Regulations") were overly prescriptive and too focussed on residential property, and that "one size does not fit all". Bircham Dyson Bell LLP said the 1992 Regulations included requirements which are often irrelevant but also "surprising omissions". The CLA thought they should be simplified; they are too prescriptive (e.g. requiring the measurements of individual rooms) and insufficient (e.g. not enough focus on how the value of the land could be enhanced). Other consultees said there was a lack of awareness of the 1992 Regulations amongst qualified surveyors.

8.81 Val James said the 1992 Regulations "create more problems than they solve" and she agreed with us that the surveyor should be left to decide on the matters he considers relevant. When disposing of charity land, she checked surveyors' reports against the 1992 Regulations yet necessary amendments "very rarely [added] anything to the substance of the advice given and little value was achieved from the legal costs involved".

8.82 Similarly, Sustrans and Railway Paths said:

many firms have template valuation forms to comply with RICS guidance or quality assurance procedures, which they are reluctant to depart from for [professional indemnity insurance] reasons. I have sometimes had to decide whether to return a perfectly satisfactory report, and risk delaying the transaction, simply because it was not in the format specified by the 1992 Regulations despite this format being unsuitable for the transaction in question.

8.83 By contrast, Cluttons LLP supported the 1992 Regulations as covering "the basics the Charity should be asked to consider in each case". Similarly, Gerald Eve LLP disagreed with our comment in the Consultation Paper that "matters to be considered when selling a flat will be different to selling a field". They said that, no matter the type of property, investigations need to be made to calculate its value and the 1992 Regulations ensure that all matters have been investigated and considered.

8.84 Lawyers in Charities said that prior to the 1992 Regulations, surveyors often provided free advice to small local charities, but that ended in 1992 because the requirements for reports are complex and detailed, so surveyors do not provide them free of charge.

Value of surveyors' reports

8.85 Legacy Link questioned the added value of surveyor's reports. They are costly, yet often "simply repeat an estate agent's valuation". "It has been rare, in my experience of some dozens of these, for the [surveyor's] report to point up anything that might alter the valuation of the land by more than some 3-4%, which is within the variability of offers usually received".

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394 CLA; Bircham Dyson Bell LLP; Sustrans and Railway Paths; Withers LLP; Stewardship.

395 They added that the Charity Commission's guidance "gold-plated" the Part 7 requirements without taking into account "the wide variety of property transactions which charities may be involved in, and which require different and appropriate advice".
The Methodist Church said that the Part 7 regime did not guarantee that charities’ assets will be protected; a qualified surveyor might give advice without considering whether there is any development value.

**Advice on marketing and advice on value**

In the Consultation Paper, we commented that – on a strict interpretation of Part 7 – trustees must obtain advice at two stages in the disposal process, first on how to market the property, and second on the market value of the land at the time of the disposition. Some consultees commented that, in practice, a report is only obtained once an offer has been accepted and the conveyancing process is underway.

Gerald Eve LLP defended the need to obtain advice on marketing and then advice on sale price. The CLA’s suggestion, which we reported in the Consultation Paper, that charities often “adopt a more pragmatic approach by instructing surveyors at a later stage” was described as “fundamentally flawed”. Advice at the outset about value, options and strategy is “essential to ensuring the optimum strategy and best terms”. In one case, they were asked to provide a report when the sale of a school had been agreed, but they thought that better sale terms could be achieved. A higher price, and overage provisions, were obtained owing to their involvement, but the delays “could have been avoided through early advice”. Gerald Eve LLP said that it is often the case that, when they are approached at a late stage, “the terms agreed are not the best reasonably obtainable and the charity is in a difficult position whereby they wish to transact at under value. … it can be appropriate for the sale to be delayed or aborted, subject to the surveyor’s advice”. Gerald Eve LLP concluded that, rather than reduce the advice requirements, charities should be encouraged to obtain early advice.

Sustrans and Railway Paths said that transactions may take years to complete, and that the requirement in Part 7 to obtain marketing advice as well as valuation advice is burdensome; if both are given at the same time, the valuation advice may be out of date by the time the matter is concluded. They have therefore had to pay additional fees to have earlier reports brought up to date.

**Preference for marketing advice, rather than valuation advice**

Sustrans and Railway Paths said:

The current requirements misunderstand the purpose and nature of a valuation. A formal valuation is usually only required when the valuation figure has to be relied on without being tested in the market - for example, for reporting on a company’s asset values, or for taxation purposes. In my 30 years’ experience in the private sector it was unusual to obtain a formal valuation for an open market sale or letting which had been properly exposed to the market, although advice would be taken on the appropriate price or rental level to expect.

By insisting on formal valuation reports in all situations the charitable sector is often being asked to pay for a higher level of professional advice than is really necessary. What is actually required is a marketing report, which costs less than a formal valuation, and will often be included in the fee for achieving the disposition at no extra cost.
Lack of understanding of the regime

8.91 Consultees commented that the regime is not well-known, well-drafted or well-understood.396

(1) Bircham Dyson Bell LLP and the CLA said it is unclear when the surveyor should be instructed, and on what they are to advise.

(2) The CLA said that there is often an assumption that it required “best price” rather than “best terms”.

(3) The CLA and Bircham Dyson Bell LLP said there can be confusion over whether a party is a “connected person”.397

(4) Bircham Dyson Bell LLP said there was uncertainty concerning the meaning of “disposition” which was undefined.

(5) The CLA and Bircham Dyson Bell LLP said that the exception in section 117(3)(c)(i) suggests some express authority is required, whereas it should require that the trustees “consider the disposal to be in furtherance of the purposes of the (disposing) charity”.

(6) Trowers and Hamlins LLP said it was uncertain whether rentcharges fell within the disposal or mortgages regime.

Legacy cases

8.92 The ILM and Cancer Research UK explained the difficulties arising when disposing of property that has been left to charity by will.398 Legacy income from property sales is significant. The ILM said that £2.3 billion was left in legacies to UK charities in 2014 and that 87% of legacy income comes from residuary gifts, of which a third derives from property sales.

8.93 The application of Part 7 to legacy properties is unclear. Whilst Cancer Research UK treats most legacy property as subject to Part 7 by reason of deemed appropriation, “the majority of charities take a more relaxed approach to the disposal of legacy property and the application of Part 7” and it is likely that some charities do not consider that Part 7 applies to the sale of property left by will at all.

8.94 The confusion stems from the fact that legacy property is almost always sold by the personal representatives, without the charity becoming the legal owner, so the charity’s interest is not recorded on the register of title and the purchaser does not therefore become aware of the charity’s interest and the need to comply with Part 7.

8.95 Compliance often only becomes necessary after property has been “appropriated” to the charity. Property will often be appropriated for tax reasons after it has been marketed and an offer accepted (if the offer is made in excess of probate value, then capital gains tax can be avoided if the property has been appropriated to the charity

396 Bircham Dyson Bell LLP; RSPCA; Cancer Research UK; ILM.
397 Bircham Dyson Bell LLP expressed the view that wholly owned subsidiaries do not fall within the definition.
398 Similar comments were made by Withers LLP; Legacy Link; National Trust.
beneficiary before it is sold). Compliance with Part 7 therefore only becomes necessary at a very late stage, and as a result of a desire to avoid tax. But it remains the case that HM Land Registry and the purchaser need not be notified of the appropriation, so there is no mechanism to ensure compliance with Part 7.

8.96 The ILM carried out a survey of its members to inform its consultation response. It had responses from 69 charities, including the 14 largest charities by legacy income (with a legacy income over £25 million), and 18 of the 20 charities with an income between £10 million and £25 million.

8.97 Respondents to ILM’s survey identified the main benefits of obtaining surveyors’ reports were (a) assisting in deciding how to market a property, (b) identifying issues that justify acceptance of a lower offer, and (c) exploring how to take advantage of development opportunities. Respondents were also asked to identify the main disadvantage of being compelled to obtain a surveyor’s report.

1. 30% said that reports are often obtained after a property has already been marketed and an offer obtained, with the valuation in the report simply reflecting the offer. The reports are obtained “simply to comply with the legislation rather than because there is any inherent value in the report itself”. (See paragraph 8.98(2) below for an explanation as to why reports are often obtained at a late stage.)

2. 28% said reports can cause ill-feeling from executors, who do not understand that they are required. Executors and charities appear not to feel that the reports add value.

3. 19% said that reports can cause considerable delays, which is probably linked to the fact that it is obtained at a late stage once compliance with Part 7 becomes necessary.

4. 11% said reports “were not value for money since they rarely revealed more than an estate agent’s valuation”.

5. 7% identified the expense of the reports as the main disadvantage.

6. In addition, 30% of respondents said that all of these points were significant disadvantages.

8.98 Cancer Research UK said the law “does not work”, particularly as the charity is not always making the decision to dispose of property. They distinguished between the following situations:

1. Specific gifts of property to a charity. It was suggested that the personal representatives hold the property as bare trustees, so the decision to dispose sits with the charity trustees.

2. Appropriation of property to a charity or a group of charities. The personal representatives hold the property as trustees, so the decision to dispose sits with the charity trustees. This group can be subdivided into:
(a) Where the property is appropriated to one charity. The Part 7 requirements apply, and the charity's trustees must comply. The complex and confusing result is that the personal representatives are the vendors (holding legal title to the property) but the charity trustees must provide the certificate in the sale documentation. In one case, it “caused delay with the sale and necessitated the expense of instructing another solicitor to explain the position to the conveyancing solicitor”.

(b) Where the property is appropriated to a group of charities. The Part 7 requirements apply, but it is the personal representatives who are usually treated as the charity trustees and must comply with the Part 7 requirements. In practice it is the charities that obtain a report and ensure compliance since it is the charities that decide to dispose of the property. The National Trust said that, in this situation, each charity obtains a separate report which is unnecessary; the charities should be able to nominate one to take the lead.

(c) Where the property is appropriated to a charity (or a group of charities) and a non-charity beneficiary. The Part 7 requirements do not apply since the personal representatives are not “de facto” trustees.

There is an added complication. The personal representatives might agree a sale then subsequently appropriate the property (often for tax purposes), in which case a surveyor’s report must be obtained to confirm the sale price. This was described as “an artificial tick-box exercise”.

(3) Deemed appropriation, where residue is ascertained and contains a property. The personal representatives carry out the sale, sometimes taking instructions from the charities but sometimes not. The charity as beneficiary may not be informed of progress of the administration. “It will therefore often happen that we are not advised of the point in the administration where the residue has been ascertained and deemed appropriation of the property has occurred. A sale of the property after this point may take place without any steps being taken by them to comply with the Act, but this is something which we are not able to control. Indeed, we may not be advised of a sale until long after it has completed” so charities are “in a position of non-compliance without them even being aware of it until much later in the administration”.

(4) Disposal by a charity acting as a personal representative. When the charity is “wearing a different hat” it is unclear whether Part 7 applies. There are potentially other beneficiaries who could make a claim for a sale at an undervalue.

8.99 Cancer Research UK thought that £100,000 was a reasonable estimate of what it spends annually on compliance, which it said was “out of proportion to the risks involved.”

Agreement with reducing the advice requirements

8.100 The majority of consultees agreed that the advice requirements should be deregulated, either as we had proposed or to some greater or lesser extent.
Reasons for agreeing with de-regulation

Application of Part 7 to land but not other assets

8.101 Consultees in favour of de-regulation often commented that there was no rationale for treating land differently from other assets, which can be equally complex and difficult to value.\(^{399}\) Whilst acknowledging that the regime provides some protection to small charities without access to legal and property advice, the Wellcome Trust saw no reason to impose a “substantially more onerous” regime for land than for other significant charity transactions, such as investments. Whilst land can be valuable and complex, so can many financial investments.

General trustee duties

8.102 Consultees often supported de-regulation on the basis that trustees’ general duties are sufficient.\(^{400}\) In supporting our proposal, Sustrans and Railway Paths acknowledged that many charities did not have in-house expertise but thought, however, that general duties on trustees to act in their charity’s best interests should be sufficient. “We do not understand why property transactions are singled out for such detailed regulation when other activities, which may be equally complex and bring even greater financial risks, are not.”

8.103 Stone King LLP, whilst cautious about de-regulation, said that they always advised charities that “the ‘techie’ regulation is just a reminder mechanic – to check and validate all is well – as all fiduciary duties should already have meant the trustees have done the key thinking so as to do the right thing”.

8.104 Cancer Research UK favoured Lord Hodgson’s recommendation to abolish the regime and rely on trustees’ general duties. Trustees could take advice when they considered it necessary to do so, supported by Charity Commission guidance. Having said that, it thought that our proposal was similar to Lord Hodgson’s – it “[reaches] the same conclusion albeit by different routes” – since both “rely on the trustees determining whether advice is required”.

Analogy with other duties on trustees

8.105 Some consultees who favoured de-regulation thought there should be consistency between the duties on trustees when dealing with land and with other assets. The Charity Commission agreed with our proposal, saying it was consistent with other duties on trustees to consider taking advice. Prof Duncan Sheehan thought that the requirements that apply to the acquisition and disposal of other assets used as investments under the Trustee Act 2000 should apply by analogy to the acquisition and disposal of land. Lawyers in Charities made similar comments. The Wellcome Trust said our proposal “places the responsibility onto trustees to obtain and consider appropriate advice, whist leaving flexibility to determine what advice is required”.

8.106 Francesca Quint said: “A useful comparison would be the replacement of the Trustee Investments Act 1961 with the statutory power of investment under the Trustee Act

\(^{399}\) Bircham Dyson Bell LLP; Independent Schools Council; Lawyers in Charities; Veale Wasbrough Vizards LLP; Wellcome Trust; National Trust.

\(^{400}\) Sustrans and Railway Paths; Church Growth Trust; Stone King LLP; Cancer Research UK.
2000, coupled with the statutory duty of care and the requirement to set a policy and take appropriate advice. It is worth bearing in mind that the 1961 regime was detailed and prescriptive, and considerable legal and other professional expertise was routinely expended (at considerable cost) on assisting trustees to comply with the technicalities (or seek escape from them) for many years. A protective attitude towards charities would have justified retention of the old regime in the same way as those anxious about charities entering into unwise land transactions might seek to justify retention of the bulk of the existing regime for the disposal of charity land, but in fact there has been no evidence of charities or other trusts suffering from bad investment decisions because of the reforms in the Act of 2000.”

General comments about our proposal

8.107 University of Plymouth said our proposal would be “a welcome relaxation”. Guy’s and St Thomas’ Charity agreed, saying that, as a large land-owning charity, it had suitable in-house and external expertise.

Difference between large and small charities

8.108 Many consultees commented on the differences between large and small charities.

8.109 The Churches’ Legislation Advisory Service said there was a significant difference between major denominations such as the Church of England with in-house expertise on property matters, and small denominations with a few churches and a very limited central administrative resource. It concluded that there should remain some requirement to obtain advice, but that regulation should be “lighter-touch than at present and without the blanket requirement for a report from a RICS-qualified surveyor”.

8.110 Stone King LLP noted that its members who worked with larger charities, with more experienced and knowledgeable trustees, saw the annoyance of the costs involved, whereas its members who worked with less experienced trustees saw the value of the Part 7 requirements.

8.111 Despite supporting our proposals, Veale Wasbrough Vizards LLP were concerned about small charities with little experience of land transactions; unless they take advice, they may be at greater risk of disposing of land at an undervalue.

8.112 Stewardship commented that our proposal would make Charity Commission guidance crucial for small charities.

8.113 The Charities’ Property Association said our proposal was “a difficult question on which to generalise”. Most of its members are large landowning charities with in-house expertise or an ongoing relationship with relevant property experts. But they thought that some requirement for advice should be retained, “particularly for smaller charities that may make only very occasional disposals”; they contrasted an expert charity such as the Landmark Trust with a non-technical small religious order.
Choice of adviser

8.114 Various consultees agreed with us that charities should be able to choose an appropriate adviser. The Canal & River Trust said that a RICS surveyor's report may not be appropriate for all disposals and thought charities should have the flexibility to decide whether to obtain advice and, if so, the kind of advice, from whom and at what stage in the transaction.

8.115 The CAAV agreed with the flexibility of allowing trustees to decide on an appropriate adviser; “property assets are very varied and the professional most suited to advise on high street shops in a city centre might not hold the same qualifications as the person best suited to advise on agricultural land matters”. It favoured removing the requirement for a RICS surveyor's report, and replacing it with Charity Commission guidance on how to find appropriate professional advice. “This more flexible approach will allow trustees to take more appropriate and proportionate action, whilst providing a safeguard so that trustees know what is expected of them”.

8.116 The Charities' Property Association agreed with us that a report from a RICS surveyor may not always be necessary or even ideal, and that a properly qualified local estate agent may be a more appropriate source of advice. They wanted to retain a requirement to obtain advice, but thought that regulation should be lighter touch and “proportionate to the nature of the transaction in question and the expertise in property matters of the charity proposing to carry it out”.

8.117 The United Reformed Church, Yorkshire Synod, welcomed the flexibility of being able to use a reputable high street estate agent. Currently, their choice is limited to those with a RICS surveyor on their staff, or they must obtain and pay for a separate report. The Churches’ Legislation Advisory Service, Withers LLP, Lawyers in Charities and the Wellcome Trust made similar comments about using a local estate agent in appropriate cases.

8.118 The ILM said that its members “always endeavour to secure the best possible sale price” and “where necessary they will obtain surveyor’s reports but they also have the skill and experience to sell properties successfully through estate agents”. In the ILM’s survey of its members, 89% of respondents agreed with our proposal to reduce the advice requirements so that it is not compulsory to obtain a surveyor’s report, and 84% of respondents felt capable of correctly deciding when to obtain a surveyor’s report.

8.119 The RSPCA agreed with our proposal, but thought that advice ought to be obtained where the land has not been advertised on the open market.

The 1992 Regulations

8.120 Many consultees criticised the 1992 Regulations; see paragraphs 8.80 to 8.84 above. Sustrans and Railway Paths did not think that there was a particular difficulty with the

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401 Val James; Canal & River Trust; CAAV; Charities’ Property Association; RSPCA; Institute of Legacy Management; Cancer Research UK.

402 No respondent said that they would never obtain a surveyor’s report, and less then 20% said that they would do so “rarely”. Over 80% of respondents said that they would “sometimes”, “often” or “always” obtain a surveyor’s report.
requirement to obtain and consider a report from an appropriate qualified surveyor. Rather, the problems arise from the “excessive and sometimes inappropriate detail” required by the 1992 Regulations and the Charity Commission’s guidance in CC28. They also criticised the Charity Commission’s emphasis on a surveyor’s local knowledge being of overriding importance; “this may not be the case where specialist properties are concerned and where there is no local market”. They pointed out that marketing advice was not the same as a valuation. They concluded that “trustees need to be able to obtain advice which is tailored to the particular circumstances rather than forced to fit into a particular template”.

8.121 The Charities’ Property Association thought the 1992 Regulations should be “reviewed and simplified”. Bates Wells Braithwaite, whilst largely in favour of retaining the current regime, acknowledged that the 1992 Regulations “are not appropriate for many transactions” and can be “onerous”, for example on the grant of easements or the surrender of leases (which might be a disposal of a liability).

The form of advice

8.122 United Reformed Church, Yorkshire Synod thought it important that advice is given in writing and not orally. Whilst it agreed that a formal report should not always be necessary, the risks of misunderstanding can only be avoided if advice is written. Val James made similar comments, saying written advice provides helpful evidence in the event of a future challenge to the transaction.

Should it be compulsory to obtain some sort of advice?

8.123 Part (3) of our proposal would have permitted trustees to decide that they did not need to obtain advice. Amongst those consultees who agreed that there should be deregulation, opinion was split as to whether they should be permitted to decide not to obtain advice.

Trustees should be able to decide not to obtain advice

8.124 Some consultees thought trustees should have the option. Sustrans and Railway Paths said the option to decide not to obtain advice “will allow charities to deal with low value and low risk transactions without incurring excessive and disproportionate costs”.

Trustees should always have to obtain some sort of advice

8.125 Others did not. Anthony Collins Solicitors LLP disagreed with allowing trustees to dispense with the need to obtain advice since “in some cases charity trustees do not know what they do not know, i.e. they need professional advice to understand the value of the land”. They had experience of trustees agreeing in principle to sell a small parcel of land for a low sum, but subsequently discovering following professional advice that it had hidden value. One case concerned a ransom strip needed for

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403 WCVA; Sustrans and Railway Paths; together with consultees who agreed with our proposal generally; see n 383 above.

404 Anthony Collins Solicitors LLP; CAAV; United Reformed Church, Yorkshire Synod; Bates Wells Braithwaite; Methodist Church; Charities’ Property Association; Val James.

405 See also our discussion of a de minimis threshold in paras 8.196 to 8.197 below.
vehicular access to two fields being developed for housing; the final sale price was ten times higher than originally proposed. Another concerned an enlarged garden, but the charity had not considered that the enlarged garden could then be used for development and therefore had a higher value.

8.126 Similarly, CAAV did not agree that trustees should be able to dispense with the need to obtain advice, since they “might not always appreciate their position in relation to a property asset”, which can be complex with many factors contributing to their value. It was concerned that removing the obligation would result in some, particularly small charities, failing to achieve full value for their property assets. It gave an example of a charity which, without professional advice, would have disposed of land at an undervalue; “a requirement to seek appropriate advice on a property transaction can be of benefit to the charity”. It thought the duty to obtain advice was flexible enough; “a charity need not necessarily incur significant costs if the matter is very straightforward”.

8.127 The Methodist Church said trustees can be “taken advantage of by a developer who assures them that the price being offered is right”. Sometimes trustees are desperate to sell an asset that is expensive to heat and insure, but “it is only upon seeking advice that they are informed of the real value”.

8.128 The Charities’ Property Association thought that there should remain a requirement to obtain some sort of advice, particularly to protect smaller charities. They questioned whether trustees of small local or religious charities had sufficient experience to make properly informed decision, referring to a case where a Parochial Church Council had sold a painting without obtaining advice and complying with the legal requirements. 406

8.129 Val James said “There are instances when less sophisticated trustees may simply not appreciate the need for advice and the minimal costs associated with a brief letter from a professional adviser reassuring them … are preferable to an action for breach of trust for an honest but unreasonable mistake.” She thought the assumption should be that advice will be obtained from someone professionally qualified in land valuation. She thought that the person giving advice should take responsibility to confirm that he or she does indeed have the necessary experience and ability to provide advice; “professionals are more aware of the limits of their competency than those instructing them can be”.

A mid-way point

8.130 Some consultees thought that advice should be required in all but unusual cases. Prof Gareth Morgan said “it is important to protect smaller charities with limited expertise from being hoodwinked by a developer, or a strong-minded trustee or member of staff from disposing of land too readily”. He thought a surveyor’s report “should generally be required unless the charity manifestly has equivalent expertise available internally”.

8.131 Cluttons LLP said there was a difference between a large charity with a professionally staffed property department, and a small charity which might rely, for example, on a trustee with some dated knowledge of property matters. They thought the default position should be taking professional advice.

406 Re Emmanuel Church, Leckhampton (2014) Gloucester Consistory Court.
8.132 Stewardship thought that, to protect charities from less conscientious trustees, the circumstances in which it is unnecessary to obtain advice – such a trustees having appropriate knowledge and skills – should be prescribed.

**Importance of guidance**

8.133 Many consultees commented on the importance of Charity Commission guidance on making the decision not to obtain advice. WCVA said “it is essential that guidance [is] issued to assist trustees in determining when it would be reasonable to abstain from obtaining advice on the disposition”.

8.134 The Independent Schools Council had concerns about some charities being at risk of selling land at an undervalue without taking advice, but it thought that the problem could be addressed by referring trustees to guidance as to the professionals who can assist. Veale Wasbrough Vizards LLP thought it essential for the Charity Commission’s guidance to emphasise the need for advice in the case of sale of part of land, or the grant of rights over charity land; the grant of a right of way “could have major consequences for the value of the charity’s land on any future disposal”.

8.135 The University of Liverpool CL&PU said that, in order to assess the risk of not obtaining advice, trustees would need clear guidance, which they thought should be set out in statute rather than Charity Commission guidance. They said that, without legal challenge, Charity Commission guidance effectively becomes the law, and “given the complexity of this risk assessment, we would have concerns whether Charity Commission guidance would be effective in this sphere”.

**Other comments on permitting trustees to decide not to obtain advice**

8.136 Some members of the CLA thought that the trustees would, in practice, always obtain advice, despite this proviso, for fear of being challenged as to the reasonableness of a decision not to obtain advice. Similarly, the Law Society noted trustees’ worries about personal liability.

8.137 The Churches’ Legislation Advisory Service said that trustees who decide not to obtain advice “should be required formally to state their reasons for that decision”. Cluttons LLP, the National Trust and the Charities’ Property Association made similar comments.

8.138 University of Plymouth anticipated that dispensation would only be appropriate where the trustee body included relevant advisers, such as a lawyer and surveyor.

8.139 RICS thought the decision as to whether or not to take advice should be determined by the charity based on the monetary values concerned.

**Restrictions in the register of title**

8.140 Many consultees commented on the benefits of restrictions being entered on the register of title of charity land by HM Land Registry, with the requirement for trustees to certify compliance with the Part 7 requirements to satisfy the restriction, as a means of enforcing the advice requirements. The general prohibition on disposing of charity land (which we proposed removing) is the basis on which such a restriction can be
entered on the register, though some consultees wanted to remove the prohibition but retain the restriction on the register.

8.141 Stone King LLP said that land registration provided a “very helpful protection mechanism”; the restriction on title allows policing of the Part 7 requirements by the buyer, or mortgagee, of land in the conveyancing process. That protection mechanism is not available in respect of land acquisition, or the disposal or acquisition of other assets, which might explain why the law does not include protective measures for those transactions. Stone King LLP was keen that the mechanics of restrictions be “used as much as can be to steer the trustees to whatever the duties are so that they are given every chance to do the right thing”. Similar comments were made by the University of Liverpool CL&PU, Veale Wasbrough Vizards LLP and Withers LLP.

8.142 Bates Wells Braithwaite said that the restriction on title, and certificate in land dispositions to confirm compliance, “is a simple method of monitoring such transactions”. It is low cost to the tax payer, efficient, and effective. The current general prohibition on charity land disposals ensures that the requirement to obtain advice is triggered before a property transaction is completed, so that “an uncomfortable ‘undoing’ of the legal mess created by pursuing such a transaction without adequate advice will not need to happen” which avoids unnecessary time, costs and risk to trustees. The general prohibition also ensures that the advice requirements can be policed by HM Land Registry through its simple system of checking for compliance with restrictions when disposals are registered.

8.143 These, and other, consultees, wanted to keep the restriction, and certification, possibly changing the duties on trustees and therefore what trustees had to certify that they had done.

Legacy cases

8.144 For ILM’s members “the most important thing … is that there is clarity as to what transactions are subject to the legislation and what requirements result from it”. They thought that “the sale of legacy property does not need to be subject to the same level of regulation as the disposal of other charity land”. The ILM said that “charities often feel that obtaining reports has no purpose beyond complying with the legislation [so] much of this money is effectively being wasted”. The ILM therefore wanted the disposal of legacy property to be excluded from the Part 7 requirements (if Part 7 is not removed entirely).

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407 HM Land Registry said that removing Part 7 would affect the current obligation on the Chief Land Registrar to enter a restriction in the register pursuant to section 123(2) (as well as requiring repeal of or amendment to the Land Registration Rules 2003).

408 Although the CLA (in its proposed compromise) also favoured removal of the general prohibition on trustees disposing of charity land. Similarly, the National Trust thought that, even if the prohibition is removed, a failure to comply with the duty to obtain advice should render the transaction ultra vires.

409 CLA; Bircham Dyson Bell LLP; RSPCA; Charities’ Property Association; and Val James.

410 The ILM suggested an alternative solution; there would be no need for property to be appropriated (and therefore no need for Part 7 to be engaged) if the exemption from capital gains tax was extended to cases where the proceeds of an asset were due to a charity
8.145 Similarly, Cancer Research UK was in favour of general de-regulation, but as a starting point and in the light of the difficulties arising in the legacy context (see paragraphs 8.92 to 8.99 above), it thought that the Part 7 requirements should not apply to disposals by personal representatives, or where the charity is acting as a personal representative.

(1) As the personal representatives are disposing of the property, the risks of inappropriate transactions and transactions with connected persons “are a step removed”.

(2) In this context, most reports are obtained for “straightforward residential properties where the property market has determined the price. The necessity to obtain written advice/a report is an expensive tick-box exercise”.

(3) When the trustees are making the disposal decision, the trustees’ obligation to act in the best interests of the charity “are sufficient protection”.

8.146 By contrast, Gerald Eve LLP thought that obtaining surveyors’ reports even in legacy cases “will have identified development potential, enhanced sale values and increased net proceeds to the charity”.

**Disagreement with reducing the advice requirements**

**Support for the existing regime**

8.147 Some consultees argued that the current regime should be retained. Bates Wells Braithwaite argued that the current regime:

(1) protects public trust and confidence in charities; the public are most interested in how their donations are spent, so ensuring land transactions achieve the best terms is extremely important;

(2) is policed efficiently, simply and at low cost by HM Land Registry through the restriction on title;

(3) avoids burdening the Charity Commission with regulation of land transactions, since Part 7 provides a simple level of support to trustees by setting out a clear process; and

(4) is “generally proportionate, given the risks and complexity involved in property transactions, although we note some potential areas for relaxation”.

8.148 They said there was a “significant risk for charity trustees, and cost to the third sector as a whole, if these provisions are removed. We would propose the current system simply needs updating, rather than overhaul.”

8.149 Some CLA members thought the current regime to be helpful and beneficial. The CLA summarised the arguments in favour of the current regime (or in favour of some sort of regulation).

(1) Land is different from other assets:

(a) it tends to be a major asset of a charity;
(b) it is more difficult to value and it has different potential, which can be a “trap for the unwary trustee”, and

(c) dealings with land can have reputational impact for a charity.

2. The value of land can be enhanced with specialist advice.

(3) Small charities find a statutory framework helpful and reassuring; it can also act as a trigger to alert trustees to matters that they ought to consider.

8.150 RICS, whilst acknowledging that the existing requirement could be disproportionate, thought that “the public must have confidence that charities are being administered with probity. The duty on trustees to obtain advice is at the heart of a trustee’s fiduciary duty.”

8.151 The National Trust, on balance, favoured retention of the regime. Despite its bureaucracy and costs. It “imposes a useful discipline and a system of checks and balances”, including for the National Trust. Property transactions are often fast-paced and exciting, with the risk that objectivity may be lost. That is “countered very effectively by the Part 7 requirements”, which ensure that “hearts have been ruled by heads”.

8.152 Stone King LLP said the purpose of the law is not “to make trustees’ lives easier but to serve them by checking them when they need checking and to serve the public good by protecting the confidence at large in charity”.

Appropriate experience and expertise

8.153 Some consultees favoured retention of the requirement for a RICS surveyors’ report because some charity trustees are insufficiently experienced to deal with property transactions, which can be complex.\^411 The existing requirements ensure that charities obtain full value when they dispose of land.

8.154 The United Reformed Church, Yorkshire Synod said that trustees sometimes incorrectly believe that land has a high value, so efforts to dispose of it are a waste of time and money since little or nothing will be realised. Conversely, trustees are sometimes unaware that land has a high value. Accordingly, the requirement to obtain advice is “an important way of protecting willing but not appropriately experienced trustees”, particularly small charities without the support of umbrella bodies. As Cluttons LLP said, “an apparently waste strip of land can easily be a ransom strip” with a high value.

8.155 Some members of the CLA thought that independent advice on whether the value of land could be enhanced was important, for example, through improvements or a change of use. In addition, advice can alert trustees to the value of property in the voluntary sector; for example, a lease with a user restriction may have a low current use value, but it might diminish the value of the landlord’s reversion, so the combined marriage value of freehold and leasehold would be substantial.

\^411 Monsignor Nicholas Rothon; Landmark Trust; United Reformed Church, Yorkshire Synod; University of Liverpool CL&PU; Action with Communities in Rural England; Bates Wells Braithwaite; Cluttons LLP; Gerald Eve LLP; National Trust; Stewardship.
RICS said that a surveyor’s report provided trustees “with the defence of due diligence”, and that seeking advice “from a non-professional may leave trustees vulnerable”.

Gerald Eve LLP thought that it should remain compulsory to obtain advice from a RICS member in all cases; RICS “promotes and enforces the highest professional standards and qualifications in the management and development of land and property. Every surveyor is subject to regulation, which exists to ensure competence and enhance professional status through providing confidence to consumers and markets.” RICS surveyors “can draw on detailed knowledge of valuation of different asset types, planning and development, sales strategy and agency”, particularly as policy and practices evolve over time. Advice from a RICS surveyor is also independent, and surveyors are accountable for the advice that they give. The current regime ensures “the highest quality of property advice is provided prior to a disposal to protect the interests of the charity”.

Gerald Eve LLP gave examples of cases where they had secured better terms for a charity than would otherwise have been accepted (even with the involvement of estate agents). They disagreed that surveyors’ reports are expensive and disproportionate to the value of the land; even with their fee, “if advice is sought at an early stage, the net proceeds to the charity can be increased”.

Bates Wells Braithwaite said it had “experienced numerous incidences from practice where the provisions of Part 7 … have assisted in preventing charities entering into transactions at an undervalue and have protected a charity's trustees”, and gave two examples.

Risks of exploitation

Some consultees thought the existing requirements helped to prevent charities from being exploited, and that our proposal would reduce that protection. Trustees “can be misled by those who may have helped them in the past on minor matters but who take advantage when a major property transaction is about to take place. … Trustees may seek advice, for example, from a local builder who has helped maintain the property, but may take advantage of the situation to arrange a sale for his own benefit.”

Cluttons LLP said that many buyers see charities as “a soft touch” and “the rigour of the current regime is a very powerful negotiating tool to rebut such views and to obtain best value”.

Stone King LLP distinguished between “mad/bad trustees”, for whom it is difficult for the law to prevent something going amiss, and “innocent but inexperienced trustees”, whom the law should seek to protect. People rarely become trustees because they are keen to deal with the charity’s land; but “there are plenty of third parties who are very savvy and will be happy to take advantage of the trustees”.

412 Monsignor Nicholas Rothon; Cluttons LLP; Methodist Church.

413 Monsignor Nicholas Rothon.

414 Similarly, the Law Society said “those who wish to flout the rules will find ways to do so”.

Indeed, the Part 7 requirements can be a useful negotiating chip for a charity to obtain better terms, since they can say that they must comply with the legal requirements for a surveyor's report.

8.163 Stone King LLP added that proper constraints on trustees’ powers can improve donor confidence; “a few bad news stories could do quite a bit of damage to that”.

**Figure 2: the benefits of the requirement to obtain advice from a qualified surveyor**

Cluttons LLP reported that a large charity with a property department had granted a long-lease at a nominal rent to another charity, and that tenant charity wished to purchase the freehold at current value, which was fairly low. Cluttons LLP advised the charity not to sell, since the potential redevelopment value would appreciate over the coming years.

Cluttons LLP gave a further example of a charity that had been losing money in its operation of a nursing home. The charity’s trustees wished to sell the nursing home to its manager; “they had had enough of problems with the manager”. Cluttons LLP advised advertising, which resulted in an offer of double the manager’s. “It was only the requirement to take professional advice which pushed the charity into instructing surveyors and which resulted in a gain to the charity of approximately £250,000.”

Stone King LLP had experience of cases where “a local developer/friend of the charity/estate agent has promoted an idea and it was the need to satisfy the Charities Act that flushed out quite how bad the loss to the charity was likely to be”. There are “numerous examples both of very significant help from the current regime plus examples of its clumsiness and disproportionality”.

CAAV gave the following example from one of its members: a charity held a long lease of land with an unexpired term of around 45 years at a rent of £2 per annum. The land was in disrepair and was of no use to the charity. The local authority landlord wanted the land back for redevelopment, which the trustees agreed, being “more concerned at removing the liability arising from the site being disused, overgrown and insecure”. “The trustees had reached a careful and duly considered position and the disposal appeared eminently sensible in their minds, but in my view they were not aware of the strength of their position.” Owing to the involvement of the CAAV member, they secured a better deal.

**Unique nature of land disposals**

8.164 Some consultees justified retention of the current regime on the basis that land was unique and should be treated differently from other assets.

8.165 The University of Liverpool CL&PU said that the current requirements “send a message that land is to be treated differently from other assets (as it is in most areas of law). Land as an asset class is complex; without sufficient safeguards, the impulse of charity trustees may be to sell land as a wasting asset to make a short-term gain, rather than retain and improve land to increase the long term return on the asset”. The existing regime provides “a necessary check and balance on dealings with land”.
Bates Wells Braithwaite said land transactions are often complicated and the regulatory regime for other investments would not be appropriate. They said that charity land deserved special treatment since:

1. “land is often not just an investment but a key way for the charity to meet its charitable purposes”;
2. “land is often donated”; and
3. “often a charity’s most valuable asset will be its land”.  

Stone King LLP thought that land deserved special treatment for the following reasons.

1. As well as being an asset, it can be a liability.
2. It is a natural monopoly and it can be operationally critical; if lost, it cannot easily be replaced.
3. As land is a natural monopoly and relatively illiquid, the land market behaves differently from other markets.
4. The limited availability of land in England and Wales gives it a skewed value, and it can be an especially large part of a charity’s balance sheet.
5. As an asset, land is unusual in benefitting from a state-guaranteed register. Land registration facilitates helpful protection mechanisms, namely the restriction on title, which is not available for other assets (nor for the acquisition of land).

A framework for decision-making

Some consultees thought that the existing regime provided a helpful framework for trustees, particularly of small charities, to make a decision about disposals of land. Bircham Dyson Bell LLP disagreed, adding that compliance “does not necessarily equate with compliance with the charity trustees’ duties. The current regime may, therefore, give rise to false confidence.”

Veale Wasbrough Vizards LLP thought our proposals might cause trustees concern about personal liability, making it more difficult for charities to find willing trustees or leading to “greater expense for charities in terms of professional fees as trustees seek to ensure that they have complied with the duty to obtain and consider advice”.

Criticisms of our proposal

Those consultees who supported the existing regime made various criticisms of our proposal.

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415 Stewardship made similar comments.
416 Cluttons LLP; Stone King.
Insufficient protection of charitable assets

8.171 As explained above, some consultees thought a qualified surveyor’s report was necessary to ensure that charities obtained full value when disposing of land. Our proposal that a surveyor’s report should not be compulsory was described by Gerald Eve LLP as “fundamentally flawed”. The Law Society thought that our proposed duty “may not be effective in preventing charities’ assets from being disposed of inappropriately”.

8.172 Some consultees thought it inappropriate for trustees to obtain advice from anyone other than a qualified surveyor. As noted in paragraphs 8.116 to 8.118 above, some consultees were in favour of allowing charities to obtain advice from estate agents. Others disagreed. Stewardship did not think that trustees should seek advice from an estate agent instead of a qualified surveyor unless they are working to equivalent professional standards set by a professional body. Estate agents “have a wide variation in professional qualifications, standards and ethics”, and land is subject to so many variables that “trustees should not be led to believe that a simple ‘market appraisal’ is sufficient”. Similarly, the Welsh Government noted the risks of trustees obtaining advice from unregulated valuers such as estate agents which “could lead to variance in the quality of advice on which trustees base their decisions”.

8.173 Gerald Eve LLP opposed extending the regime to estate agents (including NAEA members) since they do not have the same level of training and qualifications; risks arise where the asset is complex or has development potential. Moreover, many estate agents are personally incentivised. They gave an example of a case where they had overseen the sale of a residential property with development potential which they had valued at £1.1 million. The estate agents recommended acceptance of an offer of £1 million, but Gerald Eve LLP had recommended rejecting the offer after which an enhanced sale price of £1.15 million was achieved.

8.174 In a further case, a charity wished to sell a property used as a care home, but wanted a care home to continue being run at the property. Gerald Eve LLP were instructed to advise on the charity’s options, including selling the care home as a going concern as well as sale with vacant possession. They were then instructed to oversee the sale of the home and through a marketing and vetting campaign, they identified a commercial care home operator and negotiated complicated terms to ensure clawback in the event that planning permission for alternative use was obtained in the future. “An estate agent simply does not have this expertise.”

Trustees would always seek advice anyway

8.175 The University of Liverpool CL&PU said “experience suggests that trustees would … seek advice in all cases” given trustees’ risk appetite. Similarly, some members of the CLA thought that a new regime imposing a duty to obtain advice would impose a burden on trustees; how would they know when they need advice? It would “simply replace one problem with another”.

Trustees would not know how to obtain appropriate advice

8.176 RICS said that not all trustees know who would have the appropriate ability and experience to provide suitable advice.
8.177 Some CLA members opposed a general advice requirement on the basis that trustees would not know what sort of advice to obtain (such as whether the value of land could be enhanced, or whether there was hidden marriage value). The CLA were divided as to whether detailed guidance could mitigate that risk.

8.178 Stewardship did not think that simply placing a duty on trustees “will adequately protect the charity unless the law prescribes from whom that advice should be sought”.

Proposal provides no more protection than guidance

8.179 Bircham Dyson Bell LLP was concerned that the proposal would “turn into a duty always to obtain advice, but that it would still rely upon the trustees obtaining the right advice in order to be alerted to relevant risks”. Obtaining the right advice would depend on the existence of suitable guidance, but if such guidance is effective then a statutory duty to obtain advice would be redundant.

Advice should go beyond current value

8.180 The University of Liverpool CL&PU thought that our proposal would result in charities obtaining advice simply on the current value of the property. They thought that such advice would sometimes be insufficient; land might have additional value in the long term, for example if there is a change of use or if repairs are carried out. The 1992 Regulations currently require surveyors to give trustees advice on such matters.

Advice duty redundant without enforcement mechanism

8.181 The Institute of Chartered Secretaries and Administrators said that a duty to obtain advice as we had proposed was “potentially worthless” since “without any mechanism to ‘police’ that trustee duty, it is arguable that the duty is unlikely to be adhered to in many instances”.

8.182 Bates Wells Braithwaite said that our proposal, which concentrated on trustees’ duties, would have to be regulated by Charity Commission guidance and regulatory action against trustees for breach of their duties. They suggested that, in a time of increased pressure on the Commission’s resources, it is better to leave the regulation of land transactions to the Part 7 procedure. Similarly, Stone King LLP pointed out that, from the Charity Commission’s point of view, our proposal would create an added burden since the policing of land transactions would move from the buyer (through the restriction and requirement for a surveyor’s report) to trustee duties, which would fall to be investigated by the Commission.

Lack of knowledge of regime

8.183 Bircham Dyson Bell LLP were unconvinced that, given the lack of knowledge of the regime, replacing one regime with another is necessarily going to change anything; “if charity trustees and professionals are unaware of the current regime, it is not clear why they would be any more aware of its replacement”.

Indemnity insurance

8.184 Cluttons LLP noted that qualified professionals are required to have professional indemnity insurance, which reduces risks to the charity assets. In the Bayoumi case,
advice was clearly required, and had the transaction been valid, the charity’s only recourse would have been against the surveyor who advised on the sale.

**Alternative suggestions for reform**

**Changing the transactions to which Part 7 applies**

8.185 Bates Wells Braithwaite thought that an obligation to obtain advice from someone reasonably believed to be competent (as for leases of up to seven years) would be acceptable for a significant number of transactions. They suggested that such an obligation should be the default requirement, but that for leases over seven years and freehold disposals above a certain amount, the requirement for a RICS report should apply.

8.186 The ILM suggested excluding residential property from the Part 7 advice requirements.

**The CLA’s suggested compromise**

8.187 As noted above, members of the CLA working group did not agree on reform to the existing regime and therefore they suggested the following compromise.

1. Charities should be given a general power to dispose of land, which would need to be consistent with section 6 of the Trusts of Land and Appointment of Trustees Act 1996, and subject to any consent requirements in the charity’s constitution.

2. The power should be subject to:

   (a) the trustees deciding that “the disposal is on the best terms that can reasonably be obtained for the charity”, which would reflect:

      (i) the financial consideration payable;

      (ii) any other financial advantages from the disposal;

      (iii) any furtherance of the charity’s purposes from the disposal;

      (iv) the reputational implications of the disposal; and

      (v) the tax implications of the disposal.

   (b) a requirement to obtain the advice of a qualified surveyor in the case of disposals of “substantial interests in land” – which the CLA called “regulated disposals” – such as the transfer of a freehold or the grant or assignment of a long lease at a nominal or low rent (or a contract for such disposals). The surveyor should provide advice on the following matters, unless the surveyor considers the factor to be irrelevant:

      (i) the value of the land for its current use, including the effect of existing interests affecting the land;
whether, in light of previous advertising and offers made, any further advertising would be appropriate; and

whether the value of the land could be enhanced by alterations, division or sale with other land.

(c) the advice requirement proposed in the Consultation Paper, in the case of other disposals such as the grant of an easement, wayleave or assignment or surrender of rack-rented leases.

(3) The requirements should be capable of delegation.

(4) Retention of the certification regime, supported by restrictions entered by HM Land Registry.

8.188 For mortgages, the CLA thought that the current advice requirements worked well, "given the potentially serious consequences especially in respect of operational property, in the case of default". They thought that charities should be given a general power to mortgage land (in place of the current prohibition), subject to existing consent requirements and to a proviso that they obtain advice.

A certification regime

8.189 Bircham Dyson Bell LLP, and some members of the CLA, suggested a certification regime, which would retain the Land Registry restriction. A certificate should be provided which confirms that the trustees have power to enter into the transaction and that the trustees have complied with their duties, including their duty to manage conflicts of interest. The requirement for a certificate would alert trustees and professionals to the existence of trustees' duties, and they would then be referred to guidance. The guidance would set out their duties in more detail, and would give examples of the different sort of advice that ought to be obtained in different situations. The certificate should be given by the trustees or by the charity itself (if it is a corporate body), and it should be possible to delegate the giving of the certificate. Alerting trustees to their duties and explaining them in guidance, rather than providing a fixed framework, is more likely to assist trustees (particularly of smaller charities) to comply with their duties. Bircham Dyson Bell LLP's proposals – like the current regime – "would not prevent every act of wrongdoing" but would "increase general awareness and knowledge, with a view to thereby reducing potential wrong-doing".

8.190 Withers LLP made a similar suggestion. There should be a statutory obligation to consider Charity Commission guidance on the disposal of land, perhaps combined with our proposed duty to take advice. The requirement for certification (and the restriction in the register) should be retained, but the certificate should instead state that the trustees have complied with the statutory requirement to consider the Commission's guidance. The guidance would cover connected persons, by giving non-exhaustive examples to encourage trustees to be alert to their overriding duty to be alert to conflicts of interest. The certificate should be capable of being given by the trustees who are required to sign the contract or the disposition. For simplicity, the certificate should be given in the contract and the disposition. Their proposed certification regime would ensure trustees have the fundamental issues brought to their attention (disposals to connected persons, obtaining the best price, and taking
account of the charity’s overall purposes), whilst simplifying the bureaucratic process. It is “lighter touch”, but retains the “essential regulatory framework and the protection that affords”.

8.191 Stone King LLP suggested, in a similar vein, retention of the certificate (and restriction) but including advice requirements that were more akin to the lighter-touch advice requirements for mortgages.

8.192 Similarly, Veale Wasbrough Vizards LLP wanted to retain the certification regime for the new duties that we had proposed.

Notifying the Charity Commission

8.193 The Association of Church Accountants and Treasurers thought that the existing regime should continue, but that trustees should have the option of following the new duties that we proposed on condition that they notified the Charity Commission of their proposal, with exchange of contracts being conditional on the Commission not objecting to the transaction.

Minimum uncontroversial reform?

8.194 Bircham Dyson Bell LLP, whilst in favour of de-regulation, sought to identify various aspects of the existing regime that could be improved, and which they suggested should be uncontentious but would “alleviate many of the concerns with the current regime”.

(1) Change “disposition” to “disposal”, and defining “disposal”.

(2) Remove some disposals from the requirement to obtain a surveyors’ report.

(3) Simplify the section 119(1) requirements to “remove the doubts over when the surveyor needs to be instructed and on what they are required to advise”.

(4) Making clear that trustees’ obligations can be delegated.

(5) Making clear that employees and trustees can give relevant advice.

(6) Clarifying section 117(3)(c)(ii), for example, with “is made in furtherance of the objects of the first-mentioned charity”.

(7) Excluding from the definition of connected persons (see above):

(a) a charity’s wholly-owned subsidiary;

(b) a donor to the charity; and

(c) a trustee who is not also a charity trustee.

(8) Where the charity is a corporate body, replacing the requirement for the trustees to give the certificate with a requirement that the charity give the certificate.
(9) Clarification that giving the certificate can be delegated, for example, by section 333.

(10) Replacing or repealing the 1992 Regulations, so that the reason for a surveyor’s report is clearer.

(11) Repealing section 121 requiring public notice in the case of designated land.

8.195 Bircham Dyson Bell LLP also wanted to include a reference to managing conflicts of interest in the certificate, and the definition of “connected person” to be changed, to remove the confusion over the different definitions elsewhere in the Act.

A de minimis threshold for obtaining advice

8.196 Some consultees suggested setting a financial threshold for transactions, below which the trustees would not have to obtain advice.\(^417\) Gerald Eve LLP saw the argument for a de minimis threshold for acquisitions and disposals below £50,000. Church Growth Trust suggested a de minimis threshold of £10,000. The Methodist Church suggested a threshold of £5,000 to remove the grant of easements and wayleaves.

8.197 Other consultees expressed their view that a de minimis threshold would not be appropriate as, for example, a small strip of apparently insignificant land might have unknown (potential) ransom value.\(^418\) Val James said an easement could be granted for nominal consideration without the trustees appreciating the effect on the value of the land in the long term, for example, hindering future development.

Ad hoc exemption granted to certain charities

8.198 Monsignor Nicholas Rothon commented that, before 1992, it was possible to obtain from the Charity Commission an exemption certificate – which allowed the named charity to avoid the advice requirements – lasting for 10 years. He suggested the reintroduction of such a procedure which would allow those organisations who find the current advice requirements unnecessarily burdensome to avoid them, whilst at the same time the Charity Commission would check whether the charity had appropriate safeguards in place to avoid risks of sales at an undervalue before granting exemption. The Churches’ Legislation Advisory Service and Charities’ Property Association made similar comments. Stone King LLP pointed out that charities can already obtain schemes from the Charity Commission for bespoke authorities to relax the usual rules.

The adviser

8.199 Some consultees wished to retain the requirement to obtain advice, but to expand the category of persons who could give advice to charities.

In-house advisers

8.200 The Landmark Trust thought appropriate advice could be given by an in-house RICS surveyor. Similarly, the CLA, Bircham Dyson Bell LLP, Trowers and Hamlin LLP and Prof Gareth Morgan said that, in any reformed regime, it should be clear that advice

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417 See n 384.

418 Monsignor Nicholas Rothon; Val James.
can be obtained from an employee of the charity, or a charity trustee, subject to management of any conflicts of interest. By contrast, Gerald Eve LLP questioned whether charity trustees would be able to provide objective advice, and added that they could not be expected to provide technical advice about (for example) non-assignability clauses, clawback or overage.

**CAAV members**

8.201 The CAAV explained their membership criteria and that their members – whilst not necessarily RICS surveyors – had expertise in rural and agricultural land. Their members advise charities on the acquisition, management and disposal of land, ranging from small charities with small property interests (such as a village hall or playing field) through to large charities with significant property portfolios. It suggested that the current limitation to RICS surveyors was “prescriptive and inflexible” and a limitation on the advice available to charities. Whilst it wished to see a continuing requirement to obtain advice, it agreed that trustees should have flexibility – supported by Charity Commission guidance – concerning who should provide that advice.

**Guidance**

8.202 Many consultees commented on the need for user-friendly Charity Commission guidance on land transactions. Whatever regime is devised, the CLA and Bircham Dyson Bell LLP called for detailed guidance from the Charity Commission, which should be subject to consultation.

8.203 Stone King LLP said it would be important to have good guidance on what is reasonable advice, otherwise “trustees will start spending as much on checking with their lawyers as they did on surveyors”. Similarly, the Methodist Church emphasised that trustees would need to be supported by Charity Commission guidance to assist them in complying with their duties. The guidance should “stress that the responsibility rests with the trustees and is not just a tick box exercise”.

8.204 The National Trust said that, if the advice requirements were reduced, it would be crucial for the Charity Commission to provide clear guidance about the level of support and advice trustees should seek, since inexperienced trustees will not be aware of the different advice that is available and the appropriate adviser for different types of land. The guidance should indicate the circumstances in which trustees should take advice from an experienced and qualified professional, and the matters that the advice should cover, such as marketing, alteration and subdivision.

8.205 Stewardship thought that, if our proposal was introduced, trustees should be required to have regard to Charity Commission guidance which should spell out trustees’ duties, provide guidance on the selection of appropriate advisers, and outline pitfalls and matters affecting valuation.

**Delegation**

8.206 Various consultees commented on delegation in three contexts.

**Decisions to dispose of land**

8.207 Bircham Dyson Bell LLP and Trowers and Hamlins LLP thought it important that management of land should be capable of being delegated within suitable delegation
provisions in the charity’s constitution. Trowers and Hamlins LLP said that some charities with large land holdings are routinely acquiring and disposing of land; “smaller, routine transactions ought to be capable of delegation in order to permit the trustees to remain focussed on matters of strategic importance”.

8.208 The ILM emphasised the importance of trustees being able to delegate to staff decisions to sell property, including consideration of surveyors’ advice. Its survey of its members revealed that in only 13% of charities did trustees consider reports prior to a property being marketed, and in only 33% of charities do the trustees consider reports before exchange of contracts. In only 19% of charities did the trustees make the decision whether or not to accept an offer. 86% of respondents thought that legacy officers were better placed than trustees to make decisions about the sale of legacy property, and 98% of respondents said that trustees should be able to delegate all decisions relating to the sale of legacy property. In practice, most respondents said that decisions were already delegated and “the involvement of trustees in property disposals is kept to a minimum”.

Decisions about what advice to obtain

8.209 Cancer Research UK thought the trustees ought to be able to delegate the decision as to whether or not to obtain professional advice. Withers LLP thought there should be an express power for trustees to delegate their duties to a committee. The National Trust said that Part 7 should make clear that trustees can delegate obtaining a surveyors’ report.

Giving Part 7 certificates

8.210 Consultees’ comments about delegation of the giving of Part 7 certificates are set out in paragraph 8.286 and following below.

Disposal of property in order to achieve the charity’s purposes

8.211 Some consultees noted an overlap between certain land transactions and the new social investment power in the Charities (Protection and Social Investment) Act 2016. Stone King LLP said the current “largely polar nature of land transactions” did not fit comfortably with social investment; without Charity Commission consent, “they are either purely charitable or purely investment”.

8.212 Sustrans and Railway Paths explained that Part 7 did not properly cater for disposals which are made to achieve the charity’s purposes. Their purpose is to provide cycle paths so land is their “stock-in-trade”. They often acquire land for the construction of a cycle path and then dispose of the land to a local authority for a nominal sum. The purchase or construction work is often funded by the local authority, and the disposal is in the charity’s interests since it relieves the charity of maintenance obligations and ensures that the path can be used by the public in perpetuity. But unless the charities can show that the maintenance obligations are equal to the value of the land, they might not be able to comply with Part 7.

8.213 They therefore said that the requirement to obtain the best terms from a land transaction (in section 119(1)(c)) should be removed, since the purpose of the disposal may be to achieve the charity’s purposes. Alternatively, the exemption in section 117(3)(c) for dispositions to other charities should be extended to permit
dispositions to public bodies in furtherance of the charity's purposes. They acknowledged that it would be possible to obtain Charity Commission authorisation to these transactions, though they thought the process would be complex and time-consuming and, in any event, it would be impractical since it would be making several applications each week which would place a significant burden on the charities and the Charity Commission.

8.214 Similarly, Val James thought that the limitation of section 117(3)(c) to below-market value transactions was anomalous; if a charity sells to another charity (in pursuit of its purposes), it should not matter that the transaction is at full value.

8.215 Veale Wasbrough Vizards LLP said that the Part 7 regime does not cater for charities deliberately deciding to dispose of land at an undervalue where restrictions are incorporated which require the land to be used for the charity's objects, but where the purchaser is not a charity (so not falling within section 117(3)(c)). They pointed out that there would be nothing to stop a cash grant from being made, but if the trustees instead decide to dispose of land, they find it difficult to obtain a surveyor’s report or Charity Commission order. They criticised an “overly restrictive” interpretation of Part 7 which equates “best terms” with “best financial terms”, which prevents charities from considering their charity's purposes. Whilst the Charities (Protection and Social Investment) Act might confer on charities a power to grant leases at below-market rent, the Part 7 requirements (unless reformed) “are likely to have the effect of preventing charities from exercising the new power”. Similarly, the CLA thought it important that the requirement was for “best terms” rather than “best price”, since a charity might dispose of land for social impact reasons.

Mortgages

8.216 Francesca Quint said:

Because the advice required on the grant of a mortgage of charity land may not always be entirely financial, a more flexible requirement for obtaining advice would be preferable. For example, the question whether a loan is necessary or whether it is reasonable to grant a mortgage having regard to the charity's purposes may involve legal, actuarial or property advice as well or in addition to financial advice. In my experience the advice obtained is often somewhat artificial and treated as a mere formality.

8.217 By contrast, Bates Wells Braithwaite wanted to retain the existing requirements for mortgages, which “work well in practice and do not need changing in any way. Any alteration of these would cause confusion instead of focussing the trustees' attention on the key points to be considered when charging a property which are clearly specified in section 124”. Similarly, Bircham Dyson Bell LLP and Stewardship generally supported the current regime for mortgages.

8.218 Veale Wasbrough Vizards LLP said that section 124 advice is usually from the finance director or other employee of the charity, so external professional costs are often minimised. Trustees might go to someone external when there is risk involved, and they want advisers with indemnity insurance. They said that it is unclear whether employees of a charity can exclude professional liability for the advice that they give.
8.219 Some CLA members queried whether the regime should apply in respect of mortgages to secure the repayment of a grant (in the event that the conditions of the grant are not met), since the assumption is that a loan will be repaid but that a grant will not. Some considered it illogical for the advice requirements to apply to mortgages to secure grants, while others thought the advice requirement was just as important since “the results for the charity of default can be the same as for a loan”. They suggested that the drafting of the statute could be changed to recognise the difference.

Other comments

8.220 The CLA queried whether the reference to “the status of the charity” in section 124(3)(b) was necessary.

Leases

8.221 Under the Part 7 regime, surveyors’ advice is not required for the grant of leases of up to seven years. Gerald Eve LLP thought the threshold should be reduced to five years, so that leases of over five years require a surveyors’ report. They said that commercial leases were increasingly shorter; “the current threshold would now appear out of date with the majority of the market seeking 5 year leases for commercial property”. They explained the risk of sales of leases without proper advice.

8.222 Val James said it would be helpful if the section 120 lighter touch regime for leases could be extended to surrenders of leases for a similar period.

Other comments

Registered social landlords

8.223 The Welsh Government referred to its power to consent to disposals of land by registered social landlords (“RSLs”) under section 9 of the Housing Act 1996. The Welsh Government has issued a general consent order that requires RSLs to achieve best value (and obtain a surveyor’s report) when acquiring or disposing of land funded by the Welsh Government. The Welsh Government wanted to retain its power under section 9 under any reformed regime.

Consultation Question 42.

We provisionally propose that the requirements in section 121 of the Charities Act 2011 concerning advertising proposed disposals of designated land and considering any responses received should be abolished.

Do consultees agree?

[Consultation Paper, paragraph 8.89]
39 consultees responded to this question.\(^{419}\)

1. 28 consultees agreed;\(^{420}\)
2. 6 consultees disagreed;\(^{421}\) and
3. 5 consultees expressed other views.\(^{422}\)

**Agreement**

The Institute of Chartered Secretaries and Administrators summarised the difficulties of the existing requirements:

1. trustees’ must make decisions in the charity’s best interests and such decisions might not be better informed with the input of others;
2. even if consultation takes place, feedback does not have to be followed;
3. a consultation requirement places an additional administrative cost on the charity; and
4. it is indiscriminate to impose an obligation to consult in respect of land disposal, but not other high value assets of a charity.

The University of Liverpool CL&PU did not think the existing requirements “add anything but time and expense to effective dealing with designated land”. They thought the existing duties provided sufficient safeguards.

The CLA said:

We understand the main purpose of the provisions to be to allow members of the public who may feel interested in such a disposal to express any concerns about the disposal. We believe that this potentially creates an expectation that their

\(^{419}\) Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; University of Liverpool CL&PU; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Cluttons LLP; Stone King LLP; RICS; Charity Commission; Cancer Research UK; Independent Schools Council; Withers LLP; Society for Radiological Protection; Trowers and Hamlins LLP; Legacy Link; Lawyers in Charities; ACAT; Canal & River Trust; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association; Val James; RSPCA.

\(^{420}\) Institution of Civil Engineers; Francesca Quint; Landmark Trust; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; University of Liverpool CL&PU; Guy’s and St Thomas’ Charity; Lord Hodgson; Churches’ Legislation Advisory Service; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; RICS; Charity Commission (which did not object); Cancer Research UK; Independent Schools Council; Legacy Link; Lawyers in Charities; ACAT; National Trust; Veale Wasbrough Vizards LLP; Charities’ Property Association; Val James; RSPCA.

\(^{421}\) Action with Communities in Rural England; Bates Wells Braithwaite; Cluttons LLP; Withers LLP; Society for Radiological Protection; Prof Gareth Morgan.

\(^{422}\) Geldards LLP; Institute of Chartered Secretaries and Administrators; Trowers and Hamlins LLP; Canal & River Trust; Stewardship.
representations may result in abandonment of the transaction. However, in reaching their decision, the trustees should have considered all the relevant issues. We consider it will be a rare case where the notification provisions draw to the trustees’ attention a relevant issue which had escaped them previously, such as to cause the trustees to change their decision. As noted in the Consultation, the trustees’ duty is to decide how the charity’s land can best be used to serve its charitable purposes, not how public opinion suggests the land should be used.

8.228 Bircham Dyson Bell LLP said advertising “tends to elicit very little response” and in their experience had never led to a change of decision. Val James said that in her experience the regime was “not … at all productive”. Stone King LLP said “its toothless nature and the fact that it is more honoured in the breach means we agree”. They suggested that Charity Commission guidance should encourage consultation in relevant cases.

8.229 The Independent Schools Council said “public opinion is important but we consider that a charity’s trustees are best placed to make judgments about notice and consultation”.

8.230 The National Trust said it had Charity Commission dispensation from the section 121 requirements when granting easements or leases if public use of the asset is unlikely to be diminished. It agreed that advertising was not necessary in all cases.

8.231 Veale Wasbrough Vizards LLP noted that disposals of designated land could be “extremely contentious”. Removing the requirement for notice means that the community might not become aware of a disposal until after it has completed, at which point it would be too late to prevent the disposal. They nevertheless agreed with our proposal, provided trustees are given guidance that they have a duty to consider consultation with beneficiaries and the community as part of the decision-making process. “Public opinion is important, but we believe that a charity’s trustees are best placed to make judgments about whether notice and consultation are in the charity’s best interests.”

8.232 Stewardship thought the statutory requirement could be replaced by guidance to remind trustees to consider how the land can best be used to serve the charity’s purposes.

Disagreement

8.233 The Institute of Chartered Secretaries and Administrators – whilst equivocal about removing the requirement – explained the advantages of consultation:

(1) it can help trustees to make better decisions;

(2) it avoids reputational and financial risk; and

(3) it “provides an opportunity to engage with stakeholders and to ‘take them’ with the trustees”. A lack of engagement “could foster an adverse reaction which will have a bigger impact on the charity, and could cause the trustees additional administrative challenges”.
Action with Communities in Rural England explained its experience of working with rural communities and facilitating consultation about community space. It emphasised the importance of public consultation in ensuring that residents know what is happening in their community and to their assets and that they have a say in what happens to those assets. The current requirements give the community warning when trustees propose to sell land that the community uses, and allows public scrutiny of the proposals.

Action with Communities in Rural England gave some examples of cases where public consultation was important.

1. One decision to sell a parish hall had not been preceded by consideration of alternative uses, such as leasing to a community group. When the community discovered the proposal, a meeting was arranged for discussion of an alternative courses which would retain the hall for community use.

2. Another village hall charity intended to sell a one-metre strip of land to a neighbour. When the trustees discovered that they had to comply with (what is now) Part 7, they thought more carefully about the value of the land and whether the wider community was content with the disposal. “The transaction was then transparent and the trustees protected from future trustees questioning whether the decision was in the best interests of the charity and asking what the neighbour gained from the charity.”

Bates Wells Braithwaite noted that consultation notices rarely result in objections being received and that, even if they are, trustees need only take them into account. They concluded that “either section 121 notices serve little purpose or they are not reaching the attention of those who may be affected”. They thought that the information in the notice, and the manner in which notice is given (currently the subject of Charity Commission guidance) may not give the public sufficient information and may not reach those affected.

In the Consultation Paper, we said that consultation was unnecessary since trustees who proposed to use the sale proceeds otherwise than to purchase replacement property would require a cy-près scheme, which itself would be the subject of public consultation. Bates Wells Braithwaite did not agree that this supported the removal of section 121 public notice, since cy-près schemes do not always require consultation; section 121 is the only mechanism that requires public notice of the sale of designated land. They thought public notice should continue, but that the Charity Commission’s guidance concerning the manner in which notice is given (currently the subject of Charity Commission guidance) may not give the public sufficient information and may not reach those affected.

Withers LLP said “many charities of local ‘public’ amenity assets are administered by local authorities. Those authorities frequently confuse their roles as local authority on the one hand and as a charity trustee on the other…” It is therefore important that the advertising requirements should be retained or strengthened. Any lack of response to notices “often reflects the obscurity of the advertisement”, and Withers LLP suggested notices should be displayed prominently for longer.

Alternatively, they suggested a legal requirement for public notice to be given of draft schemes which would provide for the sale of designated land.
Mid-way point

8.239 Anthony Collins Solicitors LLP said that most disposals of designated land are uncontentious so the current law “merely creates unnecessary costs”. They suggested a compromise of requiring trustees to carry out such consultation as they reasonably believe is appropriate in the circumstances which “would still allow for comeback against trustees who failed to consult because they expected the disposal to be challenged”. Crucially, however, they acknowledged that “ultimately the trustees can ignore consultation responses in any event”.

8.240 Cluttons LLP said “disposals can be very controversial”, but they agreed that the requirement could be replaced by a requirement for trustees to justify why advertising is not required.

8.241 Geldards LLP thought that, after obtaining advice on a transaction, trustees should be able to decide not to advertise “if they consider that it is not in the charity’s best interests to do so”.

Other views

8.242 Trowers and Hamlins LLP was ambivalent about our proposal, preferring to allow charities to apply to the Charity Commission for exemption from the section 121 requirements. They were aware of “several smaller charities who have been rescued from sales at an undervalue by the requirement to advertise”, though avoiding sales at an undervalue is the purpose of the surveyor’s report and not the advertising requirements.

8.243 The Canal & River Trust has often disposed of designated land and, despite having a direction exempting it from section 121 for certain classes of disposals, it has had to give a number of public notices but “there have only been responses to a few of [them]”.

8.244 The Canal & River Trust drew analogies with the connected persons regime; a statutory procedure can be helpful, but it can also risk charities believing that the procedure will always ensure that the disposal is the best use of the property. It also said that disposals of designated land often involve the pursuit of a charity’s purposes. For example, it grants rights to build bridges over waterways. It seems unnecessary to comply with section 121 in such cases. It suggested limiting the section 121 requirements to outright disposals, and not granting rights (such as building bridges over waterways and discharging water into waterways).

Interaction with change of purposes

8.245 The University of Liverpool CL&PU said the existing requirements created a “temptation to treat designated land as land that can readily be sold …; in reality a cy-près scheme is needed to dispose of such land”.

8.246 Francesca Quint said the question whether designated land could be sold is subject to an additional restriction, namely whether it is consistent with the purposes of the charity.

There remains uncertainty over whether the sale of designated land is permissible in the absence of an express or clearly implied power of sale or the establishment of a
scheme to enable sale to take place. Where the main purpose of the charity is to provide (for example) a recreation ground or a set of almshouses and the trustees propose to change the purpose, and the charity’s main asset is the designated land itself, it is generally considered necessary to seek a scheme before selling the land if the trusts contain no outlet for the proceeds of such a sale, on the basis that the statutory power conferred by ToLATA is exercisable only ‘for the purposes of the trust’ and if the purpose is the provision of the land for charitable use the sale is not a means of furthering that purpose. Such proposals can be extremely controversial locally and the Charity Commission is usually careful to ensure adequate public consultation.

Consultation Question 43.

We invite the views of consultees as to whether the advice requirements that we propose governing dispositions by non-exempt charities should be extended to dispositions by exempt charities.

[Consultation Paper, paragraph 8.91]

8.247 31 consultees responded to this question.424

(1) 16 consultees thought that the advice requirements (current or new) should apply to exempt charities;425
(2) 7 consultees disagreed;426 and
(3) 8 consultees expressed other views.427

Should apply to exempt charities

8.248 Consultees who thought the advice requirements should extend to exempt charities generally did so for the sake of consistency. The University of Plymouth, as an exempt charity, said “there is no logical reason for treating exempt charities more favourably than registered charities”.

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424 Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; CL&PU (University of Liverpool); Lord Hodgson; University of Durham; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Cluttons LLP; Stone King LLP; Charity Commission; Cancer Research UK; Withers LLP; Trowers and Hamlins LLP; CAAV; Legacy Link; University of Cambridge; Lawyers in Charities; University of Oxford; ACAT; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; Val James; RSPCA.

425 Institution of Civil Engineers; University of Plymouth; Lord Hodgson; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Cluttons LLP; Cancer Research UK; Withers LLP; CAAV; Lawyers in Charities; ACAT; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

426 Geldards LLP; University of Birmingham; CL&PU (University of Liverpool); Stone King LLP; Legacy Link; University of Oxford; Val James.

427 Anthony Collins Solicitors LLP; University of Durham; Churches’ Legislation Advisory Service; CLA; Bircham Dyson Bell LLP; Charity Commission; Trowers and Hamlins LLP; University of Cambridge.
8.249 Prof Gareth Morgan thought exempt charities should be subject to the same framework “unless there are parallel requirements under other legislation”. The Association of Church Accountants and Treasurers thought that principal regulators could relax their own requirements in the knowledge that exempt charities were complying with the Part 7 regime.

8.250 Lord Hodgson made a more general comment about the regulatory position of exempt charities; he feared that “the inadequacies and inconsistencies of the present regime will become apparent (probably following some scandal)”. But he said that different regulatory regimes for land disposal and acquisition for exempt charities was not sensible, so supported an extension of any relaxation to exempt charities.

8.251 University of Durham said that the advice requirements should only apply to exempt charities if they were reformed as we had proposed; extending the current requirements to exempt charities “would be onerous for us to comply with”. Similarly, the University of Cambridge said the existing Part 7 requirement “would be unnecessarily onerous for a large charity” with its governance structure, but “there would be less justification for not applying the revised regime … to all charities”.

**Should not apply to exempt charities**

8.252 Geldards LLP did not think that the Charity Commission should have control over dispositions by exempt charities. The University of Birmingham noted that HEFCE had “produced regulation and guidance on land transactions, recognising the unique nature of the sector and the issues faced. University Estates departments have significant expertise, and therefore the current arrangements for exempt institutions are sufficient.”

8.253 Val James and Legacy Link said exempt charities generally have other controls, so extending the regime is unnecessary. Similarly, Stone King LLP said exempt charities usually have “pretty heavy regulation and oversight from other regulatory bodies”, but thought that some exempt charities might prefer our proposed “lighter touch” regulation to their existing regulation (such as academies under the Education Funding Authority approval regime).

8.254 The University of Oxford said that, “in the absence of evidence that exempt charities are acting inappropriately in relation to land transactions, we would not welcome additional obligations on exempt charities”.

**Other comments**

8.255 Anthony Collins Solicitors LLP thought that exempt charities should continue to fall outside the restrictions on dispossessions in Part 7 and instead rely on the other regulatory regimes that apply to them, subject to exempt charities having “other effective principal regulators. … Where an exempt charity does not have another principal regulator (for example industrial and provident societies which are not registered providers) then the advice requirements should apply since otherwise this group are outside any effective regulation.” Similarly, Trowers and Hamilins LLP agreed with the proposal, in so far as an exempt charity did not have a principal regulator. They emphasised that delegation was important; its housing association clients are exempt charities, and acquire and dispose of land regularly; “it is simply not practicable for every disposal to be considered by the charity trustees”.

8.256 The University of Liverpool CL&PU said in general it would be better to reduce the number of exempt charities rather than modify the law as it relates to exempt charities.

8.257 The CLA noted that some exempt charities would have their own regimes for land transactions. They said that issues about exempt charities being treated differently were not limited to the Part 7 regime and that they should not be addressed piecemeal. Rather, they suggested that “the question of the status of exempt and excepted charities is one for more in-depth consideration in a later review”. Nevertheless, guidance could suggest that it is good practice for exempt charities, in the absence of alternative regimes governing land disposals, to follow the statutory regime. Bircham Dyson Bell LLP made the same comments.

8.258 The Charity Commission did not object to the proposal, but said that it might be unnecessary if alternative regimes govern disposals and acquisitions.

Consultation Question 44.
We invite the views of consultees as to whether the new advice requirements that apply to disposals of charity land should also apply to the acquisition of land by charities.

[Consultation Paper, paragraph 8.95]

8.259 42 consultees responded to this question.428

(1) 27 consultees thought that the advice requirements (current or new) should apply to the acquisition of land by charities;429

(2) 12 consultees did not;430 and

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428 Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; Cambridge Colleges; University of Liverpool CL&PU; Guy’s and St Thomas’ Charity; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Cluttons LLP; Stone King LLP; RICS; Charity Commission; Independent Schools Council; Withers LLP; Society for Radiological Protection; Trowers and Hamlins LLP; CAAV; Legacy Link; Lawyers in Charities; Wellcome Trust; University of Oxford; Gerald Eve LLP; ACAT; Canal & River Trust; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association; Val James; RSPCA.

429 Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Landmark Trust; Colleges of the University of Oxford; Anthony Collins Solicitors (assuming new advice requirements applied); University of Plymouth; Cambridge Colleges (assuming new advice requirements applied); University of Liverpool CL&PU (current requirements); Action with Communities in Rural England (current requirements); Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Cluttons (current requirements); Stone King LLP; RICS; Charity Commission; Independent Schools Council; Society for Radiological Protection; CAAV; Legacy Link; Gerald Eve (current requirements); ACAT; Canal & River Trust (new requirements); National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA.

430 Geldards LLP; Sustrans and Railway Paths; Lord Hodgson; Churches’ Legislation Advisory Service; Bircham Dyson Bell LLP; Withers LLP; Trowers and Hamlins LLP; Lawyers in Charities; University of Oxford; Stewardship; Charities’ Property Association; Val James.
3 consultees expressed other views.\footnote{Guy’s and St Thomas’ Charity; CLA; Wellcome Trust.}

**Advice requirements should apply to acquisition of land**

8.260 Prof Duncan Sheehan thought advice requirements should mirror those under the Trustee Act 2000 for investments more generally, and that the same duties should apply to both the acquisition and disposal of charity land. Francesca Quint thought the advice requirements should apply to the acquisition of land “otherwise trustees may misunderstand the scope of their duties”. She added that the principle “also applies to significant assets other than land”.

8.261 The Society for Radiological Protection and National Trust were in favour of extending the advice requirements for the sake of consistency with disposals. Consultees in favour of extending the advice requirements to the acquisition of land noted that the risks of acquiring land at an overvalue were similar to the risks of disposing of land at an undervalue.\footnote{University of Plymouth; Institute of Chartered Secretaries and Administrators; Anthony Collins Solicitors LLP; Cluttons LLP; Gerald Eve LLP; CAAV; RICS; Canal & River Trust.} For example, the University of Plymouth said “acquisitions are potentially as important to a charity’s interest as disposals and so they should be treated in the same manner”. Some consultees noted that acquiring land – unlike disposing of land – can additionally involve the acquisition of a liability.\footnote{Anthony Collins Solicitors LLP.}

8.262 Bates Wells Braithwaite said that whilst obtaining advice is good practice, many charities purchase land without obtaining advice. They, and the National Trust, did not think that the possible delays associated with obtaining advice should be a problem, provided advice is sought at the time an offer is accepted. By contrast, the Canal & River Trust thought the applying the existing advice requirements “might lead to delays which could prejudice a charity’s ability to complete an acquisition”.

8.263 The Charity Commission said decisions on both acquisition and disposal “are subject to similar trustee duties and it is consistent with this for the advice duty to apply to both”.

8.264 Cluttons LLP said “it causes no end of confusion that charities can buy land without advice but cannot sell”.

8.265 Gerald Eve LLP said the current system for acquisitions “is flawed” in not requiring trustees to obtain advice; they wanted to apply the existing Part 7 requirements (and obligation to obtain a RICS surveyors’ report) to acquisitions.

**Advice requirements should not apply to acquisition of land**

8.266 Some consultees commented that the existing prohibition (subject to obtaining appropriate advice) on dispositions could be enforced easily by the current practice of restrictions being entered on the register of title, whereas there is no similar practical means to enforce a prohibition (subject to dispensation following obtaining appropriate advice) on the acquisition of land by charities. That very practical consideration led them to conclude that advice requirements should not be imposed in respect of the
acquisition of land. For example, Withers LLP said that, whilst it would be “simple … to mirror the certification requirements … so that they have to appear in the transaction documents”, in the absence of the restriction mechanisms it would not be such a practical safeguard.

8.267 Lord Hodgson supported deregulation for land disposals, but thought that the general duties on trustees provided “an adequate framework for land acquisition – without the need for further statutory provisions”. He said “the major challenge in the present regulatory regime is not the different treatment of acquisition as opposed to disposals, but the expensive, time consuming and often inappropriate requirements of the present disposal regime”.

8.268 The Churches’ Legislation Advisory Service agreed with our comment in the Consultation Paper that any delay caused by advice requirements might be felt more acutely with acquisitions than disposals. It concluded that a requirement to obtain advice, “however logical it may seem, would merely add unnecessarily to the burdens of trustees”. It said its larger members are competent to make the decisions for themselves, and its smaller members make so few acquisitions that “there is hardly any point in making them seek advice”.

8.269 Stewardship acknowledged the risk of charities acquiring land at an undervalue, and the inconsistency in the legal treatment of acquisitions and disposals. But it said that deals to purchase land are often conducted in competitive bidding environments and trustees may need to move quickly, particularly if other bidders are better-resourced commercial buyers. Moreover, suitable properties may be few and far between; trustees may be “willing to pay ‘over the odds’ to secure the building or pay a value that is sharply at odds with the value for alternative uses”, such as churches seeking meeting venues and wishing to purchase a former cinema or community hall. Provided trustees do so with their eyes open, with appropriate advice, and for good reasons, they should not be criticised. Stewardship concluded that, whilst trustees ought to take advice on acquisition, it should be left to Charity Commission guidance rather than made a legal requirement.

8.270 Despite the logic of extending the regime to acquisitions, the Charities’ Property Association doubted it was appropriate owing to the risks of charities’ offers being declined if the transaction will take longer. In addition, they raised concerns about how advice could be obtained if property was being purchased at auction; the cost of commissioning a report in advance would be wasted if the charity was then outbid at auction. A light-touch regime for acquisitions would not affect most members of the Charities’ Property Association who have sufficient in-house expertise not to need external advice. “But if a new regime were so light-touch that charity trustees generally could decide not to take external advice as a matter of course, would there be any point in having such a requirement at all?”

8.271 Val James said the difference between the legal requirements for acquisition and disposal has “never made sense”, and she knew of charities paying an inflated price on acquisition, even with advice. However, “on balance I would live with the inconsistency rather than apply the proposed requirements to acquisitions”.

8.272 Trowers and Hamlins LLP, Lawyers in Charities and the University of Oxford thought existing trustee duties are sufficient. Bircham Dyson Bell LLP, who favoured general
de-regulation, thought that guidance was sufficient to enable trustees to identify and manage the risk of land acquisition.

**Other views**

8.273 Guy’s and St Thomas’ Charity said that, whilst its best practice is to produce an acquisition report, it should not be required to do so.

8.274 The CLA thought the answer depended on the rationale for applying a different regime to charity land. If the rationale is to protect against the difficulties of valuing charity land, then they saw the logic of creating an advice requirement (along the lines suggested in the Consultation Paper) for acquisitions since “a bad bargain can be made in an acquisition, just as in a disposal”, but was “ambivalent” as to whether advice requirements should apply on acquisition. If introduced, the CLA wanted to be clear that it did not impose an additional burden on trustees, but rather place the current advisory position on a statutory footing. They added that issues on acquisition were different from disposal, since the charity will have to maintain the property after acquisition. Advice should therefore cover suitability for purpose and potential liabilities.

8.275 The Wellcome Trust saw the logic of extending advice requirements to the acquisition of land, and did not object to extending the new advice requirements to acquisition, but strongly opposed extending more formal requirements to acquisition.

**Acquisition of property in order to achieve the charity’s purposes**

8.276 Some consultees noted an overlap with social investment. The University of Oxford added that any “best price” test might ignore non-financial benefits to a charity of acquiring a given site.

8.277 Sustrans and Railway Paths said that they acquired land for their specific charitable purpose, namely the provision of cycle paths. There may be no alternative routes, in which case the charities might pay over the market value as special purchasers; conversely, they might pay less because the landowner supports the charitable cause. “In either case, obtaining advice on value has little benefit other than providing a benchmark against which to compare the agreed terms.” They thought that requiring professional advice was unnecessary, saying the decision should be left to trustees taking account of the charity’s particular circumstances. They criticised the Charity Commission’s strong recommendation in its guidance, *Acquiring Land (CC33)*, to obtain such advice in the case of acquisitions; it is too detailed and too prescriptive.
Consultation Question 45.

We provisionally propose that if the Part 7 requirements are not amended, or are replaced with other requirements non-compliance with which will render the transaction void, then a purchaser should be protected by a certificate, deemed conclusively to be correct, in the contract that the statutory requirements have been complied with.

Do consultees agree?

[Consultation Paper, paragraph 8.109]

8.278 34 consultees responded to this question.434

(1) 30 consultees agreed;435

(2) none disagreed; and

(3) 4 expressed other views.436

Agreement

8.279 Bircham Dyson Bell LLP said the existing situation could make purchasers less inclined to deal with charities. Trowers and Hamllins LLP said a certificate in the contract would be helpful, since they had experienced difficulties in persuading mortgagees that the statutory provisions had been complied with. Similarly, the University of Liverpool CL&PU thought purchasers should be protected under a contract, which would “facilitate charity land transactions”. “The intervention of the law is as to whether land should be bought or sold, not as to the technical rules governing the disposition itself.”

8.280 Anthony Collins Solicitors LLP said:

434 Institution of Civil Engineers; Francesca Quint; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; University of Liverpool CL&PU; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Cluttons LLP; Stone King LLP; Charity Commission; Withers LLP; Trowers and Hamllins LLP; Legacy Link; Lawyers in Charities; ACAT; National Trust; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association; Val James; Institute of Legacy Management; RSPCA; HM Land Registry.

435 Institution of Civil Engineers; Landmark Trust; Geldards LLP; Sustrans and Railway Paths; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Cambridge Colleges; University of Liverpool CL&PU; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Cluttons LLP; Stone King LLP; Charity Commission; Withers LLP; Trowers and Hamllins LLP; Legacy Link; Lawyers in Charities; ACAT; National Trust; Stewardship; Charities’ Property Association; Val James; RSPCA.

436 Francesca Quint; Veale Wasbrough Vizards LLP; Institute of Legacy Management; HM Land Registry.
a certificate in the contract would be a sensible means to ensure that the charity has complied with its obligations at the point of being contractually committed and a purchaser should be protected by this and be able to rely on this as conclusive proof of compliance with the statutory requirements. The current anomaly between contracts and the document effecting the disposition is inappropriate and needs to be removed.

8.281 Val James said the buyer deserves the reassurance that everything needful has been done at exchange of contracts. She said the certificate should continue to appear in the transfer as well, since the contract will not be produced to HM Land Registry. Withers LLP made similar comments.

8.282 Bates Wells Braithwaite said that it was already necessary for such advice to be obtained prior to exchange of contracts, so requiring a certificate in the contract is appropriate for the buyer's protection.

8.283 The CLA said that uncertainty generally arises in the case of contracts with a much later completion date, such as contracts conditional on planning consent. The risk to the purchaser is "unfair" and "not well understood".

Partial agreement

8.284 Francesca Quint thought that the protection should exist if the contract contains the statement (that is already required) rather than imposing a further requirement that a certificate be included in the contract (which is not currently required). She said:

Under the current regime there is no requirement for a certificate, as opposed to a statement in the prescribed form, in the contract. I would be reluctant to see the required formalities at contract stage increased as appears to be envisaged here. It would in my view be preferable just to say that if the relevant statements are included in the contract a purchaser in good faith for money or money's worth is protected, and dispense with the certificate as such.

Certificate by the charity itself, if a corporate body

8.285 The CLA and Bircham Dyson Bell LLP wanted the certificate to be provided by the charity (if a corporate body), rather than the charity trustees.

Execution of certificates

8.286 Withers LLP wanted the persons who can sign the certificate to be the same as the persons who are required to sign the contract and disposition.

8.287 Bircham Dyson Bell LLP said that, where the certificate is given by the trustees, it should be clear that the trustees can delegate execution of the certificate (absent an express power) by a section 333 resolution. At present, HM Land Registry and the Charity Commission assume that section 333 permits delegation of giving the certificate, but Bircham Dyson Bell LLP said section 333 conferred authority to execute documents, not to give a certificate which appeared to be a personal duty on the trustees.

8.288 Veale Wasbrough Vizards LLP raised practical concerns about the execution of certificates. Charitable companies often authorise a senior employee to sign a
contract on their behalf in accordance with the execution formalities under the Companies Act 2006. Requiring a certificate in the contract would mean that the contract would have to be signed by one or more charity trustees, which could cause delay and an administrative burden.

8.289 Similarly, they criticised HM Land Registry guidance which suggested that the charity trustees of a charitable company must execute the Part 7 certificate in accordance with section 333. They said that section 333 was intended to facilitate the execution of documents by the trustees of unincorporated charities. Instead, the charity trustees should be able to authorise the giving of the certificate by the person signing the transfer in accordance with delegation procedures in the articles of association (or under the Companies Act 2006).

8.290 Val James commented on the execution of the certificate: “it would be helpful if the wording in sections 122(3) and 125(2) could be relaxed so as to avoid the need for execution by the trustees in addition to execution by the company.”

8.291 HM Land Registry said:

> to avoid the consequence of a void disposition (which would create a mistake in the register) …, the registrar would need to be satisfied that the purchaser had been protected as proposed, in order to maintain the integrity of the register. The registrar will not normally see any contract that precedes a disposition to a purchaser and it may be that the proposed certificate would have to be given separately to the registrar, or incorporated into the disposition itself that is lodged for registration.

Legacy cases

8.292 The ILM noted that in legacy cases, the purchaser might not be aware of the need to comply with Part 7, since compliance becomes necessary following appropriation, but the purchaser and HM Land Registry need not be notified of an appropriation. Accordingly, purchasers are at risk as the contract is voidable, particularly as there is a lack of awareness of Part 7 so conveyancers for purchasers do not ask for notification of any appropriation of the property. The ILM concluded that many charities are unaware of the need to ensure that a certificate of compliance is provided at the contract stage.

THE UNIVERSITIES AND COLLEGE ESTATES ACTS 1925 AND 1964

8.293 The CLA recognised that the number of institutions affected by this proposal is relatively small in comparison to other proposals in the Consultation Paper. “As a result many of the concerns that arise from having to consider the impact on a diverse range of charities fall away and we believe it is relatively straightforward to assess the likely effect of the proposals on this group.”
Consultation Question 46.

We provisionally propose that the advice requirements under the new regime should apply even if the transaction must be authorised by the Secretary of State under the Universities and College Estates Act 1925.

Do consultees agree?

[Consultation Paper, paragraph 8.123]

8.294 16 consultees responded.437

(1) 11 consultees agreed,438 and

(2) 5 consultees disagreed.439

Agreement

8.295 Two consultees thought that the proposal would create greater consistency.440

Withers LLP could see no reason why advice should not be sought if the transaction required authorisation under the University and College Estates Act 1925 (the “UCEA”). Cluttons LLP noted that the divergence in rules can be confusing for individuals who are trustees to numerous types of charities. Additionally the Minister is more likely to authorise the transaction if trustees can show that they had sought advice.

8.296 Francesca Quint agreed, but questioned whether the same argument could apply to other “dispositions proceeding under statutory authority” under section 117(3)(a).

Partial agreement

8.297 The Colleges of the University of Cambridge described the current legal position as “somewhat obscure”. They suggested that section 117(3)(b) of the Charities Act 2011 should be repealed on the basis that section 117(3)(a) is sufficient to exclude from the Part 7 regime transactions where the Minister’s consent is required by the UCEA. The Colleges explained their view that, even if section 117(3)(b) were removed, their own land transactions would remain exempt from the Part 7 requirements since the exemption in section 117(3)(a) would apply; transactions are authorised by the

437 Francesca Quint; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; Bates Wells Braithwaite; CLA; Cluttons LLP; Stone King LLP; Charity Commission; Withers LLP; Crispin Ellison; University of Cambridge; University of Oxford; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA.

438 Francesca Quint; University Plymouth; Colleges of the University of Cambridge; Bates Wells Braithwaite (agreed in principle, subject to consultation); Cluttons LLP; Stone King LLP; Charity Commission; Withers LLP; Crispin Ellison; Prof Gareth Morgan; RSPCA. The Charity Commission and RSPCA expressed no objection to the proposal.

439 University of Liverpool CL&PU; CLA; University of Cambridge; University of Oxford; Veale Wasbrough Vizards LLP. The University of Liverpool CL&PU disagreed with the general advice requirements.

440 Cluttons LLP; Withers LLP.
Universities of Oxford and Cambridge Act 1923. So whilst the Colleges were content for the section 117(3)(b) exception to be removed, they wished to remain exempt from the Part 7 advice requirements by the retention of section 117(3)(a).

Disagreement

8.298 The CLA, University of Cambridge and the University of Oxford disagreed with the proposal as it would lead to dual regulation. Charity trustees would be required to seek both advice and consent, which would be “unduly burdensome” and “potentially duplicative”. The CLA noted that other charities are required to either seek the Charity Commission’s consent or comply with the advice requirements. It would be inappropriate to oblige charities under the UCEA to comply with both requirements.

8.299 Veale Wasbrough Vizards LLP disagreed with the proposal and made three points.

(1) Introducing the advice condition in situations where consent is also required would create inconsistency and confusion with some charities having to obtain advice and consent, yet others having to obtain neither. Some institutions which fall under the UCEA are nevertheless exempt charities and so Part 7 of the Charities Act 2011 does not apply to them in any event. In contrast other charities under the UCEA would be subject to both the advice and the consent requirement.

(2) The general powers in the institutions’ governing documents often reflect the UCEA in requiring the Minister’s consent for certain transactions. It was questioned whether it was appropriate to require institutions to obtain advice where Ministerial consent is required (regardless of whether the requirement to obtain consent is under the UCEA or the governing document).

(3) The institutions which are no longer exempt might rely on the section 117(3)(a) exemption in certain circumstances and therefore neither the Minister’s consent under the UCEA nor the requirement to obtain advice under Part 7 would be required. There would then be no safeguards concerning the disposal of land.

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441 University of Cambridge.
442 University of Oxford.
443 Section 11(3) of the Charities Act 2006 removed exempt status from Eton College and Winchester College. The Universities of Cambridge, Oxford and Durham are still exempt charities, but the colleges are not: see n 130 of the Consultation Paper.
444 See n 443 above.
445 Unless contained in the governing document.
Consultation Question 47.

We invite the views of consultees as to whether the Universities and College Estates Act 1925 should be repealed and the institutions to which it applies given the general powers of an owner similarly to trustees under the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000.

[Consultation Paper, paragraph 8.125]

8.300 15 consultees responded.\textsuperscript{446}

(1) 13 consultees thought it should be repealed;\textsuperscript{447} and

(2) 2 consultees did not.\textsuperscript{448}

Agreement

8.301 Consultees generally expressed negative views about the UCEA and therefore agreed with the proposal.

(1) The UCEA was described as “overly complicated”,\textsuperscript{449} “restrictive”,\textsuperscript{450} and “anachronistic”.\textsuperscript{451}

(2) The requirement to obtain consent is “onerous”\textsuperscript{452} and “not necessarily commercially efficient for colleges”.\textsuperscript{453}

(3) Stone King LLP said that the UCEA was inaccessible and warranted clarification if not repeal.

(4) Withers LLP and the University of Oxford agreed with repealing the UCEA as it would create greater consistency and simplify the law.

\textsuperscript{446} Francesca Quint; Colleges of the University of Oxford; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; Durham University; Bates Wells Braithwaite; CLA; Cluttons LLP; Stone King LLP; Withers LLP; Crispin Ellison; University of Cambridge; University of Oxford; Veale Wasbrough Vizards LLP.

\textsuperscript{447} Francesca Quint; Colleges of the University of Oxford; University of Plymouth; Colleges of the University of Cambridge; Durham University; Bates Wells Braithwaite; CLA; Cluttons LLP; Stone King LLP; Withers LLP; Crispin Ellison; University of Cambridge; University of Oxford; Veale Wasbrough Vizards LLP.

\textsuperscript{448} University of Liverpool CL&PU; CLA.

\textsuperscript{449} Bates Wells Braithwaite.

\textsuperscript{450} University of Oxford.

\textsuperscript{451} University of Plymouth.

\textsuperscript{452} Durham University.

\textsuperscript{453} Colleges of the University of Oxford.
Francesca Quint thought that this proposal was preferable to the proposal above (to apply the new advice requirements even where the transaction required Ministerial consent under the UCEA).

Replacing the UCEA

8.302 The Colleges of the University of Oxford agreed with repealing the UCEA:

provided that any replacement legislation did not remove powers from any charity under the Act, and that colleges are given explicit powers under replacement legislation to dispose of property interests, for example the general powers of a natural person.

8.303 Durham University agreed with repealing the UCEA and advocated giving the charities that are currently governed by the UCEA the same powers as other charities.

8.304 Cluttons LLP agreed, provided the Charities Act 2011 was followed instead.

8.305 The Colleges of the University of Cambridge did not object to the repeal of the UCEA given that land transactions governed by the university statutes, by virtue of the Universities of Oxford and Cambridge Act 1923, would fall under the exception in 117(3)(a).

A cautious approach

8.306 Veale Wasbrough Vizards LLP agreed with the proposal on the condition that trustees are required to seek advice on disposals of land. Part 7 would not apply to the universities, as they are exempt, but the UCEA requirement for Ministerial consent provides “at least some check on the institution’s proposed disposal”, so a general requirement to obtain advice would prevent all safeguards relating to the disposal of land from being removed.

8.307 The University of Cambridge referred to a Department for Environment, Food and Rural Affairs consultation in 2005 in which it was proposed to repeal or substantially amend the UCEA. The University of Cambridge reiterated its agreement to the repeal of both the UCEA 1925 and the UCEA 1964. The powers conferred by the two Acts are no longer necessary as the University has powers under other statutes which permit it to deal with land. Before the Acts are repealed the University suggested that there should be a technical review of the effect of the repeal:

The Estates Acts contain some obscure and complex legislation, in particular on aspects of trust and ecclesiastical law, and it [is] suggested that a technical review of the impact of repeal should be conducted before any legislation is brought forward, in order to ensure that repeal does not have inadvertent consequences which repealing legislation fails to address.

In addition, although the University’s Statutes and Ordinances no longer contain any reference to the Estates Acts, it is likely that there will be residual references to the Acts in other documents intended to have legal effect (e.g. wills and testaments, title deeds). Any repealing legislation will need to contain an appropriate saving provision for the purposes of interpreting any such references.
Disagreement

8.308 The CLA disagreed with repealing the UCEA but suggested it could be amended to include a general power of disposal. Repeal may have undesirable consequences for some charities that currently might not have to comply with either Part 7 or the consent requirement in the UCEA.

There are some situations where the exemptions from the requirement for Secretary of State consent are available under UCEA, which means that Part 7 of the 2011 Act, particularly in relation to short leases, does not apply either. For this particular group of charities, which tend to manage large portfolios of property, the availability of the exemptions under UCEA saves both time and financial costs from having to comply with Part 7.

EXPERIENCES

Consultation Question 48.
We invite consultees to share with us their experiences, including any delays and costs incurred, in seeking to comply with Part 7 of the Charities Act 2011 when disposing of or granting mortgages over charity land.

[Consultation Paper, paragraph 8.127]

8.309 14 consultees responded to this question. Many of their comments are integrated with the questions above.

Costs of a surveyor’s report

8.310 Bates Wells Braithwaite said that a report usually costs £500 to £2,000, depending on the transaction and complexity. Legal costs also vary depending on the transaction and whether an application to the Charity Commission is required.

8.311 Lawyers in Charities said they expect to pay at least £1,000 for a surveyor’s report, with reports in respect of more complex land costing substantially more.

8.312 Prof Gareth Morgan thought delays were often caused by non-specialist solicitors giving confusing or misleading advice. He thought there was a lack of awareness of the exemption in section 117(3)(c) for charities disposing to other charities.

Connected persons

8.313 The Canal & River Trust said that in applying for consent to make disposals to connected persons, it had experienced delays in obtaining responses from the Charity Commission, as well as difficulties in using the Commission’s online form to make the application.

454 Landmark Trust; Sustrans and Railway Paths; Bates Wells Braithwaite; CLA; Cluttons LLP; CAAV; Legacy Link; Lawyers in Charities; Canal & River Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Val James.
Insolvency

8.314 Val James said that difficulties arise when a charitable company goes into administration. The administrators have control of the charity and the charity’s property, but are not considered to be the charity trustees. The administration was complicated by the need for the directors of the company, as charity trustees, to certify compliance with the Part 7 regime “to no real purpose”.
Chapter 9: Permanent endowment

INTRODUCTION

9.1 Permanent endowment is property belonging to a charity that is subject to a restriction on its being spent for the charity’s purposes. The Charities Act 2006 introduced major reforms to enable charities to override the restrictions on spending permanent endowment; the relevant powers are now contained in sections 281, 282, 288 and 289 of the Charities Act 2011. Trustees also have the ability to “borrow” from permanent endowment in circumstances that would otherwise involve a breach of the spending restriction, but only where the Charity Commission has made an order under section 105 of the Charities Act 2011 authorising such a course of action. Since the coming into force of the Trusts (Capital and Income) Act 2013, trustees have also been able to pass a resolution to adopt a total return approach towards the investment of their charity’s permanent endowment, which enables them to disregard the traditional rules on the classification of investment returns (as income, which must be spent, and capital, which must be invested) when deciding how to invest the permanent endowment.

9.2 In Chapter 9 of the Consultation Paper we examined the law relating to the use of permanent endowment, in particular the law regulating the release of the restrictions on its expenditure. We made a number of provisional proposals to change aspects of the regime in sections 281, 282, 288 and 289 of the Charities Act 2011. We also asked consultees whether there should be a new regime, which we suggested be called “preserved endowment”, whereby trustees are free to spend the capital of the endowment fund subject to the duty to seek to maintain the real value of the fund in the long term.

9.3 40 consultees responded to at least one provisional proposal or question. 11 consultees made further or separate comments. We start by considering some general comments from consultees and then we analyse consultees’ responses to our specific questions.

GENERAL COMMENTS

The need to release permanent endowment restrictions

9.4 There were differing views as to whether it should be possible to create permanent endowment and thereby tie up assets in perpetuity. As the Institute of Chartered Secretaries and Administrators said: “Permanent endowment can either be a valuable asset to the work of a charity or can represent an undue administrative burden that adds little in the way the charity fulfils its charitable purposes.”

9.5 Some consultees noted the importance of being able to release permanent endowment restrictions. The University of Birmingham said that “Over time the value and purpose of permanent endowment may change”: the original use may not be appropriate or the income may be insufficient.
The University has had a request recently for funding originally given as permanent endowment for a Chair, which is no longer appropriate, to be used to purchase equipment. This will require approval of the Charity Commission if it is pursued. Providing more flexibility as to how such endowed funding can be dealt with would be very helpful.

9.6 Similarly, Imperial College London said:

In some instances, amending the terms of a donation held on trust can be challenging, particularly in relation to historic or long-standing donations/trusts where the original donor cannot be contacted, or where the income from the permanent endowment is no longer sufficient to meet the terms of the donation. In these circumstances, having the option to convert a permanent endowment to an expendable one may be the only practical solution to use funds which would otherwise be stagnant.

9.7 Some members of Bircham Dyson Bell LLP were cautious about relaxing the regime for permanent endowment as this would override the clear wishes of donors. They referred to the rationale for (1) allowing permanent endowment to exist, namely respecting donor’s wishes, encouraging donations and providing long term security for a charity, and (2) allowing any relaxation, namely pragmatism as a result of changes over time. The two must be balanced, though they do not necessarily compete as donors may accept that their wishes today may not be appropriate in the future.

Converting permanent endowment

9.8 Prof Duncan Sheehan endorsed the decision in *Oldham Borough Council v Attorney General*\(^{455}\) concerning the conversion of permanent endowment from one asset to another. Prof Janet Ulph referred to museum collections, which can be permanent endowment. She said that it was useful to have flexibility because, as part of good management, collections should be reviewed and changed, but in order to retain public trust it is important (a) not to sell collections to pay for general running costs, (b) to seek to transfer unwanted items to other museums, and (c) that, if an item is sold, the proceeds should be used for the benefit of the remaining collection.

Scottish perspective

9.9 The Office of the Scottish Charity Regulator (“OSCR”) said that the Charities and Trustee Investment (Scotland) Act 2005 does not provide specifically for permanent endowment. The Charities Accounts (Scotland) Regulations 2006 define permanent endowment as funds (property heritable or moveable) which have been gifted to the charity with specific conditions attached and which cannot be spent in any circumstances. These funds must be distinguished in charities’ accounts. In Scots trust law there is a presumption that unless expressly stated, capital may not be spent.

9.10 Charity trustees can apply to OSCR to remove restrictions on their powers, either by means of a reorganisation scheme or a restricted funds reorganisation scheme. Such applications can include a new power to enable the charity to expend capital.

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\(^{455}\) [1993] Ch 210. The Upper Tribunal considered the issue in *Trustees of the Bath Recreation Ground Trust v Sparrow* [2015] UKUT 420 (TCC) after the publication of the Consultation Paper.
Uncertainties about permanent endowment

9.11 Some consultees said there was uncertainty as to what can currently be done with permanent endowment. The CLA said that our work on permanent endowment (in this project, and on total return investment) has been “piecemeal”. Since many issues remain, “this area of law would benefit from a comprehensive review”. Bircham Dyson Bell LLP said that, as the regime is currently unclear, it would be better to “confirm that the foundations are in order, before adding an extension”.

1. Can permanent endowment be mortgaged? The Charity Commission’s view is that trustees can borrow against permanent endowment, so will not authorise them to do so under section 105. Bates Wells Braithwaite said that this was “difficult to square with the restriction on spending permanent endowment given that, if the charity defaults on the loan, the permanent endowment then becomes available to the creditor”. The CLA added that difficulties arise because disposal of the property will be done by the mortgagee or receiver acting as agent of the borrower; “it is not clear how the restrictions [on expenditure] and the requirements of Part 7 of the 2011 Act interact with the exercise of a power of sale”. It would be helpful to resolve this as it creates practical difficulties in planning the financing of projects.

2. Can charities self-endow? Some want it to be made clear that they can; by contrast, one consultee said it might be helpful to remove the possibility of self-endowing to avoid situations where a charity inadvertently creates permanent endowment.

3. The CLA said there is a lack of clarity and precision in the definition of permanent endowment (and the Charity Commission guidance), so it is hard to identify and use permanent endowment with confidence. Section 353 “is close to creating a presumption that any property held by a charity is permanent endowment unless it can be shown that it can be spent as income”. The concept should be redefined so that property is permanent endowment only if “(1) it is implicit from the purposes for which it was given, and (2) there is a clear restriction upon the expenditure of the property or the proceeds of sale of the property for the purposes of the charity”. Stone King LLP said they had often

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456 Bircham Dyson Bell LLP and Stone King LLP made similar comments.
457 University of Liverpool CL&PU; Bates Wells Braithwaite; CLA; Stone King LLP.
459 Raised by CLA; National Trust; Veale Wasbrough Vizards LLP; Bates Wells Braithwaite.
460 CLA, who said that “a charity may wish to secure its long term future by creating a permanent endowment from income or designating a gift or legacy as permanent endowment or to ensure protection of assets of, for example, historic importance. If such monies are simply held as reserves, it may experience difficulties with funders who are unwilling to fund a charity that has funds that are, legally, available to it.”
461 National Trust.
462 As the CLA pointed out, charities with a low income and no “permanent endowment” were not required to register, so the definition played a role in determining whether a charity had to be registered. It appears that, if there was any doubt, the presumption was that the charity had permanent endowment to ensure that it was registered: Hansard (HL) 7 April 1960 Col 814.
dealt with situations where “imprecise or unclear drafting of governing documents has inadvertently led to the creation of permanent endowment where this was clearly not the intention – for example, where property is provided to a charity but there is no power in a charity’s governing document to spend investment capital and so the charity holds investment funds which are capital locked”.

The definition should distinguish between different types of permanent endowment:

(a) property that is held as the purpose of the charity, so there can be no disposal consistent with the objects of the charity (“inalienable functional permanent endowment”);\(^{463}\)

(b) property that is held to fulfil the purpose of the charity, so can be disposed of and replaced with property that performs the same function, such as playing fields (“alienable functional permanent endowment”);

(c) property that is used by the charity, but is not required for the charity to fulfil its purposes and which does not produce an income (another form of “alienable functional permanent endowment”); and

(d) property used to produce an income (“investment permanent endowment”).

(4) Consistency with terminology in legal, accountancy and advisory contexts (legislation, regulations, SORP, guidance).

(5) Reconciling (a) the existence of expendable endowment (which is assumed in the SORP) with (b) the principle that a charity should spend its assets on its purposes, subject to retaining prudent reserves.

(6) The application of the duty of even-handedness to trustees of functional permanent endowment that is a wasting asset.

RESPONSES TO PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

Consultation Question 49.

We provisionally propose that the parallel regime for “special trusts” in sections 288 and 289 of the Charities Act 2011 be repealed.

Do consultees agree?

[Consultation Paper, paragraph 9.51]

9.12 37 consultees responded to this question.\(^{464}\)

\(^{463}\) The SORP refers to this as an “inalienable asset”.
(1) 36 consultees agreed;\(^\text{465}\)

(2) 1 consultee expressed qualified agreement;\(^\text{466}\) and

(3) no consultees disagreed.

9.13 Many consultees said that the existence of additional provisions in the Act for special trusts was “unnecessary” and even “confusing” for trustees and advisers. Consultees agreed with our view that sections 281 and 282 apply to permanently-endowed special trusts in the same way as permanently-endowed funds held for the general purposes of the charity. The Charity Commission said that in its experience there had been little, if any, need for trustees to rely on sections 288 and 289 in practice.

9.14 Francesca Quint thought that sections 288 and 289 were redundant because special trusts are technically charitable trusts in their own right, so the release of the restrictions on spending permanent endowment held on special trust can be dealt with under sections 281 and 282. “It is conceivable that one of the reasons for referring to ‘special trusts’ in sections 288-9 was that for registration and accounting purposes two or more charities may be treated as a single charity.”

9.15 Geldards LLP supported our proposal subject to the proviso that it is made clear that permanent endowment held on special trust falls within the definition of “available endowment fund” in section 281 of the Charities Act 2011.

9.16 Prof Gareth Morgan said that he did not support the repeal of sections 288 and 289 in isolation; such reforms should only take place within a more general restructuring of the powers of trustees to deal with restricted funds and small endowments under a cy-près type framework.

\(^{464}\) Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; University of Liverpool CL&PU; WCVA; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; University of Oxford; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

\(^{465}\) Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; University of Liverpool CL&PU; Wales Council for Voluntary Action; Charity Commission for Northern Ireland; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; University of Oxford; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

\(^{466}\) Prof Gareth Morgan.
Consultation Question 50.

We provisionally propose that sections 281 and 282 of the Charities Act 2011 be amended to make it clear that they apply to permanent endowment held by an incorporated charity.

Do consultees agree?

[Consultation Paper, paragraph 9.57]

9.17 36 consultees responded to this question.467

(1) 35 consultees agreed;468

(2) no consultee disagreed; and

(3) 1 consultee expressed other views.469

9.18 The powers in sections 281 and 282 of the Charities Act 2011 to release the restrictions on spending permanent endowment apply to any available endowment fund "of a charity which is not a company or other body corporate". The Charity Commission takes the view that a charitable company that holds permanent endowment on trust as a corporate trustee is permitted to use sections 281 and 282 in respect of that fund because it is a separate unincorporated charity. In the Consultation Paper we noted, however, that there might be an opposing argument that the fund is "of" the charitable company because the company, as trustee, owns legal title to the property comprising the fund. We concluded that in principle sections 281 and 282 should apply to permanent endowment held on trust by a charitable company but the words "of a charity which is not a company or other body corporate" created doubt. We provisionally proposed that sections 281 and 282 should be amended to remove this doubt.

467 Institution of Civil Engineers; Francesca Quint; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; WCVA; Durham University; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; University of Oxford; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

468 Institution of Civil Engineers; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; Wales Council for Voluntary Action; Durham University; Charity Commission for Northern Ireland; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; University of Oxford; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

469 Francesca Quint.
9.19 The University of Liverpool CL&PU thought that our proposal would bring “useful clarification in an area where there is recognised confusion”. The Charity Commission for Northern Ireland and Stewardship agreed, adding that there was no reason in principle to exclude permanent endowment held by a corporate trustee from the scope of the power.

9.20 Anthony Collins Solicitors LLP agreed with our proposal “subject to additional wording to clarify that this refers to permanent endowment held by an incorporated charity on trust for another charity otherwise the revised provision will simply create different confusion by suggesting that an incorporated charity can hold permanent endowment in its own right”.

9.21 The Charity Commission reiterated its view that sections 281 and 282 are already available in respect of permanent endowment held on trust by a charitable company but understood why some commentators had expressed doubts about the width of the powers under those sections. It said that it would welcome the clarification and confirmation that our proposed amendment would bring.

9.22 Bates Wells Braithwaite said that although the Charity Commission accepts that sections 281 and 282 already apply to permanent endowment held by charitable companies “this has never been entirely satisfactory as the wording of the sections allows for a different interpretation”. The CLA agreed. Both consultees added that the problems faced by charities governed by Royal Charter are compounded by uncertainties surrounding the basis on which they hold their property. The CLA said that “although ... the Charity Commission takes the view that a charity governed by Royal Charter is in the same position and so can likewise use sections 281 and 282 in relation to its permanent endowment, due to the residual doubt as to whether a charity governed by Royal Charter holds its assets beneficially or on trust ... it has remained unclear whether this is correct. ... If a Royal Charter charity holds [permanent endowment] beneficially, it seems that the wording would prevent use of sections 281 and 282, which is presumably not intended.” Both consultees supported amending sections 281 and 282 to put beyond doubt the ability of charities to release the restrictions on spending permanent endowment whatever their legal form.

9.23 Stone King LLP similarly commented that “it is not always clear when [permanent endowment is] held as part of a charity’s property and when it should be held in a separate charity. It would be helpful for the Charity Commission to clarify its guidance on what it regards as a separate charity.”

9.24 Francesca Quint disagreed that there was doubt over the correct interpretation of the wording of sections 281 and 282:

I would dispute the suggestion that permanent endowment held by a corporate charity is its “own” permanent endowment. It is technically a separate charitable trust even though the Charity Commission may have directed that it should be treated as part of the corporate charity for administrative and registration purposes. In the case of a CIO which has replaced a previous charitable trust having permanent endowment the trust of the permanent endowment is implied rather than expressed but it is perfectly clear from the discussions leading to the relevant legislation that a CIO could only ever hold permanent endowment on trust and no corporate body can
hold permanent endowment beneficially, the restriction on expenditure being a type of entrenched or protected charitable trust.

**Consultation Question 51.**

We invite the views of consultees as to whether the financial thresholds in sections 281 and 282 should be increased, to what level, and why.

[Consultation Paper, paragraph 9.60]

9.25 33 consultees responded to this question.  

9.26 Veale Wasbrough Vizards LLP said it was unsure of the rationale for having a fund value limit in section 282 but not in sections 268 and 275. They said that setting a fund value threshold would be difficult and arbitrary.

9.27 The Methodist Church said that reform should be approached with caution because “it must be recognised that [permanent endowment] has often been given in legacies with a particular purpose intended and to provide an ongoing income”. However, it said that “Local Methodist churches hold numerous small permanent endowments and it is this capital that needs to be released rather than the larger funds that provide a decent income. The smaller funds such as those under £25,000 can provide no useful purpose as the income isn’t sufficient to fulfil the purpose it was intended for.”

9.28 The Charity Commission said:

We are sympathetic to proposals for trustees to have more power to decide when it is in the interests of the charity that permanent endowment restrictions should be released but we are not convinced it is a matter of just raising the financial level. It may be a case of trustees satisfying themselves of certain matters before taking such decisions.

**Keeping financial thresholds up to date**

9.29 Some consultees said that the Minister should be able to increase the thresholds by secondary legislation. Others suggested that the financial limits should be indexed to inflation. Stone King LLP said “There needs to be a mechanism of review of the

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470 Prof Duncan Sheehan; Francesca Quint; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Lord Hodgson of Astley Abbotts; Durham University; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasborough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Methodist Church; NCVO; ACF; CFG; and IoF.

471 The Independent Schools Council made similar comments.

472 University of Plymouth; Bates Wells Braithwaite; Methodist Church. This is possible under the current law: Charities Act 2011, s 285(2).

473 Joel Moreland; Lord Hodgson.
limits to ensure that they are suitably current. Perhaps the Charity Commission should be tasked with consulting periodically (say every five years) on the financial limits and then make recommendations based upon responses received.” The CLA expressed general concerns about the use of financial thresholds in charity legislation: see paragraph 2.9 above.

**Ratio between the income and capital threshold**

9.30 Some consultees thought that the ratio between the current income and capital thresholds was inappropriate. They noted that prevailing investment market conditions meant that endowment funds typically yielded annual income returns of much less than 10%.\(^{474}\) The CLA said “very sizeable endowments of, say, £500,000 may generate income returns of £10,000 or less in the current market and we consider that it would not be appropriate to take such sizeable endowments outside the scope of Charity Commission consent”. These consultees thought that the ratio ought to be adjusted to prevent very sizeable endowment funds falling within section 281, with the capital threshold being determined by reference to the income threshold, that is, assuming a certain level of return.

9.31 Conversely, many consultees suggested increased thresholds that reflected the current ratio without commenting on the point. As we explain in the Report, the income and capital thresholds were introduced for different reasons, without any intention that the income threshold of £1,000 should reflect the likely investment return from a fund amounting to the capital threshold of £10,000.

**Permanent endowment treated differently depending on whether charity is incorporated or unincorporated**

9.32 Bates Wells Braithwaite and the CLA noted that the income limit in section 282 created an anomaly. Under section 282(1)(b) the income limit is “the charity’s gross income in its last financial year”. Where permanent endowment is held by a charitable company on trust, the trust and not the company is deemed to be the “charity” for this purpose and so the income of the company is irrelevant. Where, however, permanent endowment is held as part of a larger unincorporated charity (as with a charitable trust) then the income limit is assumed to apply to the charity as a whole and not just the permanent endowment. Bates Wells Braithwaite said “This means that the provisions are currently far more generous in relation to incorporated charities. We would recommend that section 282 is amended to bring this in line by providing that the income refers to the income of the endowment.”

**Suggested thresholds**

9.33 Nearly all consultees thought that the financial limits on the use of the section 281 power should be increased. Some consultees thought that the limits should be increased significantly, many adopting the tenfold increase recommended by Lord Hodgson (namely, £100,000 for the capital value of the fund and £10,000 for the charity’s income); others were more cautious. Consultees’ views as to the appropriate financial thresholds are set out in Figure 3.

\(^{474}\) Anthony Collins Solicitors LLP; Bates Wells Braithwaite; Stone King LLP; Independent Schools Council; Veale Wasbrough Vizards LLP; CLA.
9.34 NCVO, ACF, CFG and IoF suggested a £1m threshold for grant-making foundations and £100,000 for all other charities:

We believe that for grant making foundations the threshold should be higher whilst still ensuring that the procedural requirements for releasing permanent endowment (and the associated costs) are proportionate to the value of the permanent endowment. For example, in current conditions, an endowment of £100,000 would produce sustainable expenditure of about £3,500. This suggests that the effects of the restriction on spending capital will be very keenly felt even at the suggested higher level. We therefore believe that the threshold could safely be set at £1,000,000.

9.35 Prof Gareth Morgan suggested a threshold of £25,000 or 2.5% of the charity’s total assets, whichever is larger. Similarly, the Institute of Chartered Secretaries and Administrators thought that the threshold should be expressed as a percentage of the value of the fund. “The opportunity to release up to £100,000 of permanent endowment could represent a sizeable amount of a charity’s permanent endowment, while to others it may be less significant”, which is why the percentage-based approach was preferred.

**Figure 3: suggested thresholds**

<table>
<thead>
<tr>
<th>Consultee</th>
<th>Fund value limit</th>
<th>Income limit</th>
<th>Other comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joel Moreland</td>
<td>Raise “as high as possible”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NCVO, ACF, CFG and IoF</td>
<td>£1,000,000 for grant-making foundations; £100,000 for all other charities</td>
<td></td>
<td>See paragraph 9.34 above.</td>
</tr>
<tr>
<td>University of Plymouth</td>
<td>£200,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Lord Hodgson</td>
<td>£100,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Durham University</td>
<td>£100,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Anthony Collins Solicitors LLP</td>
<td>£100,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Church Growth Trust</td>
<td>£100,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Imperial College London</td>
<td>£100,000</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Association of Church Accountants &amp; Treasurers</td>
<td>£100,000</td>
<td></td>
<td></td>
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<tr>
<td>UnLtd</td>
<td>£100,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Geldards LLP</td>
<td>£100,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organization</td>
<td>Suggested Limit</td>
<td>Minimum Limit</td>
<td>Note</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-----------------</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>RSPCA</td>
<td>£100,000</td>
<td>£10,000</td>
<td>A more modest increase with a power for the Minister to increase the limit by secondary legislation would “strike a balance between flexibility for charities and protecting the intentions of donors”.</td>
</tr>
<tr>
<td>Bates Wells Braithwaite</td>
<td>Increase, but not as high as £100,000</td>
<td>Increase, but not to £10,000</td>
<td></td>
</tr>
<tr>
<td>Stone King LLP</td>
<td>Increase, but Lord Hodgson’s figures are not appropriate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charity Commission for Northern Ireland</td>
<td>£100,000 “might be appropriate in England and Wales” but “would likely place most funds [in Northern Ireland] outside the scope of the CCNI and this could affect public confidence”</td>
<td></td>
<td>Would have concern about raising the limits “significantly”.</td>
</tr>
<tr>
<td>Prof Gareth Morgan</td>
<td>£25,000 or 2.5% of the charity’s total assets whichever is larger</td>
<td>£10,000</td>
<td></td>
</tr>
<tr>
<td>Methodist Church</td>
<td>£25,000</td>
<td>£10,000</td>
<td>Income limit “may not be entirely appropriate for endowed charities. But we are conscious that a charity that has several endowed funds, each with “larger” shares and securities portfolios, may be able to benefit from an easing of restrictions, for example, where capital value maintenance is under pressure (for good reason).&quot;</td>
</tr>
<tr>
<td>Stewardship</td>
<td>£25,000 for all charities, or alternatively £25,000 for “small” charities and a higher limit for “large” charities (howsoever defined)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLA, with whom Bircham Dyson LLP agreed</td>
<td>£25,000</td>
<td>£5,000</td>
<td></td>
</tr>
<tr>
<td><strong>Veale Wasbrough Vizards LLP</strong></td>
<td>Unsure of the rationale for a fund value limit in section 282 but not in sections 268 and 275. Fund value limit is difficult to set and can be arbitrary; a reasonable approach would be to determine the limit by reference to the income limit, that is, assuming a certain level of return.</td>
<td>Should match the threshold in sections 268 and 275 (currently £10,000)</td>
<td>These limits “would strike an appropriate balance between, on the one hand, ensuring a sufficient degree of Commission oversight in relation to large funds and, on the other hand, reflecting the Commission’s limited resources and the fact that trustees are generally best placed to assess what is in their charity’s best interests”.</td>
</tr>
<tr>
<td><strong>Independent Schools Council</strong></td>
<td>Increase significantly; it should be consistent with the income threshold (as suggested by Veale Wasbrough Vizards LLP)</td>
<td>Increase significantly; make consistent with the section 275 limit (currently £10,000)</td>
<td>These limits “would reflect the constraints on the Charity Commission’s resources and the fact that trustees are generally best placed to make decisions in the best interests of their charity”.</td>
</tr>
<tr>
<td><strong>Francesca Quint</strong></td>
<td>Increase, but no figure suggested</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>University of Liverpool CL&amp;PU</strong></td>
<td>Increase, but no figure suggested</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Lawyers in Charities</strong></td>
<td>Increase, but no figure suggested</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>National Trust</strong></td>
<td>Increase, but no figure suggested</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Prof Janet Ulph</strong></td>
<td>Increase, but no figure suggested</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Institute of Chartered Secretaries and Administrators</strong></td>
<td>Limit should be expressed as a percentage of the value of the fund</td>
<td></td>
<td>Any change should be “approached with a little caution”. “The opportunity to release up to £100,000 of permanent endowment could represent a sizeable amount of a charity’s permanent endowment, while to others it may be less significant”, which is why the percentage-based approach is preferred.</td>
</tr>
</tbody>
</table>
Consultation Question 52.

We invite the views of consultees as to whether the time limit in section 284 of the Charities Act 2011 for the Charity Commission to consider a resolution passed under section 282 should be reduced to 60 days.

[Consultation Paper, paragraph 9.63]

9.36 30 consultees, including the Charity Commission, responded to this question. All consultees supported the reduction of the time limit in section 284 of the Charities Act 2011 for the Charity Commission to consider a resolution passed under section 282 from 3 months to 60 days.

9.37 We noted in the Consultation Paper that the current time limit under section 284 differs from the limits for the Charity Commission to respond to resolutions passed under section 268 and section 275 (both 60 days). Often charities seek to lift the restrictions on their permanent endowment with a view to transferring the fund to another charity (for example in a merger), which may require a resolution under section 268, or to spend the fund for purposes other than those for which it was originally received, which may require a resolution under section 275. The discrepancy in the time limits means that a charity requiring (a) a section 282 resolution and (b) either a section 268 resolution or a section 275 resolution (or possibly even both) could find that it is unable to implement the latter resolution for some time after it is approved by the Charity Commission because the former resolution is still awaiting approval.

9.38 Several consultees reported that the section 268, section 275 and section 282 powers are frequently used in tandem and that it was unhelpful that different time limits apply. Imperial College London said that section 275 and section 282 resolutions are usually submitted at the same time for consideration by its Council and that it would therefore be helpful for the dialogue with the Charity Commission to happen within the same time frame.

9.39 Anthony Collins Solicitors LLP and Stewardship suggested that there was an argument for the time limit to be shortened further to just 30 days but were mindful of the additional burden that this would impose on the Charity Commission and acknowledged that it might not be appropriate at this time.

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475 Francesca Quint; Joel Moreland; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Lord Hodgson of Astley Abbots; Charity Commission for Northern Ireland; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Lawyers in Charities; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Methodist Church; NCVO; ACF; CFG; and IoF.
Consultation Question 53.

We invite the views of consultees as to whether the current regime in sections 281 and 282 of the Charities Act 2011 is otherwise satisfactory.

[Consultation Paper, paragraph 9.66]

9.40 22 consultees responded to this question. Just over half thought that, subject to what is said above, sections 281 and 282 of the Charities Act 2011 are satisfactory. Several consultees identified further areas in which the regime under sections 281 and 282 could be improved.

“Borrowing” from permanent endowment

9.41 Veale Wasbrough Vizards LLP noted that in its experience many charities wish to retain their permanent endowment in the long term but “borrow” from it in the short term, to be recouped over a defined period. Sections 281 and 282 are not appropriate for this purpose and so such charities have to seek an order of the Charity Commission instead.

“Entirely given” requirement

9.42 The University of Plymouth said that it did not see the need for the further provisions in sections 281 and 282 regarding funds which are “entirely given” and would delete these from both sections; the financial thresholds alone should trigger the relevant provisions. Similarly, the Charity Commission said that it has “struggled to understand the provisions regarding the capital of the fund having to consist ‘entirely of property given... etc’” for section 282 to apply.

Silence from the Charity Commission

9.43 Bates Wells Braithwaite said it would favour a requirement that the Charity Commission must give express consent to resolutions under sections 268, 275 and 282, rather than the resolutions simply taking effect if the Charity Commission is silent for a certain period.

Inconsistencies with sections 268 and 275

9.44 The CLA also noted that there is nothing in section 284 to indicate the effect, if any, on the time limit for concurrence with a section 282 resolution if the Charity Commission directs the trustees to give public notice of the resolution or to provide it with more information. This contrasts with the position under section 278, which makes provision for the suspension of the time limit if the Commission objects to a section 275 resolution.

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476 Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; UnLtd; Stone King LLP; Charity Commission; Lawyers in Charities; University of Oxford; Imperial College London; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG; and IoF.
Bates Wells Braithwaite said that it would welcome amendment to bring the processes which apply to sections 268, 275 and 282 into line generally.

**Specifying a later date on which a section 282 resolution takes effect**

At present, a resolution passed under section 282 becomes effective on the date the trustees are informed that the Charity Commission concurs with the resolution (or if the period of three months has elapsed and the Commission has not informed them that it does not concur with the resolution). The CLA, Bircham Dyson Bell LLP and Stone King LLP suggested the date on which a resolution takes effect should be the date of the Commission’s concurrence (or deemed concurrence), or some later date that the trustees choose. It may, for example, be helpful for accounting purposes if charity trustees are able to choose a later date for the release of permanent endowment which aligns with the charity’s financial year end.

The CLA added that there is some inconsistency in the Commission’s approach to when its concurrence to a resolution is effective. Although section 284 and the Commission’s Operational Guidance are clear that resolutions are effective on the date of concurrence, it is their experience that notices of concurrence sometimes state that the effective date is the date on which the three month period lapses, not the date of concurrence.

**The need for a cy-près scheme**

The Charity Commission also said that the Charities Act 2011 does not make clear that permanent endowment, the retention of which is necessary to achieve the charity’s purposes, cannot be available permanent endowment within the definition in section 281 or 282 because it requires a cy-près scheme in order to liquidate it. The Commission said that if there is doubt as to this approach then it would welcome clarification.

We agree that this is the correct approach; a section 281 or 282 resolution releases the restrictions on spending permanent endowment, but does not change the purposes for which the permanent endowment is held. In such circumstances, passing a section 281 or 282 resolution would be futile (because the charity trustees would still not – in compliance with their duties to further the charity’s purposes – be able to dispose of the permanent endowment) unless at the same time the charity’s purposes were changed.

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**Consultation Question 54.**

We invite consultees to share with us their experience of releasing the restrictions on the expenditure of permanent endowment, including the procedures under sections 281 and 282 and sections 288 and 289 of the Charities Act 2011, in particular the time and costs involved.

[Consultation Paper, paragraph 9.68]
9.50 13 consultees responded to this question.\textsuperscript{477}

9.51 Anthony Collins Solicitors LLP and Bates Wells Braithwaite thought that the procedures under sections 281 and 282 are “straightforward” and “cost effective”. Stone King LLP and the RSPCA said that although sections 281 and 282 themselves were well understood by lawyers, trustees are likely to require advice both on the sections and their applicability to the permanent endowment fund in question.

9.52 The CLA and Bircham Dyson Bell LLP described the procedures as “fairly mechanical” but recognised the need for “fairly robust scrutiny of charity trustees’ decisions” in this area. The CLA said, however, that costs can be increased unnecessarily by the Charity Commission “not considering fully the statement of reasons and/or the terms of the resolution” and “asking questions the answers to which have already been submitted to it”, but that these were not problems that were unique to section 282 resolutions.

9.53 Lawyers in Charities said “One of our members advised on a potential application for Commission consent to allow proceeds of sale of a building left as a legacy for purposes expressed in a [nineteenth-century will] which were no longer appropriate for a charity providing 21st century disability services. However, the charity offered many other highly relevant activities which could be funded using these funds. Nobody would have suffered any detriment, and the charities’ beneficiaries would have directly benefitted. It was a little frustrating that the Charity Commission had such great control over whether the restrictions could be released.”

**Operational matters**

9.54 Veale Wasbrough Vizards LLP commented that in its experience many applications under section 282 are made by incorporated charities which hold permanent endowment on trust as linked charities. The Charity Commission’s online form for applying for consent to a section 282 resolution is at present unhelpful because it does not cater for linked charities.

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**Consultation Question 55.**

We invite the views of consultees as to whether a new regime should be devised that permits charities to use permanent endowment more flexibly whilst seeking to maintain its real value in the long term. We also invite consultees to comment on how such a scheme might operate.

[Consultation Paper, paragraph 9.80]

9.55 29 consultees responded to this question.\textsuperscript{478}

\textsuperscript{477} Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Veale Wasbrough Vizards LLP; Lawyers in Charities; RSPCA; NCVO; ACF; CFG; and IoF.
(1) 15 consultees supported the creation of a new regime that would permit charities to use permanent endowment more flexibly;479

(2) 5 consultees said the idea was attractive in principle but had doubts as to whether it could be achieved in practice;480

(3) 6 consultees disagreed with, or had significant concerns about, the creation of a new regime;481 and

(4) 3 consultees expressed other views.482

Preliminary point: the current law

9.56 In the Consultation Paper, we said:483

The trustees’ obligation is to preserve the actual, pound for pound value of the fund. That has two consequences. One is that the trustees are not free to balance or offset losses and gains within the fund; they do not have the freedom to invest permanent endowment in a fund expected to yield high income but to lose capital and offset that with expected capital gains from another investment. The other is that there is no obligation to maintain the real value of the permanent endowment, allowing for inflation. Generally trustees will of course aim to do so; but if the value of the fund remains nominally the same, without capital growth, that in itself does not amount to spending permanent endowment.

9.57 Consultees challenged this statement, saying that trustees were permitted to offset losses and gains, and that they were required to maintain the real value of the permanent endowment. That being the case, some consultees said there was no need for a new preserved endowment fund.

(1) Capital-depreciating assets

9.58 Francesca Quint said there was no authority for the proposition that the trustees’ obligation is to preserve the actual value of the fund:

478 Prof Duncan Sheehan; Social Finance; Francesca Quint; Joel Moreland; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; University of Liverpool CL&PU; Wales Council for Voluntary Action; Lord Hodgson of Astley Abbotts; Charity Commission for Northern Ireland; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; UnLtd; Stone King LLP; Charity Commission; Independent Schools Council; Charity Investors’ Group; Imperial College London; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; NCVO; ACF; CFG; and IoF.

479 Social Finance; Joel Moreland; University of Plymouth; Wales Council for Voluntary Action; Lord Hodgson; UnLtd; Stone King LLP; Independent Schools Council; Imperial College London; Association of Church Accountants and Treasurers; Veale Wasbrough Vizards LLP; NCVO; ACF; CFG; and IoF.

480 Anthony Collins Solicitors LLP; University of Birmingham; University of Liverpool CL&PU; National Trust; Stewardship.

481 Prof Duncan Sheehan; Francesca Quint; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Prof Gareth Morgan.

482 Charity Commission for Northern Ireland; Charity Commission; Charity Investors’ Group.

483 Consultation Paper, para 9.22.
The [Charity] Commission when requiring recoupment currently requires the historical sum to be replaced but previously, in times of high inflation, the Commissioners used to require that an approximation to the real value should be recouped by imposing a formula whereby the amount to be replaced would take account of inflation and would be adjusted according to the length of the recoupment period.

9.59 The Charity Investors’ Group\textsuperscript{484} queried our statement that trustees cannot invest in an asset expected to yield high income but to lose capital and offset that with expected capital gains from another investment. This does not “[reflect] the reality of current investment management practice in relation to permanent endowments. If it did, it would mean that trustees … would not be able to invest in government or corporate bond investments, which at present are mostly standing ‘above par’ as a consequence of the low interest rate environment.”

9.60 They said that investment managers treat the requirement to maintain capital as applicable “to the entire fund, not a single investment …. This duty not to spend capital does not, in and of itself, apply to amounts invested in specific asset classes and therefore the current rules do not, in our legal advisor’s opinion, prevent buying one form of investment or another. The advisor goes on to add: ‘if trustees administer a permanent endowment they are expected to have regard to the needs of future as well as present beneficiaries. Trustees will have to consider carefully how they are meeting this duty if investing in any depreciating asset (a lease would be another example) but that does not mean that such an asset might not be a suitable part of a diversified portfolio that overall will still produce income in the long-term. If it did, trustees would be unable to manage their portfolio in a suitably diversified way.’”

9.61 Consultees did not, however, challenge our statement that permanent endowment cannot be used to make social investments with an overall negative financial return, since that would amount to spending the permanent endowment.\textsuperscript{485}

\textbf{(2) Existing duties to maintain the real value of permanent endowment}

9.62 Some consultees said that the effect of the existing law is that trustees will seek to maintain the real value of permanent endowment.\textsuperscript{486} Our comments about the lack of a duty to maintain the real value of permanent endowment were “overstated” since trustees “must aim to balance capital growth and income returns”.\textsuperscript{487} “It would be highly unusual (and certainly not our experience) – and presumably a breach of duty – for trustees to leave the capital value at its original value”.\textsuperscript{488} By contrast, some

\textsuperscript{484} The same comments were made by NCVO, ACF, CFG and IoF.

\textsuperscript{485} This was our conclusion following our consultation on social investment: Social Investment by Charities: The Law Commission’s Recommendations (September 2014), paras 1.61 and 1.64.

\textsuperscript{486} Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); National Trust (which queried whether maintaining just actual values was consistent with trustees’ duty to act prudently); Prof Duncan Sheehan.

\textsuperscript{487} CLA (with whom Bircham Dyson Bell LLP agreed).

\textsuperscript{488} Bates Wells Braithwaite.
consultees agreed with our analysis that there was no obligation to maintain the real value of permanent endowment in the long term.\footnote{Veale Wasbrough Vizards LLP; NCVO; ACF; CFG; and IoF.}

9.63 Francesca Quint took a more nuanced approach; she said the question whether it is a breach of trust to allow permanent endowment to lose value in real terms depends on the rate of inflation at any particular time. She referred to the Charity Commission’s view in the 1970s and 1980s that trustees who retained War Stock – popular in times of low inflation but by then having fallen in real value – were in breach of trust and should have reinvested the assets. She said it was only since recessions of recent decades that the Charity Commission has been satisfied with charities replacing only historical value under recoupment orders and in their investment policies. “I anticipate that if high inflation were to return the climate of opinion would change. … I would dispute the assumption that to preserve historical value is always enough: prudence requires a higher standard of care in my view”. She therefore concluded that there was no need for a new regime but rather “a more responsible attitude on the part of trustees (and their investment advisers) towards future beneficiaries than is implicit in the view that the trustees’ only obligation is to preserve the historical value of permanent endowment”.

Support for a new “preserved endowment” regime

9.64 Anthony Collins Solicitors LLP said it could be a “win, win situation”. UnLtd said “If we were able to adopt a new regime as proposed, [our] ability to deliver [our] charitable objectives could be enhanced”.

9.65 Stone King LLP said “permanent endowment has long historic roots in a zero or low inflation environment. If devising a system of permanent endowment during an inflationary period, it would be appropriate to do so along the lines of the Law Commission’s proposal rather than have an arbitrary division between capital and income.” The capital/income classifications “are no longer so relevant” and “permanent endowment needs to move forward”.

9.66 NCVO, ACF, CFG, IoF said the existing restrictions “are blunt and unhelpful in enabling trustees to use the assets they hold in ways that deliver the charitable objectives while still giving effect to donor’s intent as to perpetuity by balancing the needs of current and future beneficiaries”. They welcomed the proposal for a new form of preserved endowment, which “would relieve trustees of the concern that they are ‘spending the family silver’ if they decide to use one of the existing options [to release permanent endowment restrictions]”.

9.67 UnLtd thought that the existence of the regime, even if charities did not opt in to it, “may help to establish best practice and to guide trustees in seeking permission to make changes through other means”.

Precedent

9.68 The Association of Church Accountants and Treasurers said that a useful precedent for any new regime would be the endowment of the Wellcome Trust. The original endowment evolved over many decades from permanent to expendable and finally into a completely new form of fund that seems to equate to a corporate general
reserve which can be treated as capital or as income entirely at the trustee’s discretion – thus allowing income to be accumulated as capital at any time and in any amount and the capital’s real value to be preserved in any way considered appropriate and allowing for the full spectrum of social investments to be made.

**Doubts and disagreement**

9.69 Various reasons were given by consultees who disagreed with a new regime, or who had concerns about how it would operate.

1. It would lead to increased bureaucracy, costs, and complexity, “particularly with trustee changes and the vagaries of the financial market”. Having said that, if trustees opt in to the new regime in respect of their entire fund, it “could in fact simplify the holding of permanent endowment”.

2. It would lead to hazard for charity trustees.

3. It would be difficult for the trustees to report on, and difficult to monitor and audit.

4. It is unnecessary and undesirable in light of:
   a. the existing mechanisms to release permanent endowment restrictions (under sections 281 and 282; total return investment; and Charity Commission orders or schemes); and
   b. the existing duty of even-handedness which already ensures that real value of permanent endowment is maintained.

5. A duty to maintain real value would be difficult to operate in practice “given the uncertainties of the investment market and fluctuations in value of investments”.

6. It would undermine donor confidence. By contrast, some consultees thought the new regime would be welcomed by donors, giving them a greater range of

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490 Francesca Quint; Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); University of Liverpool CL&PU; National Trust; Veale Wasbrough Vizards LLP.

491 Bates Wells Braithwaite.

492 Veale Wasbrough Vizards LLP.

493 Francesca Quint; Anthony Collins Solicitors LLP.

494 National Trust.

495 Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed); National Trust; Prof Gareth Morgan; Prof Duncan Sheehan.

496 CLA (with whom Bircham Dyson Bell LLP agreed).

497 University of Liverpool CL&PU.
options\textsuperscript{498} and encouraging them to establish charities with permanent endowment.\textsuperscript{499}

(7) Trustees might take decisions that do not balance the needs of current and future beneficiaries.\textsuperscript{500}

(8) Ordinary permanent endowment “would be administered with less care and foresight than is desirable”.\textsuperscript{501}

(9) It would be difficult to strike the right balance in the level of regulation:\textsuperscript{502}

(a) some regulation is necessary (for example, without clarity about the meaning of “long term”, charities “could continually defer this requirement”); but

(b) regulation could make the regime very unattractive (for example, trustees would need plans – and contingency plans – to recoup capital by the due date).

\textbf{Existing mechanisms to release permanent endowment restrictions}

\textbf{Changing attitudes}

9.70 The National Trust thought it important to emphasise what charities can already do with permanent endowment as it already has a degree of flexibility. Social Finance expressed a desire for social investment to be seen as an acceptable reason to seek permission from the Charity Commission to spend permanent endowment; social investment was not in mind when many permanent endowments were established and the original donors may have been willing to engage.

\textbf{Difficulties with existing mechanisms}

9.71 Some consultees commented on the existing mechanisms for releasing permanent endowment restrictions. NCVO, ACF, CFG and IoF said they “may not give the right flexibility appropriate to managing such a fund in the twenty-first century”. The National Trust said that, whilst there is already flexibility, the processes “would benefit from being easier to navigate”.

9.72 Social Finance said that the options for using permanent endowment to make social investments with a negative return under the current law are “substantial and potentially arduous approaches”. They “should not be a problem”, but are “unlikely to be considered appropriate by trustees in most cases – not least when they might be keen to test an idea like the social investment market for the first time”; they do not want to be accused of selling the family silver.

\textsuperscript{498} Independent Schools Council; Veale Wasbrough Vizards LLP.
\textsuperscript{499} Stone King LLP.
\textsuperscript{500} National Trust.
\textsuperscript{501} Francesca Quint.
\textsuperscript{502} National Trust.
Overlap between a new regime and total return investment

9.73 Some consultees who supported a new regime thought that it would replace the TRI regime, or that the new regime should borrow the features of the TRI regime.\textsuperscript{503}

9.74 Conversely, some consultees queried the need for a new regime given the availability of total return investment.\textsuperscript{504} The Charity Commission said that TRI permits trustees to maintain the value of permanent endowment in the long term. Prof Gareth Morgan said the TRI regulations "although complex, achieve what is needed"; they could be simplified, but a complete change to the concept of permanent endowment is unnecessary.

9.75 Prof Duncan Sheehan said "the total return methodology provides a usable model and that we should not reinvent the wheel." Charities must calculate the value (now) of the original endowment, and the rest is unapplied total return which the charity can use in any way it sees fit.\textsuperscript{505} If there is a negative overall return in one year, the charity can still apply part of the unapplied total return to the income fund. In addition, charities can spend 10\% of the investment fund, which is not prescriptive about how the fund should be recouped and over what period; it is based on the duties in regulation 6.\textsuperscript{506} Subject to some changes to the TRI regime to make it more flexible (see below), he thought that it was sufficient.

Changes to total return investment

9.76 Prof Duncan Sheehan thought the regime should operate as follows.

(1) The cap on what can be added to the investment fund should be removed; the purpose of a permanent endowment fund is to provide an income and trustees could rationally decide to build a larger fund now to provide greater income in the future.

(2) Once allocated to the investment fund, it should be protected and, so far as possible, its real value maintained. It might be appropriate to have a duty to use reasonable care to maintain the real value.

(3) The power in regulation 4 to spend up to 10\% is restrictive because it may be insufficient (for example, to repair the village hall roof). Sections 281 and 282 should be retained for cases where the trustees intend to spend without recouping (or wind-down the charity). In other cases, but where the 10\% cap is too restrictive, the charity should obtain Charity Commission consent to the charity’s plan to spend and recoup the capital.

\textsuperscript{503} Stone King LLP; NCVO; ACF; CFG; and IoF. Veale Wasbrough Vizards LLP made similar comments, noting that the requirement to obtain advice and to devise a suitable investment policy could usefully be borrowed from the TRI regime.

\textsuperscript{504} See para 9.69(4) above.

\textsuperscript{505} Similarly, NCVO, ACF, CFG and IoF said that the TRI regime has allowed permanently endowed charities to "[identify and release] 'trapped capital' accumulated in permanent endowments over years through capital appreciation which previously was unavailable to trustees". However, TRI does not work for some ACF members because they cannot determine a base value for their fund.

\textsuperscript{506} Similarly, NCVO, ACF, CFG and IoF said that the power in the TRI regime to spend up to 10\% subject to recoupment provides "welcome flexibility".
A more limited power

A power for social investment alone

9.77 Consultees noted that one of the benefits of a new regime would be to permit charities to use permanent endowment to make social investments with an expected negative financial return. Some consultees supported a power that was limited to social investment; the CLA said “we are not aware of any other significant momentum for change to the current regime”. The CLA and Bircham Dyson Bell LLP said it might be possible to launch the new regime for social investment alone, with an option to extend it more widely at a later stage if appropriate.

A power to borrow from permanent endowment

9.78 Veale Wasbrough Vizards LLP said that a significant benefit of a new regime would be allowing charities to borrow from permanent endowment without a Charity Commission order. The Charity Commission suggested it might be possible to create a more flexible scheme for charities to borrow from permanent endowment which could be operated by trustees without the need for Charity Commission intervention. The National Trust said that if this approval were made more straightforward (for example, obtaining approval from an accountant) “it could provide the flexibility that the ‘preserved endowment’ proposal is seeking, without the added complications”.

9.79 Similarly, Francesca Quint said:

In relation to the feasibility of investing in mixed purpose investments and with a view to reducing bureaucratic procedures it would be extremely helpful if the law were expressly to allow the expenditure of capital subject to recoupment without the sanction of an order of the Charity Commission and the accumulation of income so as to render it permanent endowment where appropriate not only in relation to the recoupment of expenditure on (say) a building project but also where necessary to restore the real value of a charity’s permanent endowment when it has depleted through the trustees’ choice of investments, including possibly mixed purpose investments, or a market collapse or other misfortune.

I would regard it as highly desirable that trustees should normally be expected to obtain and consider appropriate advice before implementing arrangements along these lines, and they should be matters to be routinely recorded in the charity’s accounts. The rules on social investment could expressly require the possibility of capital depletion to be considered in advice and if appropriate for protective or remedial steps to be taken to guard against the consequences e.g. where permanent endowment was involved.

The mechanics of a new "preserved endowment" regime

9.80 A new regime needs to be “as attractive and straightforward to use as possible” and it needs to encourage trustees to think responsibly. As noted above, various

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507 For example, Veale Wasbrough Vizards LLP.
508 Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed).
509 CLA.
510 NCVO; ACF; CFG; and IoF.
consultees thought that would be difficult to achieve. In the Consultation Paper, we identified various characteristics of a new scheme that would need to be considered. Consultees raised others.

Limiting the regime to certain types of permanent endowment

9.81 Bates Wells Braithwaite said that the new regime would not be appropriate for some permanent endowment funds, such as a fund to provide income for an annual prize, and the new regime should not be available in respect of these funds. Accordingly, “criteria should apply so that trustees must address the appropriateness of the power in relation to their purposes before exercising the power”. In addition, the new regime should only be available in respect of permanent endowment over a certain size, say £1 million, because it will be “complex to operate and require significant financial expertise”.

9.82 The National Trust thought some form of validation should be necessary, for example a requirement to obtain advice or to seek approval from the Charity Commission.

Limiting the regime to a certain proportion of a charity’s permanent endowment

9.83 The University of Birmingham thought the new regime should only be available for a set percentage of a charity’s permanent endowment. Social Finance thought trustees should have the option to apply the new regime to the whole or just a part of the endowment, which could be increased over time.

Restrictions on using the fund

9.84 We asked whether there should be any restrictions on the trustees’ powers to use the assets, or whether charities should have the power to use the assets in any way (such as borrowing from the fund, or entering into any transaction from an investment through to spending on the charity’s purposes).

9.85 Some consultees thought there should be freedom to use the capital in any way with no prohibition on spending the capital, provided a plan is made to replenish losses or protect the value of the fund. NCVO, ACF, CFG and IoF said that trustees will decide to opt in to the new scheme if they are satisfied that it would permit the charity’s purposes to be carried out more effectively and that the donor’s intention of perpetuity will be upheld. They thought that trustees should be required to set out their rationale for opting into the scheme (together with their policy) and that, having done so, they should have freedom to use the fund in any way they see as appropriate.

511 Lord Hodgson.
512 Consultation Paper, para 9.78.
513 Similar comments were made by CLA (with whom Bircham Dyson Bell LLP agreed).
514 Consultation Paper, para 9.78(1).
515 Social Finance; Joel Moreland; University of Plymouth; NCVO; ACF; CFG; and IoF.
9.86 Other consultees thought there should be a limit on how much could be spent “given the difficulties in spending out whilst maintaining the real value”.516

“Real value”

9.87 We asked whether a new scheme should incorporate a duty on trustees to maintain real value, or a less onerous duty to seek to maintain real value, and how “real value” should be defined.517

Preliminary: Is it possible to preserve real value?

9.88 NCVO, ACF, CFG, IoF said that this “begs the question of whether trustees are in fact able to preserve the real value of an endowment over time”. They acknowledged that many charities with an expendable endowment still aim to preserve the real value of their endowment, but that “preserving the real value of an endowment can only ever be a probability rather than a certainty”.518 They said “historical data that shows that a typical charity portfolio invested in 1899 (the earliest year for which data is available) would have maintained its value over the succeeding 112 years spending at a ‘sustainable rate’ of 4.2%, but that for 88 of those years the value of the endowment would have been below the real value. How would trustees in such circumstances have implemented a duty to maintain the value of the fund in line with inflation?” They concluded that “maintaining real value cannot be framed as a duty for trustees because it is not something they can with any certainty fulfil”. They said that “real value is instead best regarded as a means of maintaining the spending power of an endowment”, and this is one proxy for balancing the needs of present and future beneficiaries. They therefore suggested “that there may be wisdom in the current system, and the rationale underlying the Total Return approach, and that the new form may be better framed along similar lines”.

9.89 NCVO, ACF, CFG, IoF said that the decision to opt in to the regime should set out (1) how the charity’s purposes will be more effectively pursued by the new regime, and (2) “how the donor’s intent as to perpetuity will be maintained in terms of balancing the needs of present and future beneficiaries, though not necessarily in terms of maintaining the real value of the fund”. The trustees’ policy should “assess the prospects for recoupment over time”, show that professional legal and financial advice has been taken, and set a minimum duty to maintain the nominal value of the fund.

9.90 They thought that the duty should be to retain actual value over time, not real value. This would particularly help permanently endowed charities that are currently unable to take advantage of TRI “as well as those who judge that discharging their duty to future generations may entail increased expenditure today”.

516 Bates Wells Braithwaite (who suggested 10%). Stewardship made similar comments, saying permitting trustees to spend the whole fund would be reckless. It suggested a cap of 25% or £250,000, whichever was the lower, with a safeguard – such as Charity Commission consent – before the rest of the fund could be spent.

517 Consultation Paper, para 9.78(2) and (4).

518 They said that “evidence based on 30 years forecast evidence shows that, even if charities spent nothing, the chance of maintaining the real value of their endowment is no higher than 94%”. 
A duty to maintain real value or a duty to seek to maintain real value?

9.91 Some consultees thought that either duty would be more onerous than the current duty of even-handedness.\(^{519}\)

9.92 One consultee was content with a requirement on trustees to maintain real values.\(^{520}\) Most consultees, however, expressed concern about an obligation to maintain the real value of the permanent endowment.\(^{521}\)

(1) This would place the risk of market failures on trustees, which is beyond their control. There should therefore be no duty to recoup actual losses.\(^{522}\)

(2) It would create difficulties for trustees in times of long-term low-income returns.\(^{523}\) “Little or nothing may be spent for years during periods of unfavourable market conditions or high inflation”; the regime would be unattractive if it “could require the fund to become entirely dormant for years in unfavourable economic conditions”.\(^{524}\)

(3) It would be “a significant commitment which trustees may be reluctant to sign up to and, if they do, will impact on the rest of the investment portfolio as they have to benchmark against this new target (be it RPI, CPI, etc.)”.\(^{525}\) It would drive charities “to very conservative investment approaches with consequent low returns”.\(^{526}\) Conversely, it could drive trustees to inappropriately risky investments in order to achieve the real value objective or to replenish any losses, which could place more of the charity’s capital at risk.\(^{527}\)

(4) Trustees will already try to maintain real value and will try to recoup any market losses, even if there is no requirement on them to do so.\(^{528}\)

(5) The duty should be to seek to maintain the real value.\(^{529}\)

9.93 Stewardship asked what sanctions should be imposed on trustees if they failed to maintain the real value of the fund.

\(^{519}\) CLA (with whom Bircham Dyson Bell LLP agreed); NCVO; ACF; CFG; and IoF.

\(^{520}\) University of Plymouth.

\(^{521}\) Social Finance; Joel Moreland; Bates Wells Braithwaite; UnLtd; Stone King LLP; Stewardship; NCVO; ACF; CFG; and IoF; Prof Duncan Sheehan.

\(^{522}\) Social Finance; Joel Moreland; Stone King LLP; NCVO; ACF; CFG; and IoF.

\(^{523}\) Stewardship.

\(^{524}\) NCVO, ACF, CFG, IoF.

\(^{525}\) Social Finance. Similar comments were made by Bates Wells Braithwaite.

\(^{526}\) UnLtd;

\(^{527}\) Stewardship.

\(^{528}\) Social Finance; Bates Wells Braithwaite.

\(^{529}\) Wales Council for Voluntary Action; UnLtd; Stone King LLP; Stewardship; Prof Duncan Sheehan (if a new scheme is created).
Defining “real value”

9.94 Consultees made various comments on how to define “real value”:

(1) The Charity Investors’ Group identified practical difficulties in seeking to “maintain real value”. There is a “mismatch” between “volatile values and stable inflation”. “It is not possible to invest in ‘inflation’, and most long term endowments seek to generate inflation plus 3-5%”. But to achieve this, it is necessary to invest in more volatile assets, so comparing the value of an endowment at a point in time against an inflation benchmark is “problematic in practice”.

(2) The metric must be “transparent and relatively easy to invest against” such as inflation as used in UK government gilts.530

(3) A minimum capital value could be used, alongside trustees being encouraged to consider how their circumstances might differ.531

(4) Charities should be able to choose the measure that is most appropriate for them.532 This could be subject to Charity Commission supervision.533 The appropriate inflation index will be different for different charities, so a single inflation metric would not necessarily reflect the charity’s cost base:

(a) higher education inflation is consistently higher than retail price inflation; and

(b) a charity with a large staff might find wage inflation more useful.

9.95 Stone King LLP referred to Newton Investment Management ‘Sustainable portfolio withdrawal rates’ for charities’ (March 2015) which considers the highest spending level whilst maintaining the real value of the fund.

The meaning of “long term”

9.96 We asked how “long term” should be defined.534 Consultees made various comments.

(1) It should be at least 5 to 10 years.535

(2) Trustees should be encouraged to act “generationally”, taking a 25-year view.536

530 Social Finance.
531 National Trust, which explained that it adopted the more prudent “Chorley formula” which assumes that costs will grow at a faster rate than income.
532 Charity Investors’ Group; National Trust; NCVO; ACF; CFG; IoF (if there is to be a requirement to maintain real value); Prof Duncan Sheehan.
533 Prof Duncan Sheehan.
534 Consultation Paper, para 9.78(3).
535 Social Finance.
536 Lord Hodgson.
Reasonable recoupment can generally take place between 10 and 20 years, but it can be up to 30 years.  

The Charity Investors' Group noted that long term was linked with maintaining real value. “The longer the time horizon, the more likely that asset class returns will be closer to the long term historic averages.” Anything less than 30 years “would limit the ability of permanent endowments to benefit from their perpetual time horizon, to accept shorter term capital value volatility, in return for better overall long term returns.”

It depends on the charity and should be left to the trustees to define, perhaps subject to Charity Commission supervision.

The TRI regulations leave this to the trustees to decide what is reasonable and in the interests of the charity.

Sections 281 and 282

We asked whether powers equivalent to those contained in sections 281 and 282 of the Charities Act 2011 should apply. All consultees who responded thought it should. Stone King LLP said a charity that had opted in might still want to spend out, for example a charity for the relief of sickness from a particular disease for which a cure becomes available might wish to spend out to eradicate the disease.

The University of Liverpool CL&PU said that the SORP would have to be updated to reflect any new regime.

Some consultees thought that donors should be able to choose to exclude any new regime.

As permanent endowment is commonly known by the acronym “PE”, it might be confusing to call the new regime “preserved endowment”. An alternative would be “maintained endowment”.

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537 NCVO; ACF; CFG and IoF.
538 NCVO, ACF, CFG and IoF made similar comments.
539 Charity Investors’ Group; Veale Wasbrough Vizards LLP; Joel Moreland; Prof Duncan Sheehan.
540 Prof Duncan Sheehan.
541 NCVO; ACF; CFG; IoF; Prof Duncan Sheehan.
542 Consultation Paper, para 9.78(6).
543 Social Finance; Joel Moreland; UnLtd; Stone King LLP; NCVO; ACF; CFG; and IoF.
544 Bates Wells Braithwaite; CLA (with whom Bircham Dyson Bell LLP agreed).
545 Veale Wasbrough Vizards LLP.
Consultation Question 56.

We invite the views of consultees as to whether, and if so how, such a new regime would be likely to increase or decrease the costs incurred by charities in administering permanent endowment.

[Consultation Paper, paragraph 9.82]

9.101 14 consultees responded to this question. Consultees’ views were mixed. Some consultees thought that adopting the new regime would generate an overall saving for charities, whereas a roughly equal number thought that the new regime would require significantly higher advice and management costs that would outweigh any benefits that it might bring.

9.102 Bates Wells Braithwaite thought that the complex nature of the new regime may make it more expensive to operate and harder for trustees to understand. The CLA and Bircham Dyson Bell LLP agreed. Prof Gareth Morgan thought that implementing such a fundamental change to the law would have considerable costs.

9.103 Veale Wasbrough Vizards LLP said that initial “conversion” costs could be significant as it is likely that charities would need both legal and financial advice, but that costs could be saved in the long term by increasing flexibility for trustees. The National Trust and Anthony Collins Solicitors LLP expressed a similar view.

9.104 The view of the Charity Commission was that if in general terms trustees were able to make their own decisions regarding spending and replenishing permanent endowment without recourse to the Charity Commission, it is likely to reduce the administrative burden on charities and save costs. It may also release some resources currently expended by the Commission.

9.105 The Association of Church Accountants & Treasurers was confident that the new regime would reduce administrative costs “by obviating the need to seek advice about capital and income distinctions under trust law”.

546 Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; UnLtd; Charity Commission; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; NCVO; ACF; CFG; and IoF.
Chapter 10: Remuneration for the supply of goods and the power to award equitable allowances

INTRODUCTION

10.1 In Chapter 10 of the Consultation Paper we considered the requirement that charity trustees, as fiduciaries, must account for unauthorised profits made in the course of their role as fiduciaries. We focused on (1) the remuneration of charity trustees for the supply of goods and (2) the power to award equitable allowances to trustees in respect of their work and skill in bringing about a profit. We observed that the current procedures in both of these areas are costly and time-consuming for charity trustees. We provisionally proposed that there should be a statutory power to allow charities to remunerate their trustees for the supply of goods and that the Charity Commission should be given a power to award equitable allowances.

10.2 In this chapter we analyse consultees' responses to individual questions and proposals, and address other issues raised by consultees in the process.

CONSULTATION RESPONSES

10.3 37 consultees answered at least one question in Chapter 10 of the Consultation Paper. Generally, consultees agreed with our proposals and re-enforced our understanding of the difficulties faced by charity trustees in these areas.

RESPONSES TO INDIVIDUAL QUESTIONS

 Consultation Question 57.
We provisionally propose the introduction of a new statutory mechanism for the authorisation of remuneration of trustees for the supply of goods that mirrors section 185 of the Charities Act 2011.

Do consultees agree?

[Consultation Paper, paragraph 10.47]

10.4 33 consultees answered this question, all of whom agreed with our proposal.

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547 Prof Duncan Sheehan; Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological Protection; Crispin Ellison; Lawyers in Charities; Association of Church Accountants and Treasurers; National Trust; Prof Gareth Morgan; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF.
10.5 We observed in the Consultation Paper that whilst section 185 of the Charities Act 2011 gives charities a default power to remunerate their trustees (and connected persons) for the supply of services, there is no equivalent power for the supply of goods. We provisionally proposed a power to remunerate trustees for the supply of goods which would mirror the power in section 185, including the four conditions which have to be fulfilled for the remuneration to be authorised, namely: 548

(1) **Condition A:** The amount of the remuneration is set out in a written agreement between the charity and the provider of the services (“P”) and does not exceed what is reasonable in the circumstances.

(2) **Condition B:** The charity trustees are satisfied that it would be in the best interests of the charity for the services to be provided by P on the terms of the agreement. 549

(3) **Condition C:** The agreement does not result in a majority of the trustees of the charity being persons who are:

   (a) party to an agreement within (1) above;

   (b) entitled to receive remuneration out of the funds of the charity otherwise than by virtue of such an agreement; or

   (c) connected with a person falling within (a) or (b) above.

(4) **Condition D:** The trusts of the charity do not contain any express provision that prohibits P from receiving the remuneration. 550

10.6 This proposal received support from all consultees who answered the question. Stone King LLP agreed that “it seems to be an anomaly of the current Charities Act that it allows for the authorisation of services, but not goods”. The Law Society thought the proposal was “very sensible”.

10.7 This consensus exists even though, as Anthony Collins Solicitors LLP, the CLA, Stone King LLP and Bates Wells Braithwaite noted, it is commonplace for charities to provide for the remuneration for the supply of goods in their governing documents. CCNI explained that the statutory power would nevertheless “provide trustees with the reassurance of statutory guidance in assessing appropriateness of the payment”. Moreover, the CLA pointed out that there remain charities that were established before a goods provision became standard practice. As is discussed at paragraph 10.13 below, the procedures for gaining prior authorisation of a payment by the Charity Commission or for inserting a clause authorising remuneration for the supply of goods into a charity’s governing documents are often complex and disproportionate to the sum involved.

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548 Charities Act 2011, s 185(2).

549 The duty of care in section 1(1) of the Trustee Act 2000 applies to a charity trustee when making this decision: section 185(5).

550 Charities Act 2011, s 185(2). The “trusts” of a charity are “the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not”: Charities Act 2011, s 353(1).
10.8 The Independent Schools Council’s support was qualified by the statement that the reimbursement of trustees for services and goods should be “the exception and not the rule”. We consider that, if the proposed power mirrors section 185, the criteria currently in section 185(2) should be sufficient to ensure that remuneration remains exceptional. This was recognised by NCVO, ACF, CFG and IoF, who thought that the proposal “will not affect the general principles of voluntarism”.

How the mechanism should be framed

10.9 No consultee objected to the suggestion that the proposed power mirror the power in section 185, and no consultee suggested that the four conditions in section 185(2) would need to be changed in their application to the supply of goods.

10.10 Bates Wells Braithwaite and Veale Wasbrough Vizards LLP advocated the incorporation of the proposed power within section 185, as opposed to a separate statutory mechanism mirroring section 185. Bates Wells Braithwaite also emphasised that the power should not override any more “bespoke” conditions in a charity’s governing documents.

10.11 Prof Gareth Morgan suggested that the proposed power should be included in an over-arching regime for authorisation of trustee dispositions including land. On this proposal, see Chapter 8 above.

Consultation Question 58.

We invite consultees to share with us their experiences of considering whether to authorise, and subsequently authorising, the remuneration of trustees for the supply of services and for the supply of goods to a charity, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 10.49]

10.12 20 consultees answered this question.552

10.13 As noted in paragraph 10.7 above, consultees confirmed that most charities are advised to and do include a provision for remuneration for the supply of goods in their governing documents. However, consultees generally suggested that alternative routes for charities whose governing documents do not so provide are inadequate:

(1) The process for inserting a provision for remuneration for the supply of goods by amending a charity’s governing document was generally agreed to be inefficient and disproportionate to the sums involved. Anthony Collins Solicitors LLP endorsed the proposed statutory power on the ground that the amendment

551 See para 10.5 above.
552 Geldards LLP; Colleges of the University of Oxford; Colleges of the University of Cambridge; Anthony Collins Solicitors LLP; Stone King LLP; Bates Wells Braithwaite; CLA; Independent Schools Council; Lawyers in Charities; NCVO; ACF; CFG; IoF; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; Churches’ Legislation Advisory Service; Bircham Dyson Bell LLP; Church Growth Trust; Francesca Quint.
of governing documents is not a feasible alternative; Stone King LLP agreed that it is “over the top” to expect charities to amend their governing documents to make payments for goods supplied by trustees.553

(2) NCVO, ACF, CFG and IoF stated that an express statutory power was to be preferred over having to obtain Charity Commission authorisation554 for reasons of cost and time. Geldards LLP said more generally that since the Charity Commission has introduced online forms, it has been less able to perform a useful service, and therefore a statutory power is to be welcomed.

10.14 Some consultees had experienced charities remunerating trustees for the supply of goods despite this constituting a breach of fiduciary duty. The Independent Schools Council was aware of situations in which trustees have been remunerated for the provision of goods despite the charity having no legal power to do so. The Churches’ Legislation Advisory Service had encountered situations where charity trustees have supplied goods to a charity for their own benefit, and suggested a cap of £5,000 on any payment to ensure the proposed power is not abused.

10.15 We consider that these problems would be addressed by placing the power to remunerate trustees for the supply of goods on a statutory footing as proposed, with restrictions mirroring those in section 185. In particular, Condition B555 would ensure that trustees acted in the interests of the charity and not in their own interests (unless the two coincided). We do not agree that an arbitrary cap on the amount of a payment is necessary. If a large payment is made and there are suggestions that it was not in the charity’s interests, the trustees could expect greater scrutiny of – and potentially challenge to – their decision. But ultimately the size of a payment says little about whether it is appropriate and in the charity’s interests; a large payment may be justified in some circumstances whereas a small payment may be inappropriate in others.

Reform of section 185 of the Charities Act 2011

10.16 Seven consultees556 suggested that more general reform of section 185 of the Charities Act 2011 or the Charity Commission guidance relating to it might be needed from their experience of its operation. These suggestions would also apply to the new power to remunerate for the supply of goods (where relevant), if the conditions for the new power are to mirror those in section 185.

10.17 The CLA thought reform is required due to the length and complexity of section 185.557 Bircham Dyson Bell LLP agreed, and voiced a specific concern about the phrasing of Condition B within section 185(2):

553 See para 10.12 of the Consultation Paper.
555 See para 10.5(2) above.
556 CLA; Bircham Dyson Bell LLP; Church Growth Trust; Prof Gareth Morgan; Francesca Quint; RSPCA; Veale Wasbrough Vizards LLP.
557 By contrast, Veale Wasbrough Vizards LLP thought that the section was relatively straightforward: see para 10.22.
Condition B in s185 requires that the charity trustees are satisfied "it would be in the best interests of the charity to be provided by P ...". However, we think that this is subtly different from the Commission's guidance (which we think makes the point correctly). ... We think that the condition should be that the charity trustees are satisfied that the arrangement would be "in the best interests of the charity".

10.18 Bircham Dyson Bell LLP also suggested that Condition B should include “pointers to that test, as set out in the guidance”, as currently Condition B does not give “sufficient steer” to trustees. This is despite the fact that trustees are required to consult the Charity Commission guidance. In our view, however, further elongating the section is likely to exacerbate concerns that the section is already too long and complex. We consider that this problem could perhaps be solved more easily through increasing awareness of the Charity Commission's guidance.

10.19 A suggestion made by Prof Gareth Morgan was that Condition C should be altered to provide that no more than half the trustees can benefit from remuneration in any year. This responds to situations he has encountered where although no singular transaction benefits the majority of the trustees, they are all frequently being remunerated through many different transactions. In our view, such situations might already be caught by Condition C(b), but in any event to make express provision for such cases in section 185 would be unnecessary and overcomplicated. This is one of many ways in which trustees can collude to the detriment of their charity. Such conduct will amount to a breach of the trustees' duty to act in the charity’s best interests and thus will already be caught by the law.

10.20 The Church Growth Trust proposed that section 185 should be altered to allow a trustee to be remunerated for services performed under a contract of employment, which is currently prohibited under section 185(3)(a).

10.21 Bircham Dyson Bell LLP further suggested that there was uncertainty surrounding the meaning of “connected person”, which appeared in different sections throughout the Charities Act 2011.

Charity Commission guidance and model documents

10.22 As noted in the Consultation Paper, the Charity Commission has issued detailed guidance on compliance with the conditions in section 185(2). Whilst Veale Wasbrough Vizards LLP found that these conditions are generally well understood, this was questioned by the RSPCA, who thought that “a template statutory agreement would assist charities”.

10.23 Veale Wasbrough Vizards LLP expressed concern about the complexity of the provision for remuneration for the supply of goods in the Charity Commission’s model documents, in contrast to the simple test set out in section 185. In Veale Wasbrough Vizards LLP’s template documents the power to remunerate for the supply of goods is based on the test in section 185, as opposed to the test in the Charity Commission's model documents.

558 Charities Act 2011, s 185(4).

559 Charity Commission, CC11 Trustee Expenses and Payments (March 2012), para 4.
Consultation Question 59.

We provisionally propose that the Charity Commission should have a statutory power to relieve a trustee, in whole or in part, from liability to account for a profit (of any size) made in breach of fiduciary duty.

Do consultees agree?

[Consultation Paper, paragraph 10.59]

10.24 35 consultees answered this question:\(^{560}\)

1. 31 agreed;\(^{561}\)
2. 3 disagreed;\(^{562}\) and
3. 1 was undecided.\(^{563}\)

10.25 In the Consultation Paper we summarised the history of the equitable allowance, which can be awarded to charity trustees as payment for the skill and effort employed carrying out work for the charity.\(^{564}\) We provisionally proposed that, as a less costly and time-consuming process than bringing court proceedings, the Charity Commission should be able to award equitable allowances.

Agreement

10.26 There was general support for this proposal. The Charity Commission agreed to an extension to its jurisdiction; “we consider that in appropriate circumstances we should be able to [award] an equitable allowance”. The University of Liverpool CL&PU

\(^{560}\) Institution of Civil Engineers; Francesca Quint; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; Colleges of the University of Cambridge; University of Liverpool CL&PU; Prof Duncan Sheehan; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; CLA; Bircham Dyson Bell (agreeing with CLA); Church Growth Trust; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological Protection; Crispin Ellison; Lawyers in Charities; Association of Church Accountants and Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Geldards LLP; University of Plymouth; CCNI; Institute of Chartered Secretaries and Administrators; NCVO; ACF; CFG; IoF.

\(^{561}\) Institution of Civil Engineers; Francesca Quint; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; Colleges of the University of Cambridge; University of Liverpool CL&PU; Prof Duncan Sheehan; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; CLA; Bircham Dyson Bell (agreeing with CLA); Church Growth Trust; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological Protection; Crispin Ellison; Lawyers in Charities; Association of Church Accountants and Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF.

\(^{562}\) Geldards LLP; University of Plymouth; CCNI.

\(^{563}\) Institute of Chartered Secretaries and Administrators.

\(^{564}\) See paras 10.21 to 10.35 of the Consultation Paper.
thought that “there is a logical argument to be made for the introduction of such a power” to improve transparency and avoid the time and expenditure involved in going to court. NCVO, ACF, CFG and IoF similarly noted that this proposal constitutes a “cheaper and less time-consuming alternative to issuing court proceedings”. It was emphasised by Bates Wells Braithwaite and the CLA that claims for equitable allowances are rarely sought by trustees. Bates Wells Braithwaite said that this is presumably by reason of the “costs and complexity” involved in litigation.

Disagreement

10.27 The University of Plymouth feared that the proposed power would undermine the strict nature of fiduciary duties and encourage trustees to profit in breach of those duties. CCNI voiced similar concerns, fearing that charity trustees might get the impression that a breach of fiduciary duty is justified by the profit made from it (that the “ends justify the means”).

10.28 The University of Plymouth was apprehensive about a wide discretion being given to the Charity Commission. CCNI made the point that the new power could result in reputational damage for the Charity Commission, suggesting that a procedure through the Charity Commission would be a less legitimate means of awarding equitable allowances:

CCNI sees the potential for reputational damage for the regulator in instances where the conduct of and breach of duty by a trustee could be seen to result in either “endorsement”, through relief from liability to account for their profit, or “discipline” through possible regulatory action for any loss suffered by the charity.

Charity Commission resources and caseload

10.29 A further issue raised by five consultees was the ability of the Charity Commission to award equitable allowances on a practical level.

10.30 It has already been noted at paragraph 10.26 above that claims for equitable allowances are relatively rare. Despite this, the Institute of Chartered Secretaries and Bates Wells Braithwaite predicted that the introduction of the power to award equitable allowances would require an increase in Charity Commission funding. The Institute of Chartered Secretaries and Administrators also flagged the possibility of the Charity Commission’s internal policy on equitable allowances being challenged. CCNI thought the review procedure would probably be through judicial review as it is for section 191 of the Charities Act 2011; this could be expensive and a potential waste of Charity Commission resources. As a whole, therefore, it was unclear to the Institute of Chartered Secretaries and Administrators whether the introduction of a new power would survive a cost/benefit analysis. Account, however, must be taken of the fact that requests for an equitable allowance already come before the Charity Commission and are currently resolved by other, less satisfactory, means.

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565 Institute of Chartered Secretaries; Bates Wells Braithwaite; CLA; Stone King LLP; CCNI.

566 The Charity Commission has informed us that upon receipt of a meritorious request for an equitable allowance (which normally arises where the charity or trustee is asking for past remuneration from the charity to be authorised), the Charity Commission will write to the charity or its trustees stating that it has no power to award an equitable allowance, but that it considers a court would grant an equitable allowance.
10.31 Stone King LLP questioned, given past experiences, whether the Charity Commission would be willing to use the proposed power:

We have experienced several cases where the Commission is not willing to use current statutory powers to relieve trustees from a breach of duty, based on whether they have acted reasonably and honestly, and consider that the same may be true for reducing liability.

**Consultation Question 60.**

We invite the views of consultees as to whether the criteria that apply to the exercise of the power:

1. should be the same as the criteria applied by the court when considering whether to award an equitable allowance; or

2. should be the same as the criteria that apply to the exercise of the power in section 191 of the Charities Act 2011, namely whether the trustee has acted honestly and reasonably and ought fairly to be relieved from liability.

[Consultation Paper, paragraph 10.60]

10.32 26 consultees answered this question:\(^{567}\)

1. 7 thought that the criteria should be the same as the criteria applied by the court when considering whether to award an equitable allowance;\(^{568}\)

2. 18 thought that the criteria should be the same as the criteria that apply to the exercise of the power in section 191 of the Charities Act 2011;\(^{569}\)

The Charity Commission will therefore say that it will not pursue the trustee to account for unauthorised profits, and it will not pursue the other trustees or the charity for not taking action against the trustee. However, it will also say that it cannot guarantee that no one else will take issue with the unauthorised profit, and so the fact that the Charity Commission does not intend to take action is not necessarily an end to the matter. See also Charity Commission, *Ex gratia payments by charities – case studies* (May 2013) p 2.

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567 Prof Duncan Sheehan; Anthony Collins Solicitors LLP; University of Plymouth; Bates Wells Braithwaite; Bircham Dyson Bell LLP; Charity Commission; National Trust; Francesca Quint; Colleges of the University of Cambridge; University of Liverpool CL&PU; Action with Communities in Rural England; Churches’ Legislation Advisory Service; CLA; Stone King LLP; Independent Schools Council; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF; Association of Church Accountants and Treasurers; Law Society.

568 Prof Duncan Sheehan; Anthony Collins Solicitors LLP; University of Plymouth (with the qualification that it disagreed that the Charity Commission should be given the power at all); Bates Wells Braithwaite; Bircham Dyson Bell LLP ("probably", although they also supported the CLA’s proposal at para 10.36 below); Charity Commission; National Trust.

569 Francesca Quint; Colleges of the University of Cambridge; University of Liverpool CL&PU; Action with Communities in Rural England; Churches’ Legislation Advisory Service; CLA; Stone King LLP; Independent Schools Council; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF; ACAT (thought either option was acceptable “though the latter may be easier for the sector to understand”).
10.33 The criteria applied by the court when considering whether to award an equitable allowance were summarised in paragraphs 10.21 to 10.35 of the Consultation Paper. The test is fairly complex and nuanced. Section 191 of the Charities Act 2011, which empowers the Charity Commission to relieve charity trustees from liability from breach of trust or breach of duty committed in their capacity as a trustee, employs a simpler and more “broad-brush” test, namely whether the trustee has acted honestly and reasonably and ought fairly to be relieved from liability.

Simplicity and understanding of section 191 of the Charities Act 2011

10.34 The majority of consultees supported the criteria being the same as those contained in section 191 of the Charities Act 2011, mainly because the test is more straightforward and understandable than the court test. Moreover, the CLA thought there would be difficulty in codifying the complicated court test. Francesca Quint pointed out that the Charity Commission already knows how to apply the test in section 191. However, these comments can be contrasted with the view of the Charity Commission itself, which stated that it believed the court criteria to be the “most appropriate criteria” and did not express any concerns about applying that test.

10.35 Anthony Collins Solicitors LLP expressed concern that the test in section 191 was too easily fulfilled in comparison to the court test. By contrast, Bates Wells Braithwaite, NCVO, ACF, CFG and IoF observed that section 191 can be stricter than the court test, namely where the trustee’s behaviour has not been beyond reproach. In such a situation, an equitable allowance might be granted by the court even though it could not be said that the trustee acted “honestly and reasonably” under section 191. NCVO, ACF, CFG and IoF argued that more difficult cases where the trustee has not acted fairly and reasonably should be dealt with by the courts, and it would not be appropriate for the Charity Commission to authorise conduct that is not beyond reproach. Bates Wells Braithwaite expressed reservations about an equitable allowance being awarded at all in such circumstances.

10.36 The CLA supported the use of the test in section 191, with the qualification that guidance would need to be given to the Charity Commission to ensure that it did not stray too far from the criteria applied by the court. Bircham Dyson Bell LLP supported the use of the criteria applied by the courts but thought that the CLA’s proposed “compromise … should work to address the risk … of the Charity Commission and the Courts reaching different conclusions on the same facts”.

Conceptual difficulties and the court criteria

10.37 Prof Duncan Sheehan pointed out that the use of section 191 would pose significant conceptual difficulties. He noted that relieving liability and awarding an equitable allowance are conceptually different exercises, even if they both involve reducing the sum being paid by the trustee to the charity. Whilst the relief of liability in section 191 is for loss incurred by the charity as a result of breach of trust, equitable allowances relate to the disgorging of profits made in breach of fiduciary duty and allow trustees to

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570 Law Society.

571 As in O’Sullivan v Management Agency Ltd [1985] QB 428; Consultation Paper, para 10.32 and 10.33.
retain some of the profit as payment for the skill and effort expended in producing the profit.

10.38 Prof Sheehan said that, when awarding an equitable allowance, the courts had applied a different test from that in section 61 of the Trustee Act 1925 (on which section 191 is based), which shows that the award of equitable allowances and reduction in liability for breach of trust are conceptually distinct and should therefore be dealt with differently. The proposal that the Charity Commission should award equitable allowances on the basis of the test in section 191 could be seen to ignore the current state of the general law of trusts, where the courts have used distinct tests for the relief of liability and for the award of equitable allowances; in effect, it would redefine the meaning of an equitable allowance.

10.39 Stewardship pointed out the danger of framing the power as a reduction in liability, as this could result in the power being seen as allowing a fiduciary and a charity to share profits made in breach of fiduciary duty, as opposed to the trustee receiving remuneration for the work put into producing the profit. It was emphasised by the Colleges of the University of Cambridge, the Churches’ Legislation Advisory Service and the Charities’ Property Association that the power should not be used in a way which encouraged breaches of fiduciary obligations.

10.40 The National Trust, which supported the use of the test applied by the courts, pointed out that there would need to be “very clear statutory guidance” for the exercise of this power, as the underlying fiduciary duties of the trustee should not be watered down.

Other potential provisions

10.41 The CLA agreed with our proposal that there should be no limit on the size of an equitable allowance. The CLA thought “to the extent that the size of profit is a relevant factor, this is something which the Charity Commission can be expected to take into account”.

10.42 The CLA also suggested that there should be a Charity Commission power to give pre-clearance to an arrangement which would involve a breach of fiduciary duty.

10.43 Stewardship suggested that there should be a right of appeal as to the amount of the allowance. As was noted at paragraph 10.30 above, the CCNI thought that, as for section 191, the Charity Commission’s decision would be subject to judicial review.

572 We noted in the Consultation paper, para 10.51, n 67, that there was conflicting judicial authority on the question of whether s 191 (or equivalent provisions in the Trustee Act 1925 and Companies Act 2006) can be used to relieve a trustee from liability to account for a profit; see Sinclair v Sinclair [2009] EWHC 926 (Ch) [2009] All ER (D) 17, [76]; Proudman J; Coleman Taymar v Oakes [2001] 2 BCLC 749, [82]; Re Pauling’s Settlement Trusts (No 1) [1964] Ch 303, 339. In these cases there was no suggestion that such a reduction in liability, if awarded in the context of breach of fiduciary duty, would amount to an equitable allowance (indeed, the phrase “equitable allowance” was not mentioned in any of the judgments).

573 Although Stewardship did support the use of the test in section 191 for the award of equitable allowances.

574 With whom Bircham Dyson Bell LLP agreed.
Consultation Question 61.

We invite consultees to share with us their experiences of seeking to authorise an equitable allowance for a trustee, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 10.62]

10.44 2 consultees answered this question.575

10.45 The CLA reiterated the point made by consultees at paragraph 10.26 above that “this is the type of issue which comes up rarely”. The low number of responses to this question suggests that this is the case.

10.46 Stone King LLP had found that seeking an equitable allowance was “very time consuming” and that “once arguments have been prepared, we have found the Charity Commission can be cautious over spending its resources on such an application”.

575 CLA; Stone King LLP.
Chapter 11: Ex gratia payments out of charity funds

INTRODUCTION

11.1 In Chapter 11 of the Consultation Paper we considered the law surrounding the making of ex gratia payments by charities. An ex gratia payment is a payment out of charity funds that the trustees of the charity feel morally obliged to make, but for which there is no legal basis. The ability of the court or the Attorney General to authorise ex gratia payments was established in *Re Snowden*[^576] and more recently affirmed in *Attorney General v Trustees of the British Museum*.[^577] The Charity Commission has equivalent jurisdiction by virtue of section 106 of the Charities Act 2011. We provisionally proposed reforms to give charities more autonomy, subject to appropriate safeguards, in the making of ex gratia payments out of their charity’s funds.

CONSULTATION RESPONSES

11.2 44 consultees answered at least one question in Chapter 11 of the Consultation Paper. We refer regularly to the response of the Institute of Legacy Management (“ILM”), which conducted a survey of its members (charities from across the UK) for the purposes of the consultation; 77 charities responded to the survey, including “each of the 14 biggest charities by legacy income”.

RESPONSES TO INDIVIDUAL QUESTIONS

**Consultation Question 62.**

We provisionally propose that a new statutory power be introduced allowing trustees to make small ex gratia payments without having to obtain the prior authorisation of the Charity Commission, the Attorney General or the court.

Do consultees agree?

[Consultation Paper, paragraph 11.40]

11.3 44 consultees answered this question.[^578]


[^578]: Institution of Civil Engineers; Francesca Quint; Geldards LLP; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; University of Liverpool CL&PU; WCVA; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with CLA); Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Robert Pearce QC;
(1) 43 agreed, and
(2) 1 disagreed.

11.4 All but one consultee who answered this question supported our proposal to allow trustees to make small ex gratia payments. It was generally agreed that the law should be aligned with the Charity Commission practice of allowing charities to make ex gratia payments of less than £1,000 without having to seek prior authorisation. The University of Plymouth thought that “law and practice should be consistent”, and Bates Wells Braithwaite agreed that “it would be sensible to put the Charity Commission’s practice on a statutory footing”. However, some consultees were less enthusiastic – the CLA accepted the proposed power only reluctantly because this is already being done in practice.

11.5 97% of respondents to the ILM’s survey agreed with the proposal to allow small ex gratia payments without Charity Commission consent. Over 80% of respondents already set a de minimis threshold in line with Charity Commission practice, and 15% set it above £1,000.

11.6 Lawyers in Charities, in their endorsement of the proposal, emphasised the disproportionate nature of an application to make an ex gratia payment. They also emphasised that the current strain on Charity Commission resources means that the Commission cannot process applications quickly enough.

11.7 Disagreement with the proposal was based on the view that ex gratia payments should not ever be permitted.

Lack of understanding in the sector

11.8 CCNI and the CLA reported that in their experience what exactly constitutes a “moral obligation” is not well understood in the sector, “in practice, lines can often be}

579 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; University of Liverpool CL&PU; WCVA; Lord Hodgson; CCNI (“hypothetically”); Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with CLA); Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Robert Pearce QC; Society for Radiological Protection; Crispin Ellison; University of Cambridge; Lawyers in Charities; Oxford University; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; Institute of Legacy Management; Law Society; NCVO; ACF; IoF; Royal Photographic Society.

580 Royal Photographic Society.

581 OG539 Ex gratia payments by charities (September 2014), para B4.3. We refer to this as “OG539”.

582 With whom Bircham Dyson Bell LLP agreed.

583 With whom Bircham Dyson Bell LLP agreed.
Similarly, Veale Wasbrough Vizards LLP noted that it is often difficult to distinguish between ex gratia payments under section 106 and payments in the best interest of the charity. CCNI therefore argued that more needs to be done to educate charity trustees. In contrast, the ILM said that the Charity Commission receives very few requests for ex gratia payments “mainly because our members are well versed on the wording of section 106 and know that the Charity Commission will only approve applications where it is clear that a moral obligations exists”.

The impact of deregulation

11.9 Some consultees, whilst supporting the proposal in general, were worried about the impact of deregulation in this area. This was often because the need for Charity Commission authorisation is used as a defence mechanism by charities to deflect claims for ex gratia payments. Stewardship was concerned that, without sufficient oversight, ex gratia payments could become “soft options”. CCNI feared that the power could be subject to abuse, and this is why ex gratia payments should not be retrospectively authorised. NCVO, ACF, CFG and IoF emphasised the importance of the moral obligation requirement, as “deregulation in this area must not result in charity trustees making ex gratia payments simply to get rid of vexatious claimants”. In contrast, the University of Birmingham thought there was little to be concerned about, given that “there are sufficient safeguards within the general duties of trusteeship”.

11.10 The ILM reported that one solicitor in their survey pointed out that trustees can already act in the best interests of their charities, and can use section 106 and the long process of authorisation to explain why requests could not be approved. We think that this argument is weak; if there is a moral obligation to make a payment, it should be possible to make it. We appreciate, however, that it might be easier for charities to explain that the Charity Commission would not approve a payment rather than explaining that their trustees do not feel a sense of moral obligation towards the claimant.

11.11 NCVO, ACF, CFG and IoF predicted that if the power is not used cautiously it will lead to an increase in the number of illegitimate requests for ex gratia payments. As noted above, the ILM said that 97% of its respondents supported the proposal. It said:

This support [for the proposed power] is despite 30% of respondents expecting that the proposal would lead to an increase in the number of ex gratia requests and 56% admitting some degree of concern that it would be harder to reject requests.

Possibility of gaining Charity Commission authorisation

11.12 In paragraph 11.38 of the Consultation Paper we said that it should remain possible for trustees to continue to obtain formal approval from the Charity Commission for small value payments under section 106 if they wish to do so. Cancer Research UK

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584 CLA.

585 This was acknowledged in ch 11 of the Consultation Paper, n 8.

586 The solicitor’s argument was supported by the ILM’s finding that “67% of respondents felt that the current position allowed charities to act in their best interests”. However, the ILM pointed out the context that over 80% already set a *de minimis* threshold below which ex gratia payments are made without Charity Commission approval, and 84% said that trustees do not always make the decision to make an ex gratia payment.
agreed with this suggestion, as there will be situations where it is unclear whether a small ex gratia payment should be made and therefore Charity Commission guidance would be welcomed. Stone King LLP noted that it is often still useful to go through the Charity Commission because to do so properly justifies the payment.

11.13 However, Francesca Quint thought that, given the strain on Charity Commission resources, it was unlikely that the Charity Commission would actually be willing to give formal approval for small value payments. As an example, she cited the Charity Commission’s refusal to make a cy-près scheme if the charity itself can change its purposes under section 275 of the Charities Act 2011. The CLA expressed a similar concern. We comment on this concern in paragraphs 11.8 to 11.10 of the Report.

Reporting and notification

11.14 The Charity Commission said that any ex gratia payments should be noted in the charity’s accounts. The Royal Photographic Society proposed that any ex gratia payments should be recorded in the trustees’ meeting minutes and published in detail, and should not be subject to confidentiality. Anthony Collins Solicitors LLP also emphasised the importance of such payments being appropriately recorded.

11.15 The Independent Schools Council and the Association of Church Accountants and Treasurers suggested that even if payments above £1,000 do not have to be authorised by the Charity Commission, there should still be a requirement that the Charity Commission be notified of such payments.

Consultation Question 63.

We invite the views of consultees as to the appropriate financial threshold for the exercise of such a new statutory power.

[Consultation Paper, paragraph 11.41]

11.16 40 consultees answered this question.587

11.17 In general, the responses to this question were disparate, ranging from £50 to £100,000, with some consultees suggesting that there should be no threshold at all. Consultees tended to respond with a number of suggestions or proposals, and in this way most responses were fairly tentative. Some consultees suggested a fixed threshold (as we had discussed in the Consultation Paper). Others preferred a

587 Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; Church Growth Trust; Robert Pearce QC; Crispin Ellison; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF; Institution of Civil Engineers; University of Birmingham; University of Liverpool CL&PU; Cancer Research UK; Society for Radiological Protection; CCNI; Geldards LLP; Stone King LLP; Charity Commission; Institute of Chartered Secretaries and Administrators; CLA; Bircham Dyson Bell LLP; Prof Janet Ulph; WCVA; Prof Gareth Morgan; ILM.
threshold that reflected the size of the charity, perhaps with an upper and/or lower limit.

Threshold based on costs being disproportionate to the payment

11.18 In the Consultation Paper we raised, and then rejected, the possibility of permitting charity trustees to make ex gratia payments where the cost of a section 106 application would be “disproportionate” to the value of the payment.\textsuperscript{588} No consultees supported this suggestion. Cancer Research UK stated that “a test based on the proportionality of costs in making an application to the Charity Commission is uncertain and ambiguous for legacy teams and trustees and could potentially lead to unlawful payments being made”.

Problems with a threshold

11.19 The CLA\textsuperscript{589} and Cancer Research UK identified issues with placing any monetary threshold on ex gratia payments which do not require Charity Commission authorisation. A threshold is difficult to set, according to the CLA, because both charities and ex gratia payments themselves vary in size and nature. Moreover, the CLA pointed out that setting a limit might be misconstrued as automatic approval for all payments up to that amount with little scrutiny of the criteria that must be fulfilled for a payment to constitute an ex gratia payment. Cancer Research UK pointed out that a threshold in this situation can have arbitrary results; if the moral obligation arises as a result of charities receiving more than was intended under a will, a claimant would be in a better position if the legacy was split between multiple charities than if it was left to just one charity.

11.20 Cancer Research UK pointed out that the size of the payment has nothing to do with how obvious the requisite “moral obligation” is. Charities might receive legacies which constitute “textbook” ex gratia payments, but which could not be made without Charity Commission authorisation if their value was over the relevant threshold. Conversely, a small payment which could be made without Charity Commission authorisation might actually benefit from Charity Commission oversight, as the “moral obligation” might be less clear.\textsuperscript{590}

11.21 Cancer Research UK further observed that the Charity Commission’s role seems to be one of oversight, given that it gives different responses to different charities in similar situations. It thought that:

It may be possible that the Charity Commission’s concerns and oversight could be met with a high-level reporting/visibility piece in respect of decisions made by a charity under any statutory provision, with enquiries as to use of the power made when and where appropriate.

11.22 Cancer Research UK supported (as the preferred alternative to a proportionate threshold or a fixed cap of at least £10,000) a “risk based and proportionate approach

\begin{footnotesize}
\textsuperscript{588} See paras 11.35 and 11.36 of the Consultation Paper.
\textsuperscript{589} With whom Bircham Dyson Bell LLP agreed.
\textsuperscript{590} At paras 11.12 and 11.13 above, it was questioned whether the Charity Commission would still be willing to be involved in payments below the threshold.
\end{footnotesize}
clear guidance and best practice examples from the Charity Commission as to the factors a charity should take into account in considering when authority should be formally applied for (e.g. experience, process and structure of delegation, legacy income, legacy frequency, size of the legacy in question, complexity of ex gratia request and ease in meeting the moral obligation test), clearly set out in appropriate internal procedures and documentation, and subject to periodic internal audit and review. This could be viewed as an extension of a trustee’s duty to act in the charity’s best interests.

11.23 The ILM endorsed this proposal, and thought that:

There should ... be a move to a model where the Charity Commission is available to assist trustees with more challenging requests leaving trustees to make easy decisions irrespective of value.

**Fixed threshold**

11.24 31 consultees’ responses included a suggested fixed threshold.\(^{591}\) Figure 4 at the end of this chapter demonstrates the range of thresholds which consultees suggested.

11.25 Six consultees endorsed the suggestion in the Consultation Paper of a limit of £1,000.\(^{592}\) A further eight thought that £1,000, as an example of a relatively small limit, was a viable option.\(^{593}\) NCVO, ACF, CFG and IoF considered that for any payment above this amount, Charity Commission authorisation is needed to “ensure cases are genuine and not vexatious or fraudulent”. Bates Wells Braithwaite were concerned about charity trustees being “overly generous”, and therefore only wanted the law to be aligned with the current Charity Commission practice of not requiring authorisation for payments below £1,000. The University of Plymouth similarly supported the sum of £1,000 as it is “in line with current practice”. The WCVA supported more generally a “very small” limit with appropriate guidance.

11.26 However, other consultees thought that a threshold of £1,000 would be too low; for example, Anthony Collins Solicitors LLP considered it too low a sum given the costs involved in gaining Charity Commission authorisation. Crispin Ellison and Stewardship suggested limits of £2,000 and £2,500 respectively. 12 consultees thought the

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\(^{591}\) Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; Lord Hodgson; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; Church Growth Trust; Robert Pearce QC; Crispin Ellison; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF; Prof Janet Ulph; Prof Gareth Morgan; CLA (only some members of the working party); ILM; Institute of Chartered Secretaries and Administrators; Stone King LLP; Cancer Research UK.

\(^{592}\) Colleges of the University of Cambridge; Churches’ Legislation Advisory Service; Bates Wells Braithwaite; Robert Pearce QC; Charities’ Property Association; Action with Communities in Rural England.

\(^{593}\) NCVO; ACF; CFG; IoF (“we would recommend that this new power can only be exercised within a low monetary threshold (for example, no more than £1,000)”; University of Plymouth (“we suggest the amount remains small (ie, £1,000)”; Veale Wasbrough Vizards LLP (“an appropriate threshold would be anywhere between £1,000 and £2,000”); CLA (only some members of the working party); Lord Hodgson.
The proposed £5,000 limit was reasonable. The National Trust said that “a £5,000 threshold would be very welcome and reduce the levels of administration required although a higher threshold may be appropriate”. Whilst the ILM’s survey revealed that 41% of respondents preferred the limit of £5,000, the survey did not offer higher limits as options; the ILM thought that, had it done so, some respondents would have chosen higher thresholds.

11.27 Some consultees supported an even higher limit. Francesca Quint thought a limit of £10,000 would be viable, as did the RSPCA. Lawyers in Charities considered a threshold of £10,000 “to match the thresholds in Part 13 of the 2011 Charities Act”. Cancer Research UK said that if none of its other suggestions in response to this question were accepted, we would support a fixed sum at the highest level possible (suggested minimum of £10,000). Similarly, the ILM thought charities should have the “largest threshold possible”. Lawyers in Charities suggested a limit of £50,000, on the basis that this figure reflects the fact that most legacy ex gratia payments are between £5,000 and £50,000. The highest suggestion was that of the Church Growth Trust, which said:

We would like to see a substantial threshold because the moral case will often justify it being substantial. For example the payment of a substantial pension contribution where an employee has worked for a very low wage over many years. We would suggest £100,000.

11.28 The CLA was concerned that if the limit was too high, it may be more difficult for charities to fend off speculative ex gratia claims and that “there may be a risk that charities may be seen as a “soft touch” for such claims”.

Threshold proportionate to charity size

11.29 Five consultees suggested that the limit for ex gratia payments without Charity Commission consent could be proportionate to a charity’s size. The University of Liverpool CL&PU explained that:

We have some concern over the impact of a stark, financial threshold in the charity sector, given the diversity in the size of the organisations that it comprises. It may be better to express any threshold as a percentage of particular charities’ income and asset value, as those would have a less fundamental impact on small organisations (who could nevertheless benefit from the more permissive regime).

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594 Prof Janet Ulph; Anthony Collins Solicitors LLP; University of Cambridge; Association of Church Accountants & Treasurers; National Trust (although it also considered that £1,000 was a “sensible” suggestion); Law Society; Institute of Chartered Secretaries and Administrators (although reservations were expressed about a fixed cap threshold); ILM (most popular option in their survey); Francesca Quint (“I suggest £5,000 or at most £10,000”); Stone King LLP; CLA (only some members of the working party); Lord Hodgson.

595 See para 11.21 above.

596 With whom Bircham Dyson Bell LLP agreed.

597 This point is discussed further at paras 11.9 to 11.11 above.

598 Institution of Civil Engineers; University of Birmingham; University of Liverpool CL&PU; Cancer Research UK; Society for Radiological Protection.
11.30 Whilst the Institute of Chartered Secretaries and Administrators tentatively suggested a threshold of £5,000, they thought a threshold based on percentage of income might be preferable as £5,000 could constitute a sizeable proportion of a small charity’s income. Similar concerns come into play in relation to large charities where the size of the limit is relatively small, as was pointed out by Cancer Research UK, which has a legacy income of £167 million a year.

11.31 As to the size of a proportionate threshold, both the Institution of Civil Engineers and the Society for Radiological Protection thought that a charity should be allowed to make ex gratia payments of up to 1% of that charity’s income. The Institution of Civil Engineers added the qualification that “as long as this does not compromise reserves policy or financial covenants”. The University of Birmingham opted for a smaller proportion of charity income – it said the threshold should operate on a “sliding scale … So for charities such as the University with a turnover of over £500 million it should be say £50,000”.

11.32 However, the Institute of Chartered Secretaries and Administrators pointed out that “such an approach … is not without added complexity”. The CLA, speaking generally in response to the whole Consultation Paper, noted that thresholds relating to income are not always effective, as a charity might have a low income but substantial assets.

Threshold proportionate to charity size within limits

11.33 Six consultees suggested that the threshold could be proportionate to charity size, within fixed outer limits. Stone King LLP again was concerned about the difficulties of a threshold of £5,000 in relation to smaller charities, and suggested the threshold instead be on a sliding scale proportionate to income with a lower and upper limit. The CCNI suggested a small upper limit of £1,000 so long as this constituted no more than 10% of the charity’s income. The Charity Commission endorsed a limit of between £1,000 and £5,000 so long as this was not over (say) 1% of the charity’s income. The CLA suggested a threshold based on a percentage of the charity’s turnover with an upper limit of (as an example) £5,000 and also a lower limit of (say) £1,000 (so that even the smallest charities could still make ex gratia payments of up to £1,000). Geldards LLP recommended the highest upper limit in this context, stating that the threshold “should be no more than 1% of the charity’s total annual income up to a maximum of £20,000”.

11.34 However, this option again comes with added complexity. Stone King LLP’s suggestion was qualified with the comment that “this may be unnecessarily complicated”.

Payments per year

11.35 A suggestion made by four consultees was that the threshold could apply to the cumulative value of ex gratia payments that can be made in a set period of time, as opposed to applying per payment. To apply the threshold per payment might allow

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599 CCNI; Geldards LLP; Stone King LLP; Charity Commission; CLA; Bircham Dyson Bell LLP (agreeing with CLA).

600 With whom Bircham Dyson Bell LLP agreed.

601 Action with Communities in Rural England; Charity Commission; CLA; Veale Wasbrough Vizards LLP.
excessive numbers of small payments to be made. The Charity Commission suggested that the limit be for the whole financial year. This suggestion is addressed in paragraphs 10.22 and 10.23 of the Report.

**Consultation Question 64.**

We provisionally propose that the Minister be given a power to vary the financial threshold by secondary legislation.

Do consultees agree?

[Consultation Paper, paragraph 11.42]

11.36 35 consultees answered this question:

(1) 33 agreed and

(2) 2 disagreed.

11.37 There was general support for this proposal. Anthony Collins Solicitors LLP thought the proposal had merit because “financial thresholds such as this are eroded over time by inflation and changing economic circumstances”. Moreover, as pointed out by the University of Plymouth, it is not desirable or feasible to have to amend primary legislation to keep the threshold up to date.

**Use of the power**

11.38 Despite the CLA’s support for the power, it had general concerns that, given past experience, the power would not be used in practice. We comment generally on financial thresholds in Chapter 3 of the Report. We consider that the threshold will be

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602 Institution of Civil Engineers; Francesca Quint; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Robert Pearce QC; Society for Radiological Protection; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Warsbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; ILM; Law Society; Geldards LLP; University of Liverpool CL&PU.

603 Institution of Civil Engineers; Francesca Quint; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Colleges of the University of Cambridge; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK (“if a financial threshold is set”); Independent Schools Council; Robert Pearce QC; Society for Radiological Protection; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Warsbrough Vizards; Prof Janet Ulph; Stewardship; RSPCA; ILM; Law Society.

604 Geldards LLP; University of Liverpool CL&PU.
much more likely to be updated if the Minister has the proposed power than if not, and therefore this concern does not outweigh the merits of our proposal.

Relevance of the chosen threshold

11.39 In the Consultation Paper we proposed the Minister’s power to alter the threshold in relation to a fixed monetary threshold.\textsuperscript{605} However, as explained above, some consultees proposed a threshold proportionate to charity size, and on this basis the University of Liverpool CL&PU rejected the proposed power seemingly because it would be unnecessary. On the other hand, the Institute of Chartered Secretaries and Administrators supported the proposed power “regardless of how the threshold is set”.

Further suggestions

11.40 Bates Wells Braithwaite suggested the possibility of the Charity Commission being given the power to vary the threshold.

11.41 The Charity Commission thought that the Minister’s proposed power should only be used “with the approval of the Attorney General”.

Consultation Question 65.

We provisionally propose that such a statutory power should be capable of being excluded or limited by a charity’s governing document.

Do consultees agree?

[Consultation Paper, paragraph 11.43]

11.42 34 consultees answered this question:\textsuperscript{606}

(1) 27 agreed;\textsuperscript{607}
(2) 5 disagreed; and

(3) 2 were undecided.

11.43 Most of the consultees who answered this question supported our proposal to allow the proposed statutory power to be excluded by a charity’s governing document. The Churches’ Legislation Advisory Service and the Charities’ Property Association both did so on the basis of a charity or settlor’s freedom to determine its own financial affairs; “if the charity itself does not wish its trustees to have that power ... then it should be able to make its own determination”. The CCNI pointed out that “a founder of a charity may wish to prohibit an ex gratia payment being made without the Commission’s consent”.

Disagreement

11.44 Dissent seemed to be based mainly on concerns that charities would unduly restrict their future selves. Bates Wells Braithwaite opposed charities being able to exclude or limit the power because “ex gratia payments are, by their nature, unexpected and unpredictable and it is difficult to see how it could be sensible to exclude the ability to make such payments in advance”. Anthony Collins Solicitors LLP were concerned that such an exclusion or limitation would make charities inflexible, when there would be no obligation on charity trustees to use the power anyway. Lord Hodgson said simply that he did “not see the purpose” of this proposal. However, we do not find these criticisms convincing, given that even if the new statutory power to make small ex gratia payments without Charity Commission authorisation was excluded, a charity could still seek authorisation for such a payment under section 106 of the Charities Act 2011.

The nature of the exclusion or limitation

11.45 Lawyers in Charities were concerned that charities might have existing provisions in their governing documents which would unintentionally exclude the statutory power. This concern can be met by clarifying the nature of the provision required to exclude or limit the power. The CLA and Veale Wasbrough Vizards LLP both argued that the exclusion would have to relate expressly to the specific statutory provision allowing ex gratia payments to be made. This is so that the power could not be impliedly excluded on the basis that trustees can only act in the best interests of a charity and that assets can only be used for the charity’s purposes.

Introducing and amending the exclusion or limitation

11.46 The CLA considered the introduction and amendment of such an exclusion or limitation:

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608 Anthony Collins Solicitors LLP; Lord Hodgson; Action with Communities in Rural England; Bates Wells Braithwaite; Lawyers in Charities.

609 CLA, Bircham Dyson Bell LLP (agreeing with the CLA).

610 CLA, emphasis in original.

611 With whom Bircham Dyson Bell LLP agreed.
We wonder whether there may be merit in allowing the statutory power also to be excluded without a change to the charity’s constitution (e.g. by trustee resolution). If that was permitted, we think that consideration would need to be given to how such a resolution may be reversed – presumably it would require an application to the Charity Commission.

11.47 Prof Gareth Morgan thought that “any change to such a provision [ie one excluding or limiting the proposed statutory power] should be a regulated alteration”.

Consultation Question 66.

We invite the views of consultees:

(1) as to whether the trustees of a charity should be capable of delegating the taking of a decision to make an ex gratia payment (whether under any new statutory regime for the making of payments without Charity Commission authorisation, or under section 106 of the Charities Act 2011) to another officer of the charity;

(2) as to whom the taking of the decision should be delegated; and

(3) as to whether such a power should be limited to payments of a certain value and, if so, what that value should be.

[Consultation Paper, paragraph 11.48]

11.48 In the Consultation Paper we noted that currently the Charity Commission takes the view that a decision to apply under section 106 for authorisation to make an ex gratia payment must be taken by the charity trustees; it cannot be delegated to another individual or body within the charity or to a third party. We considered that this might be administratively burdensome on some charities. On the other hand, we acknowledged that it is arguable that decisions of an entirely moral nature, and which involve the application of the funds of a charity otherwise than in furtherance of its purposes, should not be capable of being taken by anyone but the trustees.

11.49 39 consultees answered this question.

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612 Consultation Paper, para 11.44.
613 Institution of Civil Engineers; Francesca Quint; Anthony Collins Solicitors LLP; University of Birmingham; Lord Hodgson; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Crispin Ellison; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; ILM; Geldards LLP; University of Plymouth; Colleges of the University of Cambridge; OSCR; University of Liverpool CL&PU; WCVA; CCNI; Churches’ Legislation Advisory Service; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Robert Pearce QC; Society for Radiological Protection; Prof Janet Ulph; Stewardship; Charities’ Property Association; NCVO; ACF; CFG; IoF; Institute of Chartered Secretaries and Administrators; Action with Communities in Rural England.
11.50 38 consultees answered part (1) of this question.\textsuperscript{614}

(1) 18 thought that trustees should be capable of delegating the decision as to whether to make an ex gratia payment;\textsuperscript{615}

(2) 19 thought that trustees should not be capable of such delegation;\textsuperscript{616} and

(3) 1 was undecided.\textsuperscript{617}

\textit{Support for delegation}

11.51 Responses as to whether delegation should be allowed in this context were generally mixed. However, strong support was demonstrated in the ILM's survey, in which 84% reported that delegation already occurred and 91% of those who participated supported the authorisation of delegation.

11.52 The arguments put forward by consultees in favour of delegation can be summarised as follows:

(1) Delegation already takes place, particularly as many charities have dedicated legacy teams. 84% of respondents to the ILM's survey reported that trustees are not always involved in the decision to make an ex gratia payment. Cancer Research UK, Francesca Quint and Bates Wells Braithwaite also emphasised that decisions to make ex gratia payments are already delegated.

(2) The current process requiring trustees to make the decision to make ex gratia payments is lengthy given the sums involved. The National Trust said an ex gratia request will have to wait for a bi-monthly trustee meeting. Cancer Research UK told us that:

A typical ex gratia decision for this charity will involve the request passing through the Legacy Team and Secretariat before being couriered to a

\textsuperscript{614} Institution of Civil Engineers; Francesca Quint; Anthony Collins Solicitors LLP; University of Birmingham; Lord Hodgson; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Crispin Ellison; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; ILM; Geldards LLP; University of Plymouth; Colleges of the University of Cambridge; OSCR; University of Liverpool CL&PU; WCVA; CCNI; Churches' Legislation Advisory Service; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Robert Pearce QC; Society for Radiological Protection; Prof Janet Ulph; Stewardship; Charities’ Property Association; NCVO; ACF; CFG; IoF; Institute of Chartered Secretaries and Administrators.

\textsuperscript{615} Institution of Civil Engineers; Francesca Quint; Anthony Collins Solicitors LLP; University of Birmingham; Lord Hodgson; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Crispin Ellison; University of Cambridge; Lawyers in Charities; Association of Church Accountants & Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA; ILM (91%, constituting an “unequivocal yes”).

\textsuperscript{616} Geldards LLP; University of Plymouth; Colleges of the University of Cambridge; OSCR (implied); University of Liverpool CL&PU; WCVA; CCNI; Churches’ Legislation Advisory Service; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Robert Pearce QC; Society for Radiological Protection; Prof Janet Ulph; Stewardship; Charities’ Property Association; NCVO; ACF; CFG; IoF.

\textsuperscript{617} Institute of Chartered Secretaries and Administrators.
committee of trustees for a decision. The decision is then ratified at a subsequent trustee meeting and submitted to the Charity Commission. This is a very long-winded process, taking up a lot of time and administrative expense.

(3) Ex gratia payments are not seen as important enough to warrant charity trustees' time. Lawyers in Charities noted that “boards of large charities frequently delegate financial decisions up to £500,000 to their executive”. This means that, according to the ILM, “many trustees are bemused at being asked to consider ex gratia decisions”. Cancer Research UK similarly said:

Our trustees are frustrated by the current law and consider their time could be put to better use. Following a request to determine a £5,000 ex gratia [payment] one of our trustees queried whether there were some missing zeros on the papers.

(4) According to Cancer Research UK, delegation “utilises the skills and experience of the appropriate people”. The Legacy Team of Cancer Research UK are familiar with the test in Re Snowden.\(^618\)

(5) Cancer Research UK thought that charities themselves can ensure that powers of delegation are not abused “under the umbrella of acting at all times in the charity’s best interests”.

_Further requirements_

11.53 Stone King LLP thought that the requirement for Charity Commission approval should be retained where the decision is delegated. However, Cancer Research UK disagreed with that suggestion, and said that:

We view delegation in this area as operating hand-in-hand with a charity’s ability to make small ex gratia payments without recourse to the Charity Commission. Changing the law [in] one area but not the other would not solve the underlying problems with the current law – that it is administratively costly and long winded.

11.54 Crispin Ellison’s support came with the qualification that officers would have to go through appropriate training, such as that provided by the ILM, and that they should follow guidance given by the trustees. The Institution of Civil Engineers emphasised that any payments should be “disclosed and included in the trustees’ annual report”.

_Opposition to delegation_

11.55 Those who opposed delegation tended to take a stricter view as to the moral obligation requirement for ex gratia payments. The CCNI noted that “only the trustees can decide whether they are morally obliged to make a payment”, especially since “trustees have the ultimate responsibility for a charity’s finances”. Robert Pearce QC thought that the moral obligation requirement “should not be diluted”. NCVO, ACF, CFG and IoF said:

\(^{618}\) [1970] Ch 700.
Decisions of an entirely moral nature, and which involve the application of funds of a charity otherwise [than] in the furtherance of its purposes, should not be taken by anyone other than the trustees.

11.56 This is especially since, according to the University of Liverpool CL&PU, a decision to make a payment outwith a charity’s purposes could be “controversial”. The CLA\(^619\) agreed with the above reasoning and also questioned whether ex gratia payments were actually very burdensome on trustees, given how rare they are. This does, however, run counter to the comments of other consultees at paragraph 11.52 above.

11.57 A potential compromise could be found through Bates Wells Braithwaite’s suggestion that there should be a “scheme of delegation which specifies certain situations in which the trustees would regard themselves as being under moral obligation to make [a] payment”.

(2) Persons to whom the decision can be delegated

11.58 14 consultees answered part (2) of this question;\(^620\)

(1) 5 thought the provision should specify to whom the power can be delegated;\(^621\)

(2) 8 thought trustees should be able to delegate to whomever they think appropriate;\(^622\) and

(3) 1 expressed other views.\(^623\)

11.59 The University of Birmingham and the RSPCA agreed with Lord Hodgson’s proposal that it should be possible to delegate the decision to make ex gratia payments to the chief executive of the charity. Similarly, the Association of Church Accountants and Treasurers thought that delegation should be limited to the chief executive of a charity or a retained agent, subject to review similar to that in the Trustee Act 2000.

11.60 However, Lord Hodgson himself agreed that our proposal of trustees being able to appoint a “responsible officer” to take such decisions was a “better and more encompassing” approach. The ILM’s survey revealed that a majority of those surveyed thought that the “Head of Legacy Income or equivalent” would be the most appropriate individual to delegate to, but respondents did not necessarily think that delegation should be limited to such a person.

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\(^619\) With whom Bircham Dyson Bell LLP agreed.

\(^620\) Francesca Quint; Anthony Collins Solicitors LLP; Colleges of the University of Cambridge; Bates Wells Braithwaite; Cancer Research UK; University of Cambridge; Lawyers in Charities; National Trust; RSPCA; ILM; University of Birmingham; Lord Hodgson; Association of Church Accountants & Treasurers; Action with Communities in Rural England.

\(^621\) RSPCA; University of Birmingham; Lord Hodgson; Association of Church Accountants & Treasurers; Action with Communities in Rural England.

\(^622\) Francesca Quint; Anthony Collins Solicitors LLP; Colleges of the University of Cambridge (“if delegation is to be allowed”); Bates Wells Braithwaite; Cancer Research UK; University of Cambridge; Lawyers in Charities; National Trust.

\(^623\) ILM.
11.61 Those who argued that trustees should have the discretion to decide who they delegate to did so mainly for reasons of flexibility. This was emphasised by Francesca Quint, who noted that whilst large charities will have a “specified paid officer” who will already make such decisions, “there are plenty of smaller charities which do not have such dedicated systems for which the normal powers of delegation would be more flexible and enable appropriate arrangements to be made on a case by case basis”. Anthony Collins Solicitors LLP emphasised the range of officials who would be capable of making such a decision, including “a CEO, other staff or committees of trustees”. Cancer Research UK questioned whether it “would … be a good use of a Chief Executive’s time (particularly in a large charity) to approve decisions to allow a widow to keep a wedding ring”. Bates Wells Braithwaite thought an unlimited power to delegate would work with the support of Charity Commission guidance.

11.62 Moreover, it was emphasised by Cancer Research UK that it should be the job of the trustees to manage risk. Only allowing delegation to, say, the chief executive of a charity would result in unnecessary “hand holding”. In this way the National Trust thought that delegation should be controlled by a charity’s governing document.

(3) Limiting the financial value of delegated payments

11.63 11 consultees answered part (3) of this question:624

(1) 5 thought that delegation should be limited to payments of a certain value,625 and

(2) 6 thought there should be no limit on the size of payments capable of being delegated.626

Limit on size of payments

11.64 The Charity Commission thought that the power to delegate the decision to grant ex gratia payments should only be available in the case of “small sums, say £1,000 to £5,000”. Stewardship and Action with Communities in Rural England similarly chose small limits of £2,500 and £1,000 respectively, in line with their answers to when Charity Commission authorisation should be required (that is, they thought that when Charity Commission authorisation was required, the decision should be made by the trustees). Crispin Ellison suggested a much higher limit of £25,000.

11.65 The National Trust was the only consultee to suggest that the limit should not be a fixed sum. The National Trust suggested that the limit could be set at the average legacy size received by the charity or “as a percentage of the relative proportion of benefit the charity is being asked to forgo”.

624 Francesca Quint; University of Birmingham; Colleges of the University of Cambridge; University of Cambridge; Lawyers in Charities; Charity Commission; Crispin Ellison; Stewardship; National Trust; Action with Communities in Rural England; Bates Wells Braithwaite.

625 Charity Commission; Crispin Ellison; Stewardship (if delegation is to be permitted); Action with Communities in Rural England; National Trust.

626 Francesca Quint; University of Birmingham; Colleges of the University of Cambridge; University of Cambridge; Lawyers in Charities; Bates Wells Braithwaite.
Trustee discretion

11.66 Other consultees thought that it should be up to trustees to set any limit they wish on the size of payments that can be decided by those other than themselves. This would be useful because, as emphasised by Lawyers in Charities, larger charities will have an executive with the resources to make decisions on larger sums that smaller charities will not have; therefore a single fixed limit might not be appropriate.627 The Colleges of the University of Cambridge also supported there being no limit put in place because “the definition of a limit is likely to encourage what ought to be exceptional payments”.

Consultation Question 67.

We provisionally propose that the Attorney General, the court and the Charity Commission should have the power to authorise ex gratia payments by statutory charities.

Do consultees agree?

[Consultation Paper, paragraph 11.50]

11.67 In the Consultation Paper we referred to Attorney General v Trustees of the British Museum,628 in which it was held that the Attorney General, and therefore the Charity Commission, do not have the power to authorise ex gratia payments that would contravene an Act of Parliament. This is problematic for statutory charities (namely charities incorporated or governed by an Act of Parliament)629 which want to make ex gratia payments, and it is unlikely that Parliament intended, when passing Acts to establish or regulate statutory charities, to exclude this power. We proposed that the existing power to authorise ex gratia payments should be extended to statutory charities even where such a payment would otherwise be prohibited by the provisions of an Act.

11.68 28 consultees answered this question:630

(1) 27 agreed,631 and

627 However, see the comments at paras 11.29 to 11.34 about a limit proportionate to charity income/charity size. This discussion deals with many of the same considerations as that in paras 11.19 to 11.35 above.
628 [2005] EWHC 1089 (Ch), [2005] Ch 397.
629 See ch 4 above and ch 5 of the Report.
630 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Stone King LLP; Charity Commission; Robert Pearce QC; Society for Radiological Protection; Crispin Ellison; University of Cambridge; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; Law Society; CCNI.
1 disagreed.\(^\text{632}\)

11.69 Most consultees agreed with our proposal that the Charity Commission and the Attorney General should be able to authorise ex gratia payments by statutory charities. Veale Wasbrough Vizards LLP said that “we cannot see any logical justification for excluding statutory charities from benefiting from this power”. The National Trust added the qualification that “if such a power would contravene the provisions of the implementing Act this raises the need to consider Parliament's intention”. However, Anthony Collins Solicitors LLP said “we do not anticipate that the difficulties highlighted by the *British Museum* case to which the consultation refers were ever anticipated when the relevant Acts were drafted”.

11.70 The CCNI disagreed with our proposal where the authorisation of an ex gratia payment would go against a statutory provision, and questioned the assumption that Parliament would not have intended to prohibit an ex gratia payment:

> Where an express prohibition is contained within legislation preventing an ex gratia payment, it is not for the Court or the Commission to trump that legislation. We do not know Parliament's intention for including a prohibition within the legislation creating a statutory charity. Lifting such a prohibition may have unforeseen circumstances. For example, a museum may have historic artefacts, which were confiscated by a dictatorship regime. A museum may feel it is under a moral obligation to return such items to the family who was stripped of their assets. As a result, the museum may lose a number of its attractions, which could result in loss of revenue for the museum. Loss of revenue could affect the museum’s operational viability.

11.71 Stone King LLP thought that:

> The Charity Commission should also consider how such a power would apply to exempt charities, such as academies or national museums, and consider whether this might cut across other regimes (such as, in those cases, the Education Funding Agency’s regime under the Academies Financial Handbook and, with national museums, the Department for Digital, Culture, Media and Sport’s financial memorandum).

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\(^{631}\) Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&PU; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Stone King LLP; Charity Commission (“we do not object to this”); Robert Pearce QC; Society for Radiological Protection; Crispin Ellison; University of Cambridge; Lawyers in Charities; National Trust (“in principle we agree”); Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; Law Society.

\(^{632}\) CCNI.
Consultation Question 68.

We provisionally propose that the new statutory power for charity trustees to make small ex gratia payments (under paragraph 11.40 above) should be available to the trustees of statutory charities.

Do consultees agree?

[Consultation Paper, paragraph 11.51]

11.72 In line with the reasoning outlined at paragraph 11.67 above and paragraph 11.49 of the Consultation Paper, we proposed that the new power for charity trustees to make small ex gratia payments without authorisation should also extend to statutory charities.

11.73 27 consultees answered this question:633

(1) 26 agreed,634 and

(2) 1 disagreed.635

11.74 This proposal involves very similar considerations to those discussed in relation to the previous question. The University of Plymouth supported the proposal on the grounds that “charities should as far as possible be treated consistently, however they are constituted”. Prof Janet Ulph thought that such a proposal “will give trustees of statutory charities a degree of flexibility in the management of their affairs”.

11.75 The CCNI disagreed that there should be a power where it would go against statutory provisions “unless parliamentary intention is known”.

633 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&P; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Charity Commission; Robert Pearce QC; Society for Radiological Protection; Crispin Ellison; University of Cambridge; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association; CCNI.

634 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; University of Liverpool CL&P; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators (“the approach appears commensurate with the aims of the consultation”); Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP (agreeing with the CLA); Charity Commission (“we have no objection to this”); Robert Pearce QC; Society for Radiological Protection; Crispin Ellison; University of Cambridge; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Prof Janet Ulph; Stewardship; RSPCA; Charities’ Property Association.

635 CCNI.
Consultation Question 69.

We invite consultees to share with us their experiences of considering whether to make, and seeking authorisation to make, ex gratia payments, in particular the work, time and expense that have been involved.

[Consultation Paper, paragraph 11.53]

11.76 16 consultees answered this question.636

Time and cost of obtaining Charity Commission authorisation

11.77 Nine consultees voiced concerns that the time and cost involved in obtaining authorisation from the Charity Commission for an ex gratia payment are often disproportionate to the value of the payment.637 According to Cancer Research UK, “this further adds to delay, administrative burden and additional costs in communications with connected solicitors, beneficiaries and co-beneficiary charities”. This is even the case, according to Anthony Collins Solicitors LLP, where the moral obligation is clear.

11.78 Delays involved in gaining authorisation for ex gratia requests were generally said to be considerable. Cancer Research UK and Crispin Ellison recounted long-winded procedures which have to be followed when seeking authorisation for an ex gratia payment. Stone King LLP noted that this process can take months. Cancer Research UK was concerned that the Charity Commission is inconsistent in its approach to ex gratia applications; it had experience of one application being dealt with in one month, and another in nine. Cancer Research UK said the Charity Commission does not always deal with applications in the order in which they are received.

11.79 Delays and extra costs can have negative consequences for charities. The National Trust and Prof Janet Ulph pointed out that extended delays can result in reputational damage for charities; charities can be blamed for keeping claimants waiting. Cancer Research UK agreed that “it can be particularly difficult to manage the expectations of the individual requesting the ex gratia payment, in what may already be a difficult and emotive situation”.

11.80 However, the extent of delays and expenditure should not be exaggerated. Stewardship had “no difficulties” the last time it sought Charity Commission authorisation and the National Trust said that applying for authorisation is normally straightforward. Robert Pearce QC thought that “if a matter has been (as it should be) properly documented, the additional costs of presenting it to the Commission should

636 Geldards LLP; Anthony Collins Solicitors LLP; Colleges of the University of Cambridge; Action with Communities in Rural England; RSPCA; CLA; Bircham Dyson Bell LLP (agreeing with CLA); Stone King LLP; Cancer Research UK; Crispin Ellison; University of Cambridge; National Trust; Prof Gareth Morgan; Stewardship; Robert Pearce QC; ILM.

637 Geldards LLP; Anthony Collins Solicitors LLP; CLA; Bircham Dyson Bell LLP (agreeing with CLA); Stone King LLP; Cancer Research UK; Crispin Ellison; University of Cambridge; National Trust.
be negligible”. This last point does, however, run counter to many responses from charities.

Charity practice: internal limits

11.81 The ILM’s survey revealed that the majority of its respondents have an internal limit below which they will not apply to the Charity Commission for authorisation before making an ex gratia payment. The majority of those who had a limit applied the same informal limit as that applied by the Charity Commission, namely £1,000.

The uncertain definition of ex gratia payments

11.82 The ILM noted generally that “the legacy sector … suffer from [a] lack of clarity over what is, and what is not permitted under section 106”. Stone King LLP agreed that it is often unclear whether there is a moral obligation, and that this requirement needs to be more “tightly defined”.

11.83 According to Bircham Dyson Bell LLP, it is also difficult to draw the line between settlement of potential legal claims and making ex gratia payments. In such situations, Charity Commission advice would be welcome. Stone King LLP pointed out problems that arise on the border of these two options:

[Consider] cases where there is a potential legal claim available to the claimant (e.g. proprietary estoppel) but one which is speculative or which would probably lack merit if pursued as a legal claim. Are charities obliged to reject the request as an ex gratia and effectively force the claimant to bring a legal claim? Conversely, can they opt to deal with the legal claim and compromise it, albeit they would presumably have to compromise in accordance with their duty of care and consider settlement largely on the basis of the (weak) merits of the claim?

11.84 Inconsistency and uncertainty has led, according to the CLA, to trustees often being in the awkward position of not knowing whether a payment requires authorisation, and trying to argue that such a payment is of indirect benefit to the charity. In such situations, the CLA suggested that the Charity Commission should be “more willing to provide an Order or suitable advice to the charity trustees”; Bircham Dyson Bell LLP also emphasised the importance of Charity Commission advice in such situations.

11.85 There was reported to be uncertainty as a result of the approach taken by the Charity Commission. Cancer Research UK said it had “experience of the Charity Commission sanctioning different views amongst charities in respect of the same ex gratia request in a single estate”. Stone King LLP was concerned that in situations where a single legacy leaves money to a number of different charities, these charities might take different approaches as to whether there is a moral obligation to make an ex gratia payment in relation to that legacy. In such a situation, Stone King LLP thought that there should be a way in which charities can consult the Charity Commission for advice before making a formal application.

11.86 We would make two comments in response. First, it should be recalled that even if charity trustees feel a moral obligation to make such a payment, this does not mean that there is a legal obligation to make it – the trustees simply have a power to do so.

\[638\] With whom Bircham Dyson Bell LLP agreed.
There is therefore no legal requirement that charities act consistently in relation to similar or even the same ex gratia claim.\textsuperscript{639} Second, given that under the current law the Charity Commission is evaluating whether trustees feel a moral obligation to make a payment (as opposed to evaluating itself whether there is a moral obligation),\textsuperscript{640} it is unsurprising that the Charity Commission’s decisions vary between different trustees. We acknowledge, however, that this is not a coherent position, because it is difficult to see how the Charity Commission can assess whether or not charity trustees regard themselves as being under a moral obligation; this point is considered in paragraphs 10.29 to 10.40 of the Report.

Situations in which ex gratia payments arise

11.87 There were mixed responses as to whether our statement in the Consultation Paper that ex gratia payments arise mainly in the situation of legacies was accurate. Whilst the RSPCA agreed with our analysis, Veale Vasilborg Vizards LLP said that its main experience had been with payments to employees. According to Veale Wasbrough Vizards LLP, the fact that Charity Commission guidance focuses on legacies means charities have to pay for legal advice in other situations. In \textit{Re Snowden} it was recognised that a charity giving an employee on retirement “a pension in excess of that to which he or she is contractually entitled” can constitute an ex gratia payment.\textsuperscript{641} The CLA noted that circumstances in which ex gratia payments arise other than in relation to legacies include:

Where charity trustees wish to make additional provision for a recently deceased employee (for example contributing towards funeral costs), or if, on the winding-up of the charity (or a particular part of its operation), the charity trustees wish to provide enhanced redundancy payments to employees which may exceed that which may be justifiable from an employment law perspective.

11.88 Prof Gareth Morgan argued that charities should not be able to use ex gratia payments to make payments to trustees where they should have followed the procedure for remuneration for the supply of services in section 185 of the Charities Act 2011. He did, however, accept the making of “nominal” ex gratia payments to retiring trustees. Action with Communities in Rural England said that it had experienced situations in which payments are made to trustees for performing their job well. It agreed with Prof Gareth Morgan that such payments should not be seen as ex gratia payments but rather as remunerations; however it noted that it was difficult to explain to trustees why this is the case.

\textsuperscript{639} Indeed, in \textit{Re Snowden} [1970] Ch 700, 708, Cross J acknowledged that the charities were all making ex gratia payments of different values in relation to the same legacy. This is also implied in Charity Commission, \textit{CC7 Ex Gratia Payments by Charities} (May 2014) p 5: “If there is more than one charity intending to apply for authority to make an ex gratia payment relating to gifts in the same will, the charities must submit separate applications for authority (although each charity can nominate the same person to apply on their behalf). The applications must include separate information and evidence from each charity in support of the case. This must confirm that the trustees of each charity feel that they are under a moral obligation and explain the grounds for that belief.” We refer to the guidance as “CC7”.

\textsuperscript{640} The Charity Commission has said that charity trustees “must be able to convince the commission that there are reasonable grounds for them to believe they would be acting immorally by refusing to make the payment”: \textit{CC7}, p 4.

\textsuperscript{641} [1970] Ch 700, 708 Cross J.
11.89 The CLA suggested that the Charity Commission guidance should be updated to take account of the different situations in which ex gratia payments can arise. We acknowledge that there is little said about situations not connected to property left in a will in the Charity Commission guidance. The CLA also suggested that “it would be helpful if types of actual ex gratia payment applications that the Charity Commission has considered could be published and the knowledge shared”. Case studies are already published by the Charity Commission.

OTHER COMMENTS MADE BY CONSULTEES

The need for section 106

11.90 The ILM noted that section 105 could be used in cases where a payment would be in the best interests of a charity but there is no moral obligation to make that payment. It then said that:

There is a persuasive argument that section 106 is unnecessary due to the power given in section 105 on the basis that wherever there is a moral obligation to make the payment it is invariably the case that making the decision would be expedient in the interests of the charity.

11.91 We do not think that it will always be the case that an ex gratia payment will be in the interests of the charity, unless the interests of the charity are extremely widely defined. In the Consultation Paper we noted that although making an ex gratia payment will sometimes be in the interests of the charity, this will not always necessarily be the case. For example, there may be a case where the sum which the trustees have a moral obligation to give is so large that it could not be said that it would be in the interests of the charity to give that sum away. In any event, the point is clearly not beyond debate, and therefore we consider that it is desirable to have a separate tailored power for ex gratia payments for certainty and clarity within the Charities Act 2011.

The moral obligation test in section 106

11.92 The ILM asked its respondents whether the “moral obligation” test for determining whether a payment should be made is the correct test. 69% of respondents said that they “came across situations where despite there being no legal duty or moral obligation to agree to a request for a payment, they nonetheless felt that it was in their charity’s best interests to agree to the payment.” According to the ILM, “[70]% of charities make these payments despite the wording of section 106”. However, we consider that situations in which a payment would be in the interests of the charity can already be permitted under section 105 or under the power which many trustees have in their charities’ governing documents to take any action that is in the best interests of the charity.

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642 CC7 p 4; Charity Commission, Ex gratia payments by charities – case studies (May 2013).
643 Charity Commission, Ex gratia payments by charities – case studies (May 2013).
644 See para 11.5 of the Consultation Paper.
645 There could therefore be an argument for introducing a similar small payments scheme for section 105; on this, see paras 11.101 to 11.103 below.
11.93 Following from these responses, the ILM raised a concern that the current regime under section 106 is too narrow:

The legislation as it is currently written is far too inflexible and does not obviously permit charities to give items of “sentimental” value to friends and relatives of supporters who have left them a legacy. An argument might be made that the cost of disposing of the items exceeds the value of the item itself but this is not watertight.

(...) A further example which is not infrequent is when charities are asked to contribute to some form of memorial to the testator. If it is a headstone then there is probably a “moral obligation” and section 106 can be used effectively. However, when the headstone is more expensive or the request is more substantial, the moral obligation starts to be less certain.

**Involvement of the Attorney General under section 106**

11.94 The Attorney General has the power to authorise ex gratia payments. The Attorney General also supervises and directs the Charity Commission in the exercise of its powers under section 106.\(^{646}\) The Attorney General can direct the Charity Commission not to exercise its power, or to consult the Attorney General before the power is exercised.\(^{647}\)

11.95 Robert Pearce QC was critical of the involvement of the Attorney General, and argued that his or her involvement made the section overcomplicated:

It is not clear why the Commission should be required to exercise this power under the supervision of the Attorney. If a power is to be conferred on the Commission, the Commission should (subject to the existing methods of judicial and Parliamentary oversight) be trusted to exercise it unsupervised. I suggest that references in the section to the Attorney should be eliminated.

In my limited experience … when the Commission consults the Attorney it is not easy for the charity to understand whether the response given by the Commission represents the view of the Commission, the Attorney, or a combination of the two. This is unsatisfactory, and supports my suggestion that references in the section to the Attorney should be eliminated.

To the extent that a response given by the Commission has been influenced by consultation between the Commission and the Attorney, the charity may feel (rightly or wrongly) that, if its application to the Commission is unsuccessful, the prospects of it successfully making a fresh application to the Attorney (as envisaged by the section) have been jeopardised by discussions between the Commission and the Attorney to which the charity was not a party. This is a further unsatisfactory consequence of the way section 106 links the Commission and the Attorney.

11.96 He also suggested that directions made by the Attorney General to the Charity Commission be published.

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\(^{646}\) Charities Act 2011, s 106(3).

\(^{647}\) Charities Act 2011, s 106(4).
11.97 Francesca Quint, however, emphasised the importance of the Attorney General’s supervision of Charity Commission decisions. Referring to the case of *Re Henderson*[^648] (which was heard with *Re Snowden*), she noted that in cases where the moral claim falls on the executors of a will, as opposed to a charity receiving a legacy, the decision goes through the Attorney General alone. She thought that “this division of responsibilities explains why, for consistency, it is desirable for the Commission and the Attorney to adopt a similar approach”. The involvement of the Attorney General can be justified in this way.

The potential for appeal under section 106

11.98 Robert Pearce QC thought that there should be a right to appeal the decision to grant or refuse authorisation of a payment under section 106. He said the current situation is unsatisfactory because:

(a) A fresh application to the Attorney may be perceived as being unsatisfactory if the charity believes (rightly or wrongly) that the Attorney has already taken a position on the matter in the course of discussions between the Commission and the Attorney while the Commission was dealing with the matter.

(b) Judicial review is an unsatisfactory option because (i) the subject matter of the complaint falls naturally within the expertise of the Tribunal, and (ii) a charity may wish to present its application to the Commission both under CA 2011 section 105 and 106, and, as matters stand, it can appeal to the Tribunal from a decision under section 105 only.

Section 105

The scope of section 105

11.99 Robert Pearce QC, Prof Janet Ulph and the ILM (and its respondents) thought that reform of section 106 of the Charities Act 2011 should be accompanied by reform of section 105. Robert Pearce QC emphasised that there is often overlap between these sections (as well as section 110 of the 2011 Act and section 15 of the Trustee Act 1925), for example where there is a claim with a very shaky but potential legal basis and a strong moral basis.

11.100 Robert Pearce QC and Prof Janet Ulph criticised section 105 itself. Robert Pearce QC thought that section 105 is overcomplicated and too narrow, and that it should be reformed so as to allow the Charity Commission to authorise actions which are “expedient in the interests of charity generally” (as opposed to “expedient in the interests of the charity”) (emphasis added). Prof Janet Ulph raised two specific criticisms of section 105 which relate to the “the question of which actions can be justified on the basis that, although there might be a financial disadvantage, the charity is acting in a way which retains the public trust”:

(1) It is apparently unclear whether section 105 can be used to authorise museums to give back items of personal value to family members/friends if the museum no longer has use for it. It might not be clear whether such a donation is in the bests interests of the charity if it is unclear how much the object in question is

worth. Therefore “it would be helpful to museums if section 105 could be amended so that it was clear that they could return an object to a donor if it was in the interests of the museum to do so and if the property was under a certain financial value”.

(2) She questioned whether “museums can sell objects from collections at less than market value to another museum in order to keep them in the public domain”, given the trustees’ duty to obtain the best price under the common law. The Charity Commission have told her that a charity, on making a sale at less than market price, needs to be sure that this is still in the interests of the charity. It is therefore unclear whether authorisation under section 105 is required in such a situation.

Deregulation of section 105

11.101 In addition to these specific concerns, it was suggested by Robert Pearce QC and the ILM that a similar regime as that proposed for section 106 should be introduced for section 105. This would entail charity trustees being able to act outside their duties or powers as trustees for dealings involving small sums where they believe such an action is expedient in the interests of the charity. The ILM’s survey revealed that 80% of respondents thought that there should be a similar regime for section 105; the ILM noted that “the suggested limit was much the same as that suggested for section 106 with 50% of respondents wanting this to be at least £5,000” (although again the ILM said that it should have given higher options for the financial limit). This is backed up by the fact that the majority of the respondents in the ILM survey admitted to making a payment without authorisation where there was no moral obligation to make it but it would be in the interests of the charity on the basis that “it is the pragmatic thing to do” (as opposed to any specific legal basis).

11.102 More generally, the ILM thought that:

There is a strong argument that the proposals in the consultation paper are not the solution. We are in favour of charities being given unlimited powers to make payments which they believe are in their best interests. Like Cancer Research UK we believe that the Charity Commission will be needed to assist trustees when decisions are less straightforward but we do not think that there should be an obligation to obtain approval on straightforward decisions irrespective of value.

11.103 We discuss this proposal in paragraph 10.54 and 10.55 of the Report.
Figure 4: Suggested payment limits

£100,000
Church Growth Trust

£50,000
Lawyers in Charities

£10,000
Francesca Quint, RSPCA, Cancer Research UK (as a minimum)

£5,000
Francesca Quint, University of Cambridge; Association of Church Accountants and Treasurers; National Trust; Law Society; Prof Janet Ulph; Institute of Chartered Secretaries and Administrators; Stone King; Anthony Collins Solicitors; Institute of Legacy Management

£2,500
Stewardship
Crispin Ellison

£2,000
Veale Wasbrough Vizards (between £1,000 and £2,000)

£1,000
Colleges of the University of Cambridge; University of Plymouth; Action with Communities in Rural England; Churches' Legislation Advisory Service; Batey Wells Brathwaite; Robert Pearce QC; Lord Hodgson; National Trust; Charities' Property Association; NCVO; ACE; CFG; ICF CLA

£500
Professor Gareth Morgan
Chapter 12: Charity incorporations and mergers

GENERAL COMMENTS

12.1 31 consultees commented on issues discussed in Chapter 12 of the Consultation Paper.  

12.2 Consultees made various comments about the desirability of removing legal barriers to charity mergers. Lord Hodgson said “The evidence I received on charity incorporations and mergers was of a regulatory regime which was unnecessarily cluttered, not easily understood and which could too easily lead to inertia.” The Institute of Chartered Secretaries and Accountants said:

For trustees of unincorporated charities the associated risks can appear to be overwhelming and the case for incorporation conclusive. Once a decision to incorporate has been made, trustees can then be further confused by the process of establishing a new charity, dissolving the existing one and transferring the assets. For those unfamiliar with charity law, the process appears to be unnecessarily bureaucratic and long-winded – especially where the governing document is not permissive in making administrative changes without Charity Commission approval. Changes to charity law that makes it easier for charities to merge and/or incorporate should therefore be welcomed by many trustees and their advisers.

Issues outside the scope of our project

12.3 Stone King LLP wanted to see a streamlined process for incorporations, along with the ability for a charity to keep the same charity number and HMRC number to resolve practical problems.

Comparative

12.4 OSCR said “The 2005 Act makes no specific provision for the process of incorporation for unincorporated charities: “change of legal form” is a term coined by OSCR referring to dissolution of the existing charity and transfer of assets to a new corporate charity. The existing legal framework in Scotland is problematic. There is no provision for legacies where charities merge.”

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649 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCPA; Lord Hodgson; CCNI; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Independent Schools Council; Trowers and Hamlins LLP; Lawyers in Charities; Wellcome Trust; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; ILM; NCVO; ACF; CFG and IoF; HM Land Registry.
Consultation Question 70.

We invite the views of consultees as to whether, and if so how, the power for unincorporated charities to transfer their assets to another charity under section 268 of the Charities Act 2011 should be expanded.

[Consultation Paper, paragraph 12.50]

12.5 28 consultees responded to this question.\textsuperscript{650}

12.6 Some consultees noted that, as well as exercising the powers referred to in the Consultation Paper, charities can sometimes merge simply by transferring their assets to another charity (with similar purposes) as an application of funds in pursuit of their charitable purposes.

**Necessity of section 268**

12.7 Trowers and Hamlins LLP noted the existing express powers that charities usually have which may allow them to incorporate or merge.\textsuperscript{651} Anthony Collins Solicitors LLP said charities often have specific powers to incorporate, merge or wind up, and if not then they can usually transfer assets to another charity as an action in fulfilment of their own charitable purposes, so section 268 appeared “superfluous”.

12.8 Veale Wasbrough Vizards LLP also alluded to the express powers, which remove some of the necessity for the section 268 power. However, they felt that section 268 was still needed “because it reduces administration in amending the relevant governing instrument, and is wider than the general power.”

12.9 The Charity Commission said that “most charities have either express or implied powers to transfer their unrestricted funds to another charity with appropriate objects in furtherance of the transferor charity's purposes. However, where the charity has power to dissolve and transfer its assets, a direct application outside of such a power has been questioned as a “fraud on a power”. In consequence, we are not averse to section 268 being extended to permit all charities to transfer their unrestricted assets to another charity with similar objects.”

12.10 The CLA said that there was currently uncertainty as to whether section 280 could be used to introduce powers to merger or incorporate, so where a charity falls within the conditions for section 268 then it can be a useful power. However, under the CLA’s proposed expansion of section 280, they thought that section 268 should be abolished because the new section 280 could be used to introduce a power to merge or

\textsuperscript{650} Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&P; WCVA; Lord Hodgson; CCNI; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Cancer Research UK; Trowers and Hamlins LLP; Lawyers in Charities; Wellcome Trust; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG and IoF.

\textsuperscript{651} See para 12.45 of the Consultation Paper.
incorporate. They said that clarity would be necessary as to the effect of the introduction of such a power on any express dissolution clauses, particularly where a third party is named as the beneficiary of any surplus on dissolution. They wanted it to be clear whether the Charity Commission’s and/or the third party’s consent would be necessary. They thought that it would not fall within the current definition of “regulated alteration” in section 198, but they were divided as to whether consent should be required to the introduction of such a power under the new section 280.

Expanding the power

12.11 Geldards LLP, WCVA, the Charity Commission, Trowers and Hamlin LLP and the Association of Church Accountants and Treasurers agreed that the power should be expanded and thought that our suggestions in paragraph 12.47 of the Consultation Paper appeared sensible. Stewardship thought that section 268 should be expanded but thought it important for the interests of donors to be considered, so did not want to see all constraints removed.

12.12 The CLA said that, if section 280 was not expanded as they had suggested, then section 268 should be retained and expanded. Nevertheless, they acknowledged that it is “not a desirable or first choice option”; indeed, it is a “last resort” due to the requirement to wait for 60 days for the Charity Commission to object to the resolution. They thought that section 268 should be available consistently between incorporated and unincorporated charities, and regardless of whether the transferee charity is a company or a CIO.

Aligning with other powers

12.13 The Institute of Chartered Secretaries and Administrators said “as section 268 powers are similar to those available to unincorporated charities elsewhere in the Charities Act 2011, there is some weight to the argument that section 268 powers should be expanded to accurately mirror the appropriate thresholds in place for similar powers.” Bates Wells Braithwaite made similar comments.

Increasing the threshold of the charity’s annual income

12.14 Eleven consultees said that the income threshold should be increased,\(^{652}\) which would include more smaller charities and align the regime with section 275 and 282.\(^{653}\) Lord Hodgson maintained his suggestion to increase the threshold to £25,000. Bates Wells Braithwaite also thought that £25,000 was appropriate. Francesca Quint suggested £25,000 or £50,000, and suggested an alternative filter based on capital value.

12.15 Some consultees thought that Lord Hodgson’s proposal did not go far enough. Stewardship suggested increasing the threshold to £250,000, NCVO, ACF, CFG and IoF suggested £50,000, and four consultees suggested that there should be no income condition at all.\(^{654}\) The CLA (with whom Bircham Dyson Bell LLP agreed) thought that there was no rational basis to distinguish between transfers to a CIO (for

\(^{652}\) Francesca Quint; Anthony Collins Solicitors LLP; Action for Communities in Rural England; Cancer Research UK; Lawyers in Charities; Veale Wasbrough Vizards LLP; Stewardship; NCVO; ACF; CFG, and IoF.

\(^{653}\) Veale Wasbrough Vizards LLP.

\(^{654}\) Anthony Collins Solicitors LLP; University of Plymouth; Stone King LLP; CLA.
which there is no income threshold) and transfers to a charitable company (for which there is a £10,000 threshold); indeed, larger charities will often prefer to incorporate as a company than as a CIO so section 268 is presently only available to a few specific types of charity.

**Designated land**

12.16 Ten consultees said that the designated land restriction should be removed. The University of Plymouth could not understand why the restriction applied when it would not apply if the transferee was a CIO.

12.17 The CLA thought that designated land would be protected by its nature. It is designated if the purposes of the charity are such that it may only be used for a specific purpose. They thought that such land amounted to a special trust, and that section 268 applied to designated land separately, distinct from any wider purposes of the charity holding the land. The requirement for “substantial similarity” would therefore prevent the land from being used for other purposes. Nevertheless, they wanted the position to be clarified.

12.18 Stone King LLP had concerns with the designated land requirement suggesting that:

*We did have some concerns regarding designated land, and whether these provisions could enable a charity to get around the restrictions on disposal. However, we anticipate that putting in place appropriate controls to protect the interest of the original donee (perhaps by statutory imposition of special trusts, if not otherwise modified by Charity Commission scheme etc.) this might be overcome and continue.*

12.19 Three consultees were concerned with removing the designated land restriction. Action with Communities in Rural England said it was “too important to lose”.

**Applicable to other forms of charities**

12.20 In the Consultation Paper we suggested that the power could be made available to incorporated charities. 13 consultees thought it should.  

12.21 Stone King LLP thought the power should be applicable regardless of a charity’s legal form. “Lay trustees often do not necessarily understand the difference between incorporated and unincorporated charities, and so the more powers that apply to all, the easier it is for trustees to understand.” The Charity Commission commented that the section 268 power might be useful to incorporated charities with an existing power to merge or wind up.

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655 Anthony Collins Solicitors LLP; University of Plymouth; CLA; Bircham Dyson Bell LLP; Cancer Research UK; Veale Wasbrough Vizards LLP; NCVO, ACF, CFG and IoF.

656 Francesca Quint; Action with Communities in Rural England; Bates Wells Braithwaite.

657 See para 12.47 of the Consultation Paper.

658 Anthony Collins Solicitors LLP (if s 268 is to be retained); University of Plymouth; Bates Wells Braithwaite; CLA (if s 268 is to be retained); Bircham Dyson Bell LLP; Charity Commission; Cancer Research UK; Prof Gareth Morgan; Stewardship; NCVO; ACF; CFG and IoF.
12.22 By contrast, Francesca Quint was not in favour of extending the power to incorporated charities where “even a simplified cy-près-type regime would be a foreign concept”.

12.23 Prof Gareth Morgan said that, if extended to incorporated charities, section 268 should include a requirement for a vote of two-thirds of the incorporated charity’s members.

**Charity Commission oversight**

*Retain requirement for Charity Commission consent*

12.24 Some consultees wanted section 268 to continue to require Charity Commission oversight. ACRE said that it ensured that trustees are acting in the best interests of the charity and community. Stewardship saw it as an important safeguard of the interests of donors and stakeholders. NCVO thought oversight should remain in order to deter abuse and because there is “significant public interest in the operation of charities”.

12.25 Bates Wells Braithwaite favoured a procedure under which the Charity Commission gives express consent to resolutions, rather than the resolution taking effect if the Charity Commission does not object. But they wanted to retain Charity Commission oversight as a safeguard, which also “gives validation and comfort to the trustees”.

12.26 Francesca Quint said that section 268 raised difficult questions for trustees for which there is little guidance to assist, so oversight is helpful.

12.27 Bates Wells Braithwaite thought the current framework – under which the Charity Commission can invite views from the public and make the final decision – worked well, albeit that the Commission is likely to require advertising or object to section 268 resolutions only rarely.

12.28 The CLA thought that oversight guarded against the improper use of section 268, particularly if the power is to be expanded. Some members of the CLA suggested that the Commission should provide positive consent to section 268 resolutions, in the hope that that would speed up the process of obtaining authorisation.

*Remove requirement for Charity Commission consent*

12.29 Other consultees thought that the requirement for Charity Commission consent should be removed. Anthony Collins Solicitors LLP thought “It should simply be a matter of the trustees being satisfied that such action is in the best interests of the charity and having obtained such advice as they consider necessary to enable them to reach that decision”. Similarly, the Charity Commission did not think that consent was necessary since it does not have to give consent when charities already have a power to merge. Lord Hodgson said that he was inclined to believe that his recommendation in his 2012 report to retain the requirement was wrong.

12.30 Veale Wasbrough Vizards LLP thought that, if the income threshold under section 268 is increased, there was more justification for retaining Charity Commission oversight. However, as most charities have express powers which would not require the Commission's consent, there is a good argument for removing the requirement. Trustees are best placed to determine how funds should be applied and whether the charity should merge or incorporate. The position is different from the powers under
sections 275 and 282 as charities will not typically have an express power to amend their purposes or to spend permanent endowment.

**Alternative suggestions**

12.31 Cancer Research UK suggesting removing the requirement for Charity Commission consent in the case of resolutions by charities with incomes below a certain threshold.

12.32 The University of Plymouth thought that, instead of the Charity Commission supervising each case, prior notice of the resolution should be given to members of the charity and the Commission should intervene and decide whether or not to object to the transfer if objections are raised by, say, 10% of members or by dissenting trustees within 30 days of receiving notice of the resolution. Otherwise, the transfer should proceed without the need for Charity Commission approval.

**Permanent endowment and restricted funds**

12.33 The Charity Commission said that “It is also appropriate that permanent endowment and property on special trusts should be capable of being transferred under this power provided that the charity taking it holds it as far as possible on the same trusts.” Prof Gareth Morgan made similar comments.

**Other conditions**

12.34 The University of Plymouth wanted to retain the requirements that the transfer is expedient in the interest of furthering the purposes for which the property is held, and that one of more purposes of the transferee is “substantially similar” to one or more of the charity’s purposes. It suggested, however, that the requirement for a resolution of two-thirds of the trustees be changed to three-quarters of trustees to be in line with the requirements for special resolutions for companies.

**Disagreement with expanding the section 268 power**

12.35 The University of Liverpool CL&PU did not think that the current regime appeared to inhibit the effective merger of charities. “While we too can see an attraction in extending the powers under this section, we see no compelling need for change and would be concerned that any such changes may have an unintended and more permissive impact on transfers of property (not just mergers).” CCNI said that it had no experience of giving consent under its equivalent power but did not think that the power needed to be extended.

12.36 The RSPCA said that it would “prefer to see the provisions on vesting property for the purpose of mergers expanded”.

**Analogy with section 235 and 240 powers for CIOs**

12.37 We said that the section 235 and 240 powers for CIOs to transfer and amalgamate are wider than the section 268 power. Francesca Quint noted, however, that such powers can only be effected with the Charity Commission’s consent. She said that the Charity Commission is not simply the agent of the trustees and there might be circumstances in which the Commission would refuse to authorise the transfer or amalgamation. Bates Wells Braithwaite also commented on the Commission’s oversight of these powers, and thought it unlikely that they will have been used a great deal given that CIOs are a recent creation.
A general power to incorporate

12.38 The Wellcome Trust thought that there should be a statutory power for charitable trusts to incorporate by operation of law, automatically continuing to hold all of the charity’s assets. There would be no need to transfer assets to a new corporate body, so many of the issues that currently arise would be resolved.

Consultation Question 71.
We provisionally propose that the condition for the exercise of the power under section 268 of the Charities Act 2011 requiring similarity of purpose between the transferor and transferee charity should be the same in respect of both unrestricted funds and permanent endowment.

Do consultees agree? [Consultation Paper, paragraph 12.54]

12.39 25 consultees responded.659

(1) 23 consultees agreed.660

(2) 2 consultees disagreed.661

Agreement

12.40 We said at paragraph 12.53 of the Consultation Paper that there is no clear rationale for a more onerous condition in relation to permanent endowment. Six consultees agreed, saying they could see no reason why a more restrictive condition applied to permanent endowment.662

12.41 The University of Liverpool CL&PU said “Given the nature of merger, which necessitates a process of significant change to the original form of a charity and to the property entitlements of the merging organisations, we can also see no strong reason for any additional requirements for property held as permanent endowment. Indeed, to

659 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; CCNI; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Trowers and Hamlins LLP; Lawyers in Charities; Association for Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG and IoF.

660 Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; CCNI; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Trowers and Hamlins LLP; Lawyers in Charities; Association of Church Accountants and Treasurers; Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG; and IoF.

661 Francesca Quint; Charity Commission.

662 Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Veale Wasbrough Vizards LLP.
treat permanent endowment differently may be a prohibiting factor in effective merger and we believe the requirements of similarity are sufficient in all property transfers.”

12.42 Veale Wasbrough Vizards LLP said that there was no basis for more restrictive conditions for permanent endowment, provided the permanent endowment restrictions also transfer. They said that permanent endowment restrictions are concerned with the expenditure of capital and not necessarily the purpose that the income is put to.

12.43 Similarly, Stone King LLP were in favour of treating unrestricted funds and permanent endowment equally “because the trusts on which the permanent endowment has been transferred would continue – it would just widen the potential transferees”.

**Disagreement**

12.44 The Charity Commission said:

If the permanent endowment and special trust property remains held on the same trusts as before, there is necessarily a distinction between that property and the unrestricted property transferred. That should continue to be the case. Whereas it may be acceptable for unrestricted property to be applied for a particular purpose of a charity, it is not acceptable for a fund held for distinct purposes in perpetuity to be restricted to only one of those purposes in perpetuity.

12.45 Francesca Quint said:

Section 268 approximates to the cy-près principle, where the new purpose must be wholly cy-près the original. The point about permanent endowment is that the income which arises from it is applicable across the purposes of the transferee charity, and there is no mechanism for ensuring it is used for the transferor charity’s purposes as such in the way that there is with expendable funds. Surely the answer is to keep the existing protection for permanent endowment now that it will be fairly straightforward for the transferor charity’s trustees to release it before making the transfer, thus enabling it to be expended subject to the obligation to keep to the purpose/s similar to the transferor’s purposes even if the transferee charity will in practice decide to retain all or some of it as expendable endowment.

**Consultation Question 72.**

We invite consultees to share with us their experiences of using the section 268 power, including in respect of permanent endowment, in particular the work, time and costs that have been involved.

[Consultation Paper, paragraph 12.56]

12.46 7 consultees responded.⁶⁶³

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⁶⁶³ Francesca Quint; CCNI; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Prof Gareth Morgan; Veale Wasbrough Vizards LLP.
12.47 CCNI had no experience of using the equivalent section 268 power. However, it added that there is no requirement that charity trustees incur expenses when using the power. “Trustees can submit a resolution and statement of reasons for passing it directly to the Commission without receiving advice from professional advisors.”

12.48 Veale Wasbrough Vizards LLP had little experience of using section 268 as other powers were generally available. However, they added that the 60-day objection period was likely to cause problems concerning when a transfer or merger would go ahead. Charities are likely to plan incorporations to fit within their accounting periods and therefore the power may be problematic. Furthermore the costs associated with dealing with the transfer of permanent endowment are “disproportionately high” when compared with unrestricted funds.

12.49 Bates Wells Braithwaite said that they used section 268 regularly, often alongside sections 275, 281 and 282 when merging restricted funds. Section 268 is useful as the Charity Commission has said that “an unincorporated charity, with no constitutional power of amendment, cannot use section 280 to add a power to merge to its constitution” (an interpretation that they disagree with). Therefore section 268 can be used to transfer assets on merger. In addition, section 268 is a generous provision as it permits transfers to charities where the purposes are “substantially similar to the purposes or any of the purposes”; the purposes do not have to be the same.

12.50 Prof Gareth Morgan said:

I have used section 268 effectively for a wind up of a church operating as a trust which wished to transfer to a CIO. In this case the church building was not permanent endowment, but it was helpful that it could have been included. Section 268 is mainly useful when there are doubts as to whether the old charity has suitable powers of wind up. However, section 268 does not seem to allow the new charity to give an explicit indemnity when assuming the liabilities (as well as the assets) of the old charity – it would help if this could be incorporated into the legislation.

12.51 Francesca Quint said that the availability of section 268 can cause difficulties in practice since the Charity Commission refuses to make a scheme if the matter can be dealt with under section 268. Even if there are a number of charities to be re-organised, some of which fall within section 268 and some do not, the Commission expects the trustees to use section 268 where it is available; this “significantly [increases] the work involved … and thus the costs”.

12.52 The CLA gave detailed examples of a case in which the power was used and was helpful, and a case in which the Charity Commission said that the power was not available (and the CLA disagreed with the Commission’s view).
Consultation Question 73.

We invite consultees to share with us their experiences of using vesting declarations under section 310 of the Charities Act 2011, including any difficulties that they have encountered and whether they consider the power to be satisfactory.

[Consultation Paper, paragraph 12.67]

12.53 12 consultees responded to this question.\(^6\)

12.54 Geldards LLP thought that the power is “satisfactory as it avoids the need for an additional conveyance”. They have had no problems when registering the declarations with HM Land Registry.

12.55 Generally other consultees suggested that section 310 was limited it its application and they were more likely to use alternative methods. Veale Wasbrough Vizards LLP used vesting declarations in very few circumstances; mergers are usually governed by a transfer agreement or merger deed which specifies obligations and the apportionment of liabilities.

12.56 Francesca Quint said that the power was “not at all useful in practice since the exceptions are relatively complex and create the need for additional advice. It is generally simpler to have a tailored transfer agreement covering all that needs to be dealt with specifically”. She raised a further complexity with the provision of indemnities; it is necessary to establish whether the indemnity should extend to liabilities properly entered into by the trustees on behalf of the charity, or liabilities purportedly entered into regardless of whether the transaction amounted to a breach of duty.

12.57 The Independent Schools Council suggested that section 310 was limited in its use for facilitating mergers:

Mergers between schools involve the transfer of often significant assets and liabilities, which are regulated by an agreement on which professional advice is almost always required. For our member schools, section 310 is therefore of very limited experience.

Criticisms of section 310: exclusion of property, transfer of liabilities and provision of indemnities

12.58 Consultees raised three principal problems with section 310. First, the exclusion of certain property from vesting declarations. Second, the absence of any vesting of liabilities in the transferee charity. Third, the absence of any provision concerning allocation of liabilities.

\(^6\) Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; CCNI; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Charity Commission; Independent Schools Council; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; RSPCA.
12.59 Bates Wells Braithwaite commented on the limitations on the assets that are transferred by section 310 vesting declarations; they cannot transfer mortgaged land, it is unclear whether they apply to debts or goodwill, they do not apply to funding contracts, and they do not address the allocation of liabilities.

12.60 The CLA said that, since assets are transferred without consideration following a merger, the transferor charity is (or the individual trustees are) left without any assets. It is therefore important that the transferee assumes all liabilities and provides the original charity (or trustees) with an indemnity in respect of those liabilities (save for liabilities incurred knowingly or recklessly in breach of trust). They said that the need for separate agreements to deal with the transfer of liabilities and the provision of indemnities “seems to negate the rationale for having section 310”. They said that the section 310 mechanism is only likely to be used where the transferee is a CIO and there is permanent endowment because in those circumstances section 310 automatically confers trust corporation status on the CIO (on which, see further below); “alternative methods of obtaining trust corporation status can be significantly more onerous”.

12.61 Anthony Collins Solicitors LLP noted the advantage of not requiring any additional transfer deeds to register a change of proprietor but said that there were disadvantages in relation to the exclusions of assets from section 310 and because the “declaration does not transfer the liabilities of the transferring charity”. In order to address exclusions and liabilities a separate agreement is required, but this itself is also problematic:

Where a more standard Transfer Agreement is produced which addresses these difficulties such an agreement in itself is insufficient to vest the real property in the trustees and so a further transfer deed is needed for HMLR purposes. A solution which dealt with all of these issues in a single document would be a significant step forward.

12.62 RSPCA said the provision was not widely used “because of exceptions and our charity mergers tend to rely on conventional methods of transfer such as by deed”.

Uncertainties concerning the assets to which vesting declarations apply

12.63 Bates Wells Braithwaite explained the uncertainty as to whether land owned by a transferring charity and subject to a mortgage is covered by a section 310 vesting declaration. They thought that a transfer would only take effect in equity since a mortgagee would have the benefit of a restriction on the register that would prevent registration of the vesting without the mortgagee’s consent. The practical solution is to exclude mortgaged land from vesting declarations, which also avoids the transferee breaching its covenants with the mortgagee, which “further dilutes the usefulness” of vesting declarations.

Does section 310 confer a power to merge or a mechanism to effect a merger?

12.64 Bates Wells Braithwaite, the CLA and Bircham Dyson Bell LLP commented that section 268 provided a power to transfer property, and that section 310 vesting declarations provided a mechanism by which property could be transferred. They said

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665 Geldards LLP also commented on this issue.
that uncertainty had been created by suggestions from the Charity Commission that section 310 amounts to a power to transfer assets to another charity if section 268 (or another power) is not available.

**Modifications to section 310 in the case of transfers to CIOs**

12.65 Section 310 is modified by regulation 61 of the CIO (General) Regulations 2012 when the transferee charity is a CIO.

12.66 Bates Wells Braithwaite raised two technical concerns about the effect of regulation 61. First, they said that – given that permanent endowment is held on trust – section 310 vesting declarations could only transfer trusteeship of permanent endowment to a CIO, but the position was not clear from the wording of regulation 61. The CLA made similar comments. Second, when permanent endowment is transferred, it must be held “so far as is reasonably practicable” on the same trusts. They wanted guidance on the meaning of that phrase and the extent to which it permits CIOs effectively to re-write permanent endowment restrictions.

**Other comments**

12.67 Prof Gareth Morgan said:

They key issue which many lawyers have not appreciated is that section 310 is amended by regulation 61 of the CIO (General) Regulations 2012 – making it a really powerful concept when the transfer is made to a CIO. Some people think that section 310 should be available even without merging the old charity – I am not sure whether I agree, but it would be helpful for the Law Commission to consider this further. However, there is some legal doubt as to whether the pre-merger vesting declaration remains legally effective if the trustees of the old charity do not register the merger under section 307 within a reasonable time and this could helpfully be clarified.

12.68 Bates Wells Braithwaite said that the requirement that the original charity cease to exist precludes charities from using section 310 vesting declarations when they wish to retain a shell in order to capture potential legacies. Nor can they be used in a merger with a charity established in Scotland or Northern Ireland.

12.69 The Charity Commission noted that a charity that wants to keep a shell charity on incorporation cannot use a section 310 vesting declaration or go on the Register of Mergers.

**Practical problems with the registration of mergers**

12.70 The Charity Commission for Northern Ireland did not consider the merger provisions to be satisfactory.

(1) It is difficult to keep the register of mergers up to date since charities do not have to notify CCNI about mergers or closures. “We concluded that the specific section [concerning] mergers would take precedence over the general section with the requirement to keep the register up to date as per the general legal principle generalibus specialia derogant. Therefore, we cannot force charities to notify us of mergers outside of their annual monitoring return (unless there is a vesting declaration). Other sections of the Charities Act (NI) 2008, for example
section 20(5) use phrases such as "forthwith". The mergers specific section does not; therefore, we cannot impose a timescale for notification of mergers."

(2) Notification of a merger cannot take place until all the property has been transferred. The protection offered by the register of mergers cannot take place until the merger is entered into the register. If there is a gap between the disposal of the property and the registration of the merger with the Commission, any gift passing to the transferor taking effect during this gap may be lost.

Consultation Question 74.

We provisionally propose that the exception in section 310(3)(b), in respect of leases containing qualified covenants against assignment, be removed.

Do consultees agree?

[Consultation Paper, paragraph 12.68]

12.71 18 consultees responded:

(1) 15 consultees agreed;

(2) 3 consultees expressed other views.

Agreement

12.72 Anthony Collins Solicitors LLP said “The charity will either be incorporating in which case the applicable assets and liabilities are no different such that the landlord is not disadvantaged or the charity will be merging with another in which case the assets available to meet the obligations to the landlord will be increased. There seems, therefore, to be little disadvantage to the landlord from leases being included. This would also avoid additional costs for both parties in effecting an assignment (usually borne in full by the charity)."

12.73 The University of Liverpool CL&PU said: “While we see much strength in the arguments provided in para 12.6 [of the Consultation Paper] about not removing this exception, we feel that the interest of an effective merger should take precedence. Except in the case of absolute covenants, many covenants restricting assignment are fully qualified in practice, so that the landlord cannot refuse consent unreasonably. In

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666 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Trowers and Hamlins LLP; Lawyers in Charities; Prof Gareth Morgan; Stewardship; RSPCA; HM Land Registry.

667 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Liverpool CL&PU; WCVA; Action for Communities in Rural England; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Charity Commission; Trowers and Hamlins LLP; Lawyers in Charities; Prof Gareth Morgan; Stewardship; RSPCA; HM Land Registry;

668 Institute of Chartered Secretaries and Administrators; Stone King LLP; Stewardship.
most situations, therefore this is largely an administrative burden and the neatness of the vesting declaration is a more effective means of transfer in these particular circumstances.”

12.74 Bates Wells Braithwaite firmly supported the proposal. “It would simplify the process for transferring leases saving the charity time and costs. Currently landlord’s fees for assignment of leases can be as much as £1,000 per lease. Regarding landlord’s rights as a third party, we agree that the effect on landlords is limited as this provision is only to apply on mergers. Moreover, on the merger of two charities, the landlord would usually end up with a tenant which can provide a stronger covenant than the pre-merger tenant.”

12.75 The Charity Commission thought that the rules for qualified and absolute covenants should be the same, and if an absolute covenant can be overridden, so too should a qualified covenant.

12.76 Francesca Quint thought that removal of the second exception would make section 310 “more workable”.

12.77 The CLA agreed on the basis of providing consistency with CIOs, and the fact that such rights can already be overridden by a Charity Commission scheme.

Disagreement

12.78 The Institute of Chartered Secretaries and Administrators said “Removing the clauses that protect landlords could … be detrimental to them and may in turn adversely impact on the reputation of the individual charity and the sector.” It thought that issues concerning absolute and qualified covenants in leases were best addressed by dialogue between the charity and its landlord(s). But “the use of statutory powers to use vesting declarations to transfer property which include absolute and/or qualified covenants, without the ongoing dialogue with the landlord could … be seen as a strident step that does not facilitate the best relationship between the charity and the landlord.” However, it thought (like Stewardship) that the anomalies between sections 310, 239 and 244 “should be smoothed, one way or the other, to promote better understanding and consistency in implementation”.

12.79 Stone King LLP said: “We can understand the rationale of such an amendment, since we have experience of landlords preventing assignment on incorporation unless further fees are paid or amounts put on deposit. We do though have concerns about this exception being removed, and the resultant effect on both landlords and charities. We understand that this has been considered before, as vesting orders made by the Charity Commission used to override the landlord’s consent requirement, but it was felt that this was unreasonable, and so the prohibition came into force. It is important that third party rights are protected, and whilst there may not be an issue with an incorporation (because the charity is essentially the same entity, with the same trustees, assets and purposes), where there is a merger, a landlord may have legitimate reasons for not consenting to an assignment. Our concern, if this is implemented, is that it will lead to landlords being reluctant to offer more favourable terms to charities, and include more onerous break/forfeiture terms instead. Landlords may also include specific provisions to combat the effect (e.g. stating a personal guarantee will come into effect upon a declaration being made). If the exception were
to be removed, we would expect to see a requirement for Charity Commission consent, to ensure that landlord’s interests are protected."

12.80 Stewardship said that our proposal would bring parity with sections 239 and 244 but was concerned “how it would be viewed by lessors collectively and whether by granting such powers the ability for charities to obtain leases on reasonable or favourable terms might become more difficult”. Sections 239 and 244 are specifically limited to CIOs, which are relatively new, and it is "too early to see whether these provisions have a detrimental impact on the leasing market" and, until that is known, Stewardship wanted to retain the second exception.

**Recommendation 75.**

We invite the views of consultees as to whether the section 310 power and its exceptions are otherwise satisfactory.

[Consultation Paper, paragraph 12.69]

12.81 13 consultees responded to this question.669

**Satisfactory**

12.82 Some consultees thought that (save for the points discussed above) section 310 was satisfactory.670

**Remove first exception**

12.83 Stewardship saw no benefit to the first exception and preferred closer alignment with sections 239 and 244 (but wanted to retain the second exception). By contrast, Anthony Collins Solicitors LLP did not think that the first exception caused problems in practice.

**Remove third exception**

12.84 Anthony Collins Solicitors LLP (as well as Francesca Quint and Stewardship) thought the third exception should be removed so that such assets can be included in the vesting declaration “although notice would, of course, have to be given to the relevant institution to allow re-registration of those assets in the name of the incorporated or merged charity”. Francesca Quint thought removal would create more consistency between section 310 and the provisions for CIOs. By contrast, Veale Wasbrough Vizards LLP said that the third exception causes little difficulty in practice since notification to the relevant institutions would be required in any event.

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669 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Trowers and Hamlin LLP; Bates Wells Braithwaite; Veale Wasbrough Vizards LLP; Stewardship.

670 University of Liverpool CL&PU; Stone King LLP.
Remove all exceptions

12.85 The University of Plymouth thought that section 310 should follow sections 239 and 244 with the effect that no property is excluded from automatic vesting. Expanding section 310 in this way would simplify the law and be consistent with the provisions for CIOs.

12.86 Similarly, Trowers and Hamlin LLP thought all exceptions should be removed: “other statutory transfer processes do not provide for similar exceptions, and a vesting process which results in all assets vesting in a transferee without the need to deal with certain specific assets separately would assist greatly (acknowledging that clearly in the case of some assets other third party consents and/or administrative steps will be needed in order to make and perfect a transfer).”

Vesting of liabilities

12.87 We noted above consultees’ criticism of section 310 not permitting the transfer of liabilities. Trowers and Hamlin LLP said that it would be useful if the vesting declaration process were expanded to include a vesting of liabilities in the transferor as well as assets. “Any transferor would of course need to carry out appropriate due diligence prior to agreeing to take on such liabilities, but this should not prevent a statutory provision being added to permit such a vesting.” They referred, by analogy, to the statutory transfer of engagements process under section 110 of the Cooperative and Community Benefit Societies Act 2014.

Permanent endowment

12.88 Stewardship saw little reason to distinguish permanent endowment and thought it should be included. Similarly, the Charity Commission said “it should be possible to use the vesting declaration to transfer permanent endowment and special trust property. The CIO regulations change section 310 to permit this on a transfer to a CIO and we consider the necessary changes should be made to the section to give effect to any transfer of permanent endowment or special trust property to an incorporated body on the same terms as with CIOs. We also see no objection to it being used to transfer between two unincorporated charities.”

Consultation Question 76.

If, contrary to our provisional proposal in paragraph 12.68 above, consultees do not agree that section 310 vesting declarations should apply to leases containing qualified covenants against assignment, we invite the views of consultees as to whether section 310 vesting declarations should apply to leases containing absolute covenants against assignment.

[Consultation Paper, paragraph 12.70]
12.89 12 consultees responded to this question:671

(1)  6 consultees thought that if qualified covenants are excluded from section 310 then so should absolute covenants.672

(2)  4 consultees thought it should not;673 and

(3)  2 consultees had other views.674

A consistent approach

12.90 Six consultees thought that section 310 should treat qualified covenants against assignment and absolute covenants against assignment in the same way.675 The University of Plymouth added that there is likely to be no difference in practice as "a landlord could withhold consent under a qualified covenant or waive its rights under an absolute covenant." The Charity Commission, although supporting the proposal to apply vesting declarations to lease containing qualified covenants, expressed the view that there should be parity between absolute and qualified covenants with regards to section 310.

A different approach

12.91 Consultees who thought that section 310 should not apply to absolute covenants suggested that there would have been good reason for including it in the lease,676 and the landlord clearly wanted to restrict any transfers from taking place before having a chance to review and agree any relevant terms. The University of Liverpool CL&PU added that "the use of absolute covenants in the charity context may, however, have been included to simply restrict the use of the property to charities, but without further consultation with charity landlords this is supposition".

12.92 Stone King LLP “strongly” urged against applying section 310 to absolute covenants:

- there are many and varied reasons why absolute prohibitions are included and must be capable of being relied on or a valuable benefit to charity could be lost as gifts based on reliance on them are lost. This includes in relation to charity transactions where very specifically the transaction will only occur and be agreeable if the transaction is with that specific lessee charity. In effect this change could or would lead to overriding and subverting the original "special trust" implicit in the specific charity being given the gift.

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671 Anthony Collins Solicitors LLP; University of Plymouth; Charity Law and Policy Unit; Action for Communities in Rural England; CLA; Bircham Dyson Bell LLP; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Stewardship; RSPCA; HM Land Registry

672 Anthony Collins Solicitors LLP; University of Plymouth; Action for Communities in Rural England; Charity Commission; RSPCA; HM Land Registry.

673 Charity Law and Policy Unit; CLA; Bircham Dyson Bell LLP; Stone King LLP.

674 Stewardship; Bates Wells Braithwaite

675 Anthony Collins Solicitors LLP; University of Plymouth; Action for Communities in Rural England; Charity Commission; RSPCA; HM Land Registry.

676 University of Liverpool CL&PU; Bates Wells Braithwaite; Stone King LLP.
12.93 While Bates Wells Braithwaite wanted the second exception to be removed, they were content for leases with absolute covenants to be excluded from section 310 vesting declarations since such covenants are usually included in a lease for a specific reason; for example, a local authority might let land to a local charity and might object to the lease being assigned to a large national charity.

**Consultation Question 77.**

We provisionally propose that vesting declarations under section 310 should apply to a charity’s permanent endowment in the same way that they apply to a charity’s unrestricted funds.

Do consultees agree?

[Consultation Paper, paragraph 12.76]

12.94 19 consultees responded. All consultees agreed with the proposal, many of whom also commented on the need for trust corporation status.

**Agreement**

12.95 The Institute of Chartered Secretaries and Administrators said that, as the vesting declaration does nothing to change the nature of permanent endowment when transferred to a new or existing charity, there appears to be no reason to restrict its inclusion.

12.96 Similarly, Stone King LLP said the position for CIOs should apply to all charities, but they wanted it to “be made clear that property will still be subject to the permanent endowment restriction”.

**Corporate trustees**

12.97 Veale Wasbrough Vizards LLP said that vesting declarations should apply to permanent endowment. However, they raised a practical problem.

When appointing a company as the sole corporate trustee of permanent endowment land., only a trust corporation can give valid receipt for land. In practice, this is usually the reason why some transfers require a Charity Commission scheme or order.

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677 Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Trowers and Hamlin LLP; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.

678 Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Action for Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Trowers and Hamlin LLP; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.
12.98 Anthony Collins Solicitors LLP agreed with the proposal “provided that there is clarity as regards the impact of this provision, i.e. that if the receiving charity is unincorporated the permanent endowment is held by the trustees of that charity subject to the restrictions imposed by the original trusts but that if the receiving charity is a charitable company then the permanent endowment charity continues to exist and the charitable company is simply automatically appointed as the corporate trustee of that continuing charity.”

12.99 Similarly, the Charity Commission said that a transfer of permanent endowment under a section 310 vesting declaration “may have a different effect to the transfer of unrestricted property. In particular, whereas unrestricted property vested in a corporate charity will be held as corporate property, permanent endowment and special trust property will be held on trust following vesting”.

12.100 Francesca Quint said that a scheme is normally made to appoint the merged charity as trustee in order to confer trust corporation status on the trustee, so that it can give a valid receipt for capital moneys arising from the sale of land. She said that the problem is not addressed simply by extending section 310 to permanent endowment, but it is necessary to include a mechanism for making the merged charity a trust corporation for the purpose of holding permanent endowment.

12.101 The CLA referred to two situations in which trust corporation status could be obtained, namely when the Charity Commission appoints a trustee and where permanent endowment is transferred to a CIO by means of a section 310 vesting declaration. The CLA said (and Bircham Dyson Bell agreed) that those mechanisms were useful and suggested that there should be “wider deeming of such status where a corporate body acts as sole trustee of a charity so that the trustee can give a valid receipt for capital money”. The current provisions are “unduly limited” as they require the involvement of the Charity Commission simply in order to appoint the trustee so that it obtains trust corporation status, and it can be difficult to persuade the Charity Commission to make an appointment if the corporate body has already been appointed as trustee. Moreover, as Bircham Dyson Bell LLP pointed out, section 310 vesting declarations are used not because there is a desire to take advantage of the automatic transfer of assets but because the charity wants to take advantage of automatic conferral of trust corporation status; accordingly, the vesting declaration “is just an additional document, on top of the transfer deed which would be a standard document in these circumstances”.

Other comments

12.102 Prof Gareth Morgan said that it “would be helpful to make explicit provision for restricted income funds as well – much of the Act is drafted in a way that ignores restricted funds unless they are permanent endowment”.

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679 Charities Act 2011, sch 7, para 3.
680 Charities Act 2011, s 310, as amended by the CIO (General) Regulations 2012, reg 61.
Consultation Question 78.

We provisionally propose that, when a charity has merged and the merger is registered, for the purposes of ascertaining whether a gift has been made to that charity under section 311(2) of the Charities Act 2011, the charity should be deemed to have continued to exist despite the merger.

Do consultees agree?

[Consultation Paper, paragraph 12.92]

12.103 28 consultees responded. 681

(1) 26 consultees agreed. 682

(2) 2 consultees expressed concerns with the proposal. 683

Agreement

12.104 Cancer Research UK provided its own merger experience. The two original companies still exist as shell charities and companies (on the Charity Register and the Register of Companies). If the original companies had been dissolved Cancer Research UK might have lost millions of pounds. "We suggest that any new changes to the law take effect in a way that preserves legacies to charities that no longer exist, where the dissolution of that charity was in reliance on the new provisions, i.e. that it relates to deaths after a certain date rather than the date of the will".

Intention of testator

12.105 Stewardship said: “It appears both unreasonable and undesirable if the intentions expressed in a will can’t be carried out because of the merger of a named charity, where the intention is that the gift is for the work of the charity rather than for the use of the actual named charity itself... Where it is not the intention of the testator to benefit a successor charity following a merger, they should [say] so deliberately.”

681 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Charity Law and Policy Unit; WCVA; CCNI; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK; Trowers and Hamilns LLP; Lawyers in Charities; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Institute of Legacy Management; NCVO; ACF; CFG and IoF.

682 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Birmingham; Charity Law and Policy Unit; WCVA; CCNI; Institute of Chartered Secretaries and Administrators; CLA; Bircham Dyson Bell LLP; Church Growth Trust; Stone King LLP; Charity Commission; Cancer Research UK; Lawyers in Charities; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Institute of Legacy Management; NCVO; ACF; CFG and IoF.

683 Bates Wells Braithwaite; Trowers and Hamilns LLP.
12.106 Veale Wasbrough Vizards LLP thought the proposal struck a fair balance between respecting testamentary freedom and ensuring that gifts do not lapse simply because a charity has merged.

Remove the need for shell charities

12.107 Consultees generally welcomed the proposal on the basis that it would remove the need to retain shell charities. The Charity Commission said that it would assist it “in maintaining the integrity of the Register of Charities”.

12.108 NCVO; ACF; CFG and IoF said “The principle of section 311 in the Charities Act 2011 was to make the process of mergers as simple as possible for charities. The Law Commission has demonstrated clearly that this section does not achieve its objectives as it is currently drafted. Charities should not be required to retain a ‘shell’ charity in order to continue to receive legacies. We believe that charities would benefit from the proposed reform and that this would significantly simplify and improve the law.”

12.109 Anthony Collins Solicitors LLP said that our proposal would avoid the need to retain shell charities which is cumbersome administratively, incurs unnecessary costs for charities and is itself not fool proof since such charities may still be removed from the charity register by the Charity Commission such that charities may still lose legacies to which they are properly entitled.

12.110 The Institute of Legacy Management said that retaining shell charities for the purpose of receiving legacies was “certainly our experience and is good practice as it saves legacies from failing following mergers.” There was virtually unanimous support for our proposal from the respondents to its survey (97%), and 78% of respondents thought that the change would give the charities the confidence to shut down shell charities.

12.111 Lawyers in Charities said that the change should also refer to future mergers; if charities A and B merge to form Charity C, and Charity C then merges with Charity D, a legacy to Charity A should be deemed a legacy to Charity D.

Retrospective effect

12.112 Veale Wasbrough Vizards LLP thought that, because of the previous uncertainty around the effect of the register of mergers, the deeming provision should have retrospective effect.

12.113 Similarly, Stewardship said: “We did not retain shell charities after mergers to which we were party as transferee charity (within the meaning of section 311). This was because we were at the time unaware of the problem later identified in Berry v IBS-STL (UK) Ltd. It is possible therefore that we may have lost the benefit of some legacies. We are not aware of any but hope that the amendment proposed … can be made to be retroactive to the date of commencement of section 311.”

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684 Anthony Collins Solicitors LLP; WCVA; ICSA; ILM; Lawyers in Charities; NCVO; ACF; CFG; IoF; Veale Wasbrough Vizards LLP.
Concerns

12.114 Bates Wells Braithwaite had concerns about testamentary freedom. Whilst testators could override the statutory provisions, many wills are not professionally drafted so testators will not appreciate the nuances of the wording. “A charity merger may indicate a change of direction by the charity, which the donor may not have intended to support….” They suggested that any reform should dovetail with the most commonly used wills precedent, such as the STEP provisions.

12.115 Trowers and Hamlins LLP recognised the problems highlighted by the decision in Berry, but said that “deeming the pre-merger charity to have continued to exist may not be the most appropriate approach to resolving it, due to the potential for confusion. It would be preferable to make clear provision for gifts to be deemed to have been made to the post-merger charity.”

Consultation Question 79.
We invite consultees to share with us their experiences of retaining shell charities as a result of the potential limitations on the scope of section 311, as well as the work, time and costs involved in retaining such shell charities.

[Consultation Paper, paragraph 12.94]

12.116 13 consultees responded to this question.685

The problems of shell charities

12.117 Geldards LLP said: “Due to the limited impact for varying potential legacies of registering a merger of charities, we recommend that if a merging charity considers it may be named as a beneficiary in a supporter’s will and they may not be able to contact them with a view to revising that will, then that charity should remain on the register as a ‘shell’. This is a costly exercise usually involving arranging for the ‘shell’ charity simultaneously with the transfer of assets, liabilities and staff to the recipient body, adopting a new governing document which has the recipient charity as a trustee and/or member and then applying for the two charities to be ‘linked’ to avoid the necessity for annual returns to be sent to the Commission. Linking is not always possible and if the ‘shell’ charity is a company, (dormant) accounts and returns will need to be delivered to Companies House in any event. The costs of the above work will be in the region of £1,500 to £2,000 plus VAT, and dealing with this adds unnecessary complexity to an already stressful time for the charities involved.”

12.118 Anthony Collins Solicitors LLP said merger or incorporation “is a process fraught with difficulty and risk for charities” and that “[putting] the issue beyond question will be widely welcomed by charities and advisers alike.”

685 Geldards LLP; Anthony Collins Solicitors LLP; CCNI; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Cancer Research UK; Trowers and Hamlins LLP; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA.
12.119 The Charity Commission said: “We have been told by charities and their advisers that they cannot dissolve the unincorporated charity because of concerns that they may lose legacy income. It therefore follows that vesting declarations and the Register of Mergers would have been used much more if there had not been this limitation on the scope of section 311. We consider that the proposed change to section 311 will be widely welcomed.”

12.120 Trowers and Hamlins LLP said: “In our experience clients are keen to avoid the need to retain shell charities due to the additional administrative work necessary. From the perspective of clients seeking to undertake a charity merger, the efficiencies to be gained from merger are compromised at least to some extent by the need to retain shells.”

12.121 Lawyers in Charities said: “Several of the members have worked for or advise charities that have retained shell charities following a merger. Retaining such charities requires extensive administration e.g. holding AGMs, inclusion in accounts.”

12.122 Prof Gareth Morgan said: “I have dealt with several charity mergers where there have been huge debates on whether or not to retain the shell charity. Where this is required it is likely to involve an extra 2-3 days of professional time, and often a second big AGM for the charity to pass constitutional changes so that the old charity can continue as a shell - in addition to the AGM a year earlier where authorisation was given for the transfer.”

12.123 Francesca Quint said that the retention of shell charities to capture legacies “is a little uncomfortable, because shell charities virtually cease to operate and could be removed from the register if the Commission were not sympathetic to the current problem”.

12.124 Veale Wasbrough Vizards LLP said:

Many shell charities are retained to ensure that any bequests are transferred to the recipient charity and will almost certainly require advice on whether this should be considered.

This is an administrative burden for charities, because it involves steps such as determining who should remain as the trustees of the shell charity or appointing the company as corporate trustee and linking it to the new charity for reporting and accounting purposes and amending the governing document of the shell charity. Larger charities may not consider this to be excessive, but it is likely to be more burdensome for smaller charities.

Retaining shell charities does, of course, also create an added administrative burden on the Charity Commission.

12.125 Cancer Research UK said “the impact of retaining and maintaining three separate charities is financially and administratively burdensome…”. 
12.126 Bates Wells Braithwaite recommend the retention of a shell charity, despite the
added work and the fact that it is not guaranteed to safeguard a legacy. They did
not think that retention of a shell was particularly onerous or expensive, and that it
ensured the protection of the vast majority of legacies. They said that a unifying
direction between the original and the merged charity could assist future
administration, but that that was not always a favoured approach because the shell
charity would lose its charity registration number. The merged charity often becomes
the trustee of the original charity, which adds an administrative step in the merger
process.

12.127 The CLA (with whom Bircham Dyson Bell LLP agreed) said that reforming section
311 will not completely remove the need for shell charities. They said that “the time
and cost involved in retaining them can be disproportionate when balanced against
the purpose for which they are retained”. Further problems can arise, for example,
long-retained shell charities can be forgotten and might have no validly-appointed
trustees.

The Register of Mergers

12.128 Bates Wells Braithwaite raised a practical concern about accessibility to and
awareness of the Register of Mergers.

The Register of Mergers is buried deep within the www.gov.uk website. When a
charity is named in a Will, most executors will simply check the Register of Charities.
If the charity has merged, the entry will simply say “ceased to exist” (or sometimes
“assets transferred”). Many executors will not be aware of the existence of, or the
implications of, the Register of Mergers. They will assume from the Register of
Charities that the charity no longer exists and the legacy has failed. For this proposal
to work, where a merger has been registered, the entry on the Register of Charities
for the transferring charity needs to be updated to record that an incorporation or
merger has taken place, with a link to the relevant part of the Register of Mergers.

12.129 We comment on this problem in paragraph 11.102 and 11.103 of the Report.

Further practical assistance for charities incorporating or merging

12.130 Stone King LLP said: “The work, time and expense in retaining shell charities can be
considerable. It also, as pointed out in the consultation document, leaves the register
with entries on it that are not operational charities. Removing the need for shell
charities would be welcome, but legacies are not the only reason for keeping a shell
charity – some are retained for the purposes of maintaining direct debits. Banks often
require new accounts to be opened on incorporation or merger, and this requires
regular donors to be contacted individually, to be asked to change their regular
donation details. There is a risk that individuals do not respond, and the charity loses
out on its regular income, and this could be addressed by banks having an automatic
switching power in these circumstances, or there being an express power for the
charity to assign an existing bank account to a new entity. If the charity were able to

For example, if the transferee charity uses the same name as the pre-merger charity, the shell charity may
have to change its name, which can trigger an executor’s discretion not to pay a legacy; the STEP
precedent gives executors power to re-direct a legacy where the charity has changed its name, so retention
of the shell would not necessarily safeguard such legacies.
keep the same number on incorporation, this would also resolve some of the practical difficulties."

**A registration gap under section 311**

12.131 Bates Wells Braithwaite raised a concern about section 311 and a possible registration gap. A relevant charity merger can only be registered after all property has been transferred to the merged charity.\(^687\) Section 311 only applies to gifts that take effect on or after the date of registration of the merger. Accordingly, if property is transferred and the original charity ceases to exist on one date, and the merger is then registered at a later date, then gifts taking effect between those dates are not caught by section 311. Bates Wells Braithwaite suggested that registration should be back-dated to the date on which the original charity ceased to exist.

12.132 We do not agree. The register of mergers needs to be accurate on any given day. If personal representatives search the register of charities to find that the original charity has ceased to exist, and on the same day search the register of mergers to find that there is no registered merger in respect of the original charity, then the gift should fail. Back-dating the registration of a merger would cause confusion for personal representatives who ought to be able to rely on both registers on any given day. The solution to the potential registration gap is for merging charities to ensure that the merger is registered before the original charity ceases to exist. Registration of the merger can take place before the original charity has ceased to exist, provided all of the property has been transferred to the merged charity. That way, at all times either (a) the original charity will continue to exist and will appear on the register of charities, and/or (b) the merger will be registered on the register of mergers, and a gift by will should not fail.

**Retention of charity number**

12.133 The CLA and Bircham Dyson Bell LLP said that shell charities are sometimes retained in order to retain the original charity number. They said that it would be helpful if the incorporated charity could adopt the original charity’s registration number.

**Whether shell charities are entitled to remain on the register**

12.134 CCNI referred to section 16(5) of the Charities Act (NI) 2008 which states that the Commission “shall remove from the register - (a) any institution which it no longer considers to be a charity, and (b) any charity which has ceased to exist or does not operate.” It said:

> We are currently contemplating the question as to whether an institution can remain on the register of charities if it has incorporated or merged in order to prevent gifts to the original charity from failing. The issues concerning us are:

> Whether the original charity can be considered as still operating if it has merged or incorporated.

\(^{687}\) Charities Act 2011, s 307(1).
Whether the original charity can remain on the register of charities if it is only
processing gifts to the merged or incorporated charity which otherwise would
have failed.

Whether such an institution would fulfil the statutory definition of a charity.

OTHER COMMENTS

Substantial property transactions

12.135 The Church Growth Trust said: “Section 201 [of the Charities Act 2011] needs to be
amended so as to exclude the application of section 190 of the Companies Act 2006
in this situation of a merger. Section 190 [of the Companies Act 2006] is intended to
prevent sales of assets at inflated or under values whereas a merger situation where
one charity is giving its assets to another, by its nature does not involve the possibility
of too much or too little being paid for any asset.”

RESPONSES TO SUPPLEMENTARY CONSULTATION

12.136 We set out above consultees’ responses to our proposals aiming 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 the
Supplementary Consultation Paper we explained what a trust corporation is and why it
is important on a merger. We summarised how charities currently acquire trust
corporation status on merger and proposed that it be made more widely available.

General comments on trust corporation status

12.137 As well as responding to the specific questions in the Supplementary Consultation
Paper, some consultees commented more generally on issues relating to trust
corporation status. Some of their suggestions go beyond the scope of the present
project.

Trust corporation status beyond the context of mergers

12.138 The CLA and Stone King LLP noted that, while the Supplementary Consultation
Paper focuses on trust corporation status in relation to mergers and incorporations,
this is not the only context in which trust corporation status is required. The CLA gave
two other contexts in which trust corporation status is relevant: (1) where a charity
wishes to appoint a sole corporate trustee; and (2) where a charity receives a legacy
and wishes to take out a grant of representation.

The importance of trust corporation status

12.139 The CLA listed the important effects of trust corporation status which enables the
body corporate in question to:

(1) give a valid receipt for capital monies under a trust of land;
(2) enable individual trustees to retire and be validly discharged from the trusts;\textsuperscript{688} and

(3) take out a grant of representation in a deceased person’s estate.

Current issues in relation to trust corporation status

12.140 The CLA set out a number of current problems in relation to trust corporation status.

(1) For some bodies corporate, which may hold land in a number of different capacities, it is not always clear whether the body has trust corporation status in a particular capacity.

(2) The Charity Commission appears increasingly reluctant to make schemes. They suggested that this was in part due to resourcing and capacity issues and in part due to a lack of understanding at an operational level as to why the status is required.

(3) The process of acquiring trust corporation status through the Ministry of Justice can take a number of months due to competing pressures.\textsuperscript{689}

(4) The lack of a central record of trust corporation status means that it is sometimes unclear whether a body corporate has the status (see further paragraph 12.143 below). Bates Wells Braithwaite also noted this problem and suggested that a public record would be beneficial.

(5) The legislation is unclear in places and scattered across five key statutes. The Law Society also said that they would welcome a review of the legislation governing trust corporation status more generally and consideration of a single consolidating Act.

(6) The Charity Commission’s power to create trust corporation status upon appointment is too narrow and should apply more broadly to any charity or trustee of a charity at any time.

(7) There is a general lack of awareness among charities (and sometimes their advisors) of the technical requirements for trust corporation status leading to situations where charities are caught out and charity trustees found not to have been validly discharged.

12.141 The CLA also suggested that it might be time for a longer term review of whether the concept of trust corporation status still serves a meaningful purpose.

12.142 The Association of Corporate Trustees noted that in the Consultation Paper we record the Charity Commission’s view that where trust corporation status has been automatically conferred by virtue of a Charity Commission scheme such status applies “only in relation to the charity of which it has been appointed a trustee.” They

\textsuperscript{688} Although they noted that the legislation is unclear on whether trust corporation status is in fact required in order for all of the individual trustees to retire and be validly discharged.

\textsuperscript{689} One member gave an example of an application taking nine months because it was made around the time of an election.
disagreed that this was the position at law and said that if it was it should be challenged as a matter of policy. They gave an example of the case of an Alzheimer’s charity that has moved from trust deed to corporate form with the aid of a Charity Commission scheme. The new corporate charity is aware that it has trust corporation status. Suppose that as part of its charitable activities it offers a trusteeship service for managing the treatment, welfare and finances of Alzheimer patients. It should be able, as sole trustee, to take and effectively dispose of title to the patient’s property. They also questioned how the outside world could be expected to know that the charity’s trust corporation status did not apply to this particular trusteeship.

Evidence of trust corporation status

12.143 The CLA queried how trust corporation status will be evidenced under any reformed regime as it can sometimes be difficult to ascertain whether a body corporate has trust corporation status or not. They made several suggestions.

1. A central register of trust corporations held by the Charity Commission or Ministry of Justice and accessible to members of the public online.

2. Trust corporations could be defined by their constitutional characteristics, with adequate transitional provisions for those that cannot easily prove their historical status.

3. Enabling a trust corporation that is a company to file a form at Companies House confirming trust corporation status. Community benefit society trust corporations could file similar forms with, for example, the FCA.

4. Including the power to act as a trust corporation in the charity’s constitution.

12.144 Francesca Quint suggested that, in the interests of clarity and transparency, there should be an obligation to state the fact that a corporate charity has trust corporation status on all its public documents.

Charity Commission powers in relation to trust corporation status

Power to rectify improper appointments

12.145 The CLA suggested giving the Charity Commission “a power to rectify matters, for example, where a body corporate which is not a trust corporation has been appointed as a trustee, to perfect the appointment if improperly made under the Trustee Act 1925 or to allow the entity to give valid receipts. It may be that such a power may be an extension of the Charity Commission’s power to relieve trustees under section 191 of the Charities Act 2011.” They argued that this would address the difficulty in situations where trust corporation status has not been obtained and there is doubt as to whether a valid receipt has been given and that trustees have been discharged. Bircham Dyson Bell LLP agreed.

Power to confer trust corporation status at any time

12.146 The Law Society, the CLA and Bircham Dyson Bell LLP argued that it would be useful if the Charity Commission had the power to confer trust corporation status on any charity or trustee of a charity at any time, not just on appointment. The Law Society said this would be useful, for example, when a charity receives a legacy from
an estate and wishes to take out a grant of representation but there are no employees or trustees who are willing to take out a grant on behalf of the charity.

**Acquiring trust corporation status**

12.147 We suggested various options for reform with the aim of facilitating and removing legal barriers to merger by making trust corporation status more widely available to charities.

Who should obtain trust corporation status?

12.148 In the Supplementary Consultation Paper we listed several options as to who could obtain trust corporation status under a reformed regime.690

Option 1: expanding the application of section 310 of the Charities Act 2011 (and regulation 61) currently applicable to CIOs to confer trust corporation status on other corporate charities

12.149 The CLA noted that this option would not help in non-merger situations.691 They added that the limitations of section 310 mean that it is rarely used in practice. They agreed with us that this approach would be a very marginal improvement on the current position and would be of limited benefit to the sector.

Option 2: making trust corporation status available to any corporate charity to which assets are transferred (on trust) on a merger

12.150 The CLA again pointed out that this solution is limited to the merger context. They added that it would not help where a charity needs to appoint a corporate trustee which is not a charity. They noted that “merger” would need to be defined and suggested that this should include incorporation. Finally they said it was unclear what would be caught by the term “corporate charity”; they were of the opinion that it should include all corporate charities (not just companies and CIOs). They concluded that this option was better than Option 1 but still would not go far enough.

Option 3: making trust corporation status available to all corporate charities

12.151 This was our preferred option and consultees’ views are set out in detail under Supplementary Consultation Question 5(1) below.

Option 4: making trust corporation status available to any corporate body (charitable or not)

12.152 Consultees’ views on this option are set out in detail under Supplementary Consultation Question 6(1) below.

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690 See supplementary Consultation Paper at paras 3.29 to 3.30.

691 See para 12.138 above.
Supplementary Consultation Question 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?

[Supplementary Consultation Paper, paragraph 3.46]

Question 5(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?

12.153 19 consultees answered this question:

(1) 16 agreed; 692

(2) 1 was ambivalent; 693 and

(3) 2 felt that our proposal did not go far enough. 694

12.154 The 16 consultees who agreed with our proposed power said it would simplify the process of merger and incorporation; reduce cost and delay; and increase flexibility in decision-making. Some raised queries concerning the operation of the proposed power. While no consultees expressly disagreed with our proposed power, the CLA (with whom Bircham Dyson Bell LLP agreed) argued that it did not go far enough.

Benefits of our proposed power

Simplifying the process of merger and changing legal status

12.155 The University of Liverpool CL&PU supported the proposed new power as a welcome further step in simplifying the process of merger for charities, which began with the Charites Act 2006.

692 Francesca Quint; The University of Plymouth; University of Liverpool CL&PU; Prof Janet Ulph; Charity Growth Trust; Independent Schools' Council; Baptist Union of Great Britain; The Colleges of the University of Cambridge; Anthony Collins Solicitors LLP; Stone King LLP; Lord Hodgson of Astley Abbots; Action for Communities in Rural England (ACRE); Bates Wells Braithwaite; the Charity Commission; and the Law Society.

693 The Chancery Bar Association.

694 The CLA; and Bircham Dyson Bell LLP.
12.156 Action for Communities in Rural England explained that many village hall charities, which often hold designated land, are in the process of changing to CIO status. They said that the proposed power would make this changeover much simpler.

Reducing complexity, cost and delay

12.157 The University of Liverpool CL&PU, Bates Wells Braithwaite and the Charity Commission described the current routes to gaining trust corporation status as "convoluted", "time consuming" and an "unnecessary burden" on charities, the Ministry of Justice and the Charity Commission.695 The Charity Growth Trust gave an example of an occasion when they had to apply to the Lord Chancellor’s department for trust corporation status. The process took several months and merely confirmed a set of circumstances which were obvious from their stated objects and charitable status.

12.158 Our proposed power, on the other hand, was described by Prof Ulph as straightforward and easy to understand. The Law Society said that our proposed power would reduce the time and money involved. The CLA agreed that making it easier for corporate trustees of charities to become trust corporations has the potential to save time and costs for charities, the Charity Commission and the Ministry of Justice.

Increasing flexibility for decision-making

12.159 The University of Liverpool CL&PU felt that the proposed power was in keeping with the general tenor of our reforms that trustees should be given flexibility to make decisions in the best interests of the governance and effective administration of their charities, albeit with appropriate guidance and support. Lord Hodgson generally supported the greater empowerment of charity trustees.

Protection provided by existing mechanisms

12.160 The Chancery Bar Association was ambivalent as to our proposed power. It noted that the requirements for authorisation by the Lord Chancellor or appointment by the court or Charity Commission were designed to check the fitness of the charitable company or CIO to act as a trust corporation. Making any charitable company or CIO able to become a trust corporation without any form of fitness to act check would undermine this rationale. On the other hand, they admitted that the protection afforded by the need for the Lord Chancellor’s authorisation or court appointment is limited because the fitness of a corporation to act may change subsequent to its authorisation or appointment. Further there is already a gap in the protection under what we described as “route (C)” (due to regulation 61 of the CIO (General) Regulations 2012).

12.161 By contrast, the CLA suggested that it was unnecessary to involve the Charity Commission or Lord Chancellor in obtaining trust corporation status for a charity given the existing regulation of charities and the fact that all charity trustees owe fiduciary duties.

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695 The Charity Commission’s records show that it was asked to appoint a sole corporate trustee by scheme or order 25 times in the 2015/16 financial year.
How should the new power operate?

The purposes for which trust corporation status should be obtained

12.162 Francesca Quint believed that a corporate charity’s entitlement to adopt trust corporation status under the new power should be confined to the charity’s charitable trusts and should not extend to non-charitable trusts, for example, pension funds for the employees of the corporation.

12.163 Stone King LLP argued that trust corporation status should have “all-purpose” general effect, not limited to the immediate trust in question. Similarly the CLA said it seemed sensible to extend trust corporation status to a corporate trustee in relation to all charitable trusts (present or future) of which that corporate charity is a trustee rather than requiring a separate resolution for each trust.696

12.164 The University of Plymouth called for clarification as to whether trust corporation status should be conferred in respect of the specific trust or for other purposes.

Resolution of the trustees

12.165 The Baptist Union of Great Britain supported the proposed new power but expressed a preference that, where a CIO follows an association model, the decision to acquire trust corporation status be made a member decision, rather than a decision for the trustees alone. They explained that an association model will usually have been adopted out of a desire to give member input on decisions and it would seem inappropriate in such circumstances for members not to have involvement in the decision to become a trust corporation. However, the CLA agreed with our position that it is unnecessary to require a resolution of the members of the company or CIO, given that this would be unnecessary in order to apply to the Charity Commission or Ministry of Justice, or to pass a vesting declaration under section 310.697

12.166 The Charity Commission thought that trust corporation status should be conferred automatically (for reasons given under Question 6(2) below) but said that if trust corporation status is to be conferred by resolution of the charity trustees it should be by simple majority.

Conditions to exercising the proposed power

12.167 The Charity Commission thought that charitable companies and CIOs would invariably meet the criteria for authorisation by the Lord Chancellor to act as a trust corporation under section 3(1) of the Law of Property (Amendment) Act 1926. Anthony Collins Solicitors LLP thought that such charities were likely to satisfy the second part of the criteria: that the charity’s constitution requires it to apply its net income (after payment of outgoings) for charitable, ecclesiastical or public purposes and prohibits it from distributing any part of that income by way of profits amongst its members. However, Anthony Collins Solicitors LLP did not think that CIOs and charitable companies should be required to satisfy the condition “that it undertakes the

696 They suggested that there may need to be an exception for corporations sole (e.g. a diocesan bishop of the Church of England) which should benefit from automatic trust corporation status where set up as the sole trustee of a charity.

697 See Supplementary Consultation Paper, para 3.42.
administration of any such trusts without remuneration." They argued that in some cases it might be reasonable to charge administration costs.

Charity Commission oversight

12.168 Stone King LLP said that for charities the resolution process could be in line with section 280 where there is a duty to notify the Charity Commission but no further approval is required whereas for non-charitable corporations the Commission’s approval ought to be required before the status comes into effect.

When should trust corporation status take effect?

12.169 The CLA argued that the corporate trustee-to-be will need trust corporation status before appointment if the individual trustees it replaces are to be discharged in accordance with sections 37 and 39 of the Trustee Act 1925. They therefore recommended that the power be widened so that bodies corporate can become a trust corporation before appointment. They urged us to consider allowing bodies corporate to pass a resolution to become a trust corporation in expectation of becoming a trustee of a charitable trust or applying for a grant or probate or letters of administration of an estate.

12.170 Stone King LLP thought that, for charities, trust corporation status should take effect on the date of filing the resolution with the Charity Commission, and for non-charitable corporate trustees of charities, on the date that Charity Commission approval is given. They said that Part 12 incorporated bodies should obtain trust corporation status on the date the certificate is granted by the Commission (see further at para 12.173 below).

Does our proposal go far enough?

Availability to other charitable corporations

12.171 The University of Plymouth, Francesca Quint and the CLA thought that the power to adopt trust corporation status by resolution of the trustees should be available to all charitable corporations, not just charitable companies and CIOs. The CLA noted that the legal structure of a charity (beyond incorporation) does not seem relevant to obtaining trust corporation status. They gave examples of community benefit societies and charities governed by Royal Charter who would benefit from the proposed new trust corporation provisions.

12.172 The Charity Commission noted, however, that charities incorporated by Royal Charter or special Act automatically have trust corporation status in relation to trusts in which their constitution empowers them to act under section 4(3) of the Public Trustee Act 1906 and rule 30(1)(c) of the Public Trustee Rules 1912.

Incorporation of charity trustees under Part 12 of the Charities Act 2011

12.173 The CLA (with whom Bircham Dyson Bell LLP agreed) said there should be clarity concerning the position of trustees of unincorporated charities who have incorporated under Part 12 of the Charities Act 2011, though they did not think such charities would

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698 The CLA went further and recommended that the power be widened to include all corporate trustees and bodies corporate in relation to assets held for exclusively charitable purposes.
require trust corporation status. Stone King LLP said that the effect of incorporation under Part 12 of the Charities Act 2011 should be to confer trust corporation status. They said it would be appropriate for trust corporation status to be effective for all purposes, and to take effect on the grant of the certificate of incorporation.

Other unresolved issues

12.174 The CLA (with whom Bircham Dyson Bell LLP agreed) argued that our proposal did not go far enough. They raised a number of issues which were not addressed.699

(1) The proposal would not assist a charity which wishes to appoint a non-charitable corporate body to be its sole corporate trustees.700 The CLA recommended that the proposal be widened to include non-charitable bodies corporate to the extent that they are acting in the capacity of charity trustee (see further comments on expansion to non-charitable bodies under Question 6(1) below).

(2) Further thought is needed as to whether “foreign” bodies corporate will be able to obtain trust corporation status in England and Wales (for example, SCIOs). They did not see any reason why such bodies should not be able to but noted that not all jurisdictions may recognise trust corporation status.

(3) Charities which change legal form should retain their trust corporation status.

Question 5(2): the conferral of trust corporation status on CIOs by regulation 61 should be repealed.

12.175 14 consultees answered this question:

(1) 7 agreed;701

(2) 3 disagreed;702 and

(3) 4 expressed other views.703

In favour of repealing regulation 61

No longer needed

12.176 Francesca Quint, Anthony Collins Solicitors LLP, the Law Society and the Baptist Union of Great Britain said that if our proposed power is accepted there will be no need for the regulation 61 provision and it should therefore be repealed. Stone King

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699 Some further issues raised by the CLA are listed under the relevant headings above.

700 They gave a list of such charities: The Wellcome Trust Limited, which acts as the sole corporate trustee of the Wellcome Trust, is not a charitable company; Dogs Trust Trustee Ltd, which is sole trustee of Dogs Trust; The Salvation Army Trustee Company, which is sole trustee of The Salvation Army; and The Council of Almoners of Christ’s Hospital, which is sole trustee of Christ’s Hospital Foundation.

701 Francesca Quint; Prof Janet Ulph; Independent Schools’ Council; Baptist Union of Great Britain; the Colleges of the University of Cambridge; Anthony Collins Solicitors LLP; and the Law Society.

702 Stone King LLP; Bates Wells Braithwaite; and the Charity Commission.

703 The University of Plymouth; the Chancery Bar Association; the CLA; and Bircham Dyson Bell LLP.
LLP, the CLA and Bircham Dyson Bell LLP agreed that if our proposal was adopted the significance of regulation 61 would be diminished.

**Trust corporation status should not be automatic**

12.177 The University of Plymouth said that repealing regulation 61 was consistent with its view that the conferral of trust corporation status should not be automatic.

**Regulation 61 rarely used**

12.178 The CLA noted that the limitations of section 310 (as amended by regulation 61), particularly in the case of a “shell charity” being kept after a merger or incorporation to prevent legacies from failing, mean that, in practice, the firms of most members of the working party did not tend to use the power. Bircham Dyson Bell LLP added that the doubts set out in the Supplementary Consultation Paper as to the extent of regulation 61 mean that they do not rely on it.

**Against repealing regulation 61**

**Conferring trust corporation status only in respect of particular property**

12.179 Stone King LLP noted that there may be charities (and trustees) who wish to obtain trust corporation status solely in respect of the property transferred by pre-merger vesting declaration rather than generally applicable trust corporation status. They therefore supported retaining regulation 61.

**A useful shortcut**

12.180 Bates Wells Braithwaite argued that regulation 61 was a useful shortcut. They said that in some merger situations the trustees having to pass a resolution for trust corporation status might create an additional step. The Charity Commission agreed that if trust corporation status is to be conferred by resolution of the charity trustees there is a benefit to preserving regulation 61 as a route which avoids trustees having to pass an additional and seemingly unnecessary resolution.

**Application to permanent endowment**

12.181 The University of Plymouth welcomed the fact that regulation 61 makes section 310 vesting declarations applicable to a charity’s permanent endowment but nonetheless agreed that it should be repealed.\(^{704}\)

**Regulation 61 adds clarity**

12.182 The CLA noted that it may do no harm to retain the power under section 310 (as amended by regulation 61) which adds clarity upon transfer of property to a CIO.

**Transitional provisions if regulation 61 is repealed**

12.183 The Law Society and the Charity Commission noted that transitional provisions will be needed to protect CIOs which have already made use of regulation 61. The CLA said this should include provisions to protect CIOs planning to use the provisions in the near future.

\(^{704}\) The original consultation response argued that all section 310 vesting declarations should apply to permanent endowment.
Supplementary Consultation Question 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

[Supplementary Consultation Paper, paragraph 3.47]

Question 6(1): should trust corporation status be made available to non-charitable corporations?
12.184 17 consultees answered this question:

(1) 4 said that trust corporation status should be made available to non-charitable corporations;\(^\text{705}\)

(2) 9 said that it should not;\(^\text{706}\) and

(3) 4 expressed other views.\(^\text{707}\)

Non-charitable corporations who are trustees of charitable trusts
12.185 There was disagreement amongst consultees as to whether trust corporation status ought to be made available to non-charitable corporations who are trustees of charitable trusts.

12.186 Stone King LLP thought that non-charitable corporations should be able to obtain trust corporation status in respect of charitable trusts, with the proviso that they obtain the approval of the Charity Commission before trust corporation status takes effect. The CLA and Bircham Dyson Bell LLP agreed that our proposed power should be widened to include non-charitable bodies corporate to the extent that they are (or on appointment will be) acting in the capacity of a charity trustee or trustee for a charity and/or holding charity property and/or holding assets for exclusively charitable purposes or for the benefit of a charity. They said that this would be in line with the current position under rule 30(1)(d) of the Public Trustee Rules.

12.187 The CLA noted that rule 30(1)(d)(ii) of the Public Trustee Rules 1912 does not restrict the appointment of trust corporation status to charitable corporations. They also suggested that qualifying restrictions could be imposed, similar to those under the 1912 Rules. For example, a requirement that the body corporate is holding (or will, on appointment, be holding) assets as a trustee and that its profits are applied for

\(^{705}\) Stone King LLP; Lord Hodgson; the CLA; and Bircham Dyson Bell LLP.

\(^{706}\) Francesca Quint; University of Plymouth; Church Growth Trust; Independent Schools’ Council; Anthony Collins Solicitors LLP; Bates Wells Braithwaite; Charity Commission; The Association of Corporate Trustees (TACT); and Law Society.

\(^{707}\) University of Liverpool CL&PU; Prof Janet Ulph; Chancery Bar Association; and the Colleges of the University of Cambridge.
exclusively charitable purposes. They did not think that capital requirements should be imposed in relation to trustees of charitable, ecclesiastical and public trusts.

12.188 On the other hand, the Charity Commission, the Law Society, Prof Janet Ulph, The Association of Corporate Trustees and Bates Wells Braithwaite thought it was unnecessary to extend the proposed new power to non-charitable corporations that act as sole corporate trustees of charitable trusts precisely because they can generally qualify for such status under the Public Trustee Rules 1912. Plymouth University agreed that in the rare case where non-charitable corporations wish to obtain trust corporation status existing routes are available and each application can be considered by Lord Chancellor or the Charity Commission.

Unintended consequences

12.189 Lord Hodgson said that while instinctively he agreed that trust corporation status should be available to non-charitable companies and should be conferred automatically, he was concerned about unknown practical implications or unintended consequences. Bates Wells Braithwaite shared this concern as did the University of Liverpool CL&PU who felt it would be appropriate to consult on this point with those who have experience of non-charitable corporations.

12.190 Similarly, Stone King LLP suggested that we needed to consider the wider consequences of making trust corporation status available to non-charitable bodies, beyond the context of mergers.

Need for scrutiny and oversight

12.191 Francesca Quint feared that if non-charitable corporations had the power to adopt trust corporation status without the supervision of the Charity Commission there would be scope for abuse, especially in relation to the charging of commercial fees. Anthony Collins Solicitors LLP agreed that any application from a non-charitable company should still be made to the Lord Chancellor or Charity Commission and should be considered on a case-by-case basis in order to retain a level of scrutiny. Stone King LLP said there was a need to ensure that the status is conferred only on appropriate bodies and that while safeguards already exist where the body is a charity (in terms of Commission regulation) there is potential for abuse by other corporate bodies that would be outside the Commission’s reach. They took the view that there should be a stricter regime for non-charitable bodies.

Other comments

12.192 The CLA recommended giving the Secretary of State a power to add to the list of those who can obtain trust corporation status by statutory instrument.

12.193 The Church Growth Trust did not believe that the functions of a trust corporation would sit well with every commercial company.

Question 6(2): should be conferred automatically, rather than being available by resolution?

12.194 18 consultees answered this question:
(1) 6 said that trust corporation status should be conferred automatically;\(^{708}\)

(2) 11 thought it should not;\(^{709}\) and

(3) 1 expressed other views.\(^{710}\)

In favour of automatic conferral

12.195 Those consultees who supported the automatic conferral of trust corporation status, while in the minority, could not see any disadvantages to doing so. On the other hand they could see numerous advantages including protection against failure to obtain trust corporation status by mistake.

Safeguarding against lack of awareness or understanding

12.196 The Charity Commission and the Law Society said that conferring trust corporation status automatically would remove the risk that the trustees of a charitable company or CIO might fail to confer trust corporation status due to a lack of awareness or understanding of the requirements. Similarly Bircham Dyson Bell LLP said that there were difficulties where charities and trustees are simply unaware of the intricacies of trust corporation status and would fail to take advantage of the option to pass a resolution.

12.197 The Chancery Bar Association suggested that if trust corporation status were to be made available without the existing protections it ought to arise automatically otherwise its absence in some cases may become a trap for the unwary.

Avoiding the risks of not having trust corporation status

12.198 The CLA noted the risks for charities and their trustees if a corporate trustee does not have trust corporation status. They argued that making the status automatic would enable bodies corporate which need the status to have it as those which do not realise that trust corporation status is needed would be less likely to fall foul of the requirements accidentally.

12.199 The Charity Commission agreed that conferring trust corporation status automatically would ensure that charitable companies and CIOs have trust corporation status at the time at which they are appointed as sole corporate trustee. They said this was particularly important where the individual trustees they replace are to be discharged in accordance with section 37 or 39 of the Trustee Act 1925.

Alignment

12.200 The Charity Commission said that there was no reason why trust corporation status should be available automatically to charities incorporated by Royal Charter and special Act but not to charitable companies or CIOs.

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\(^{708}\) Chancery Bar Association; Lord Hodgson; CLA; Bircham Dyson Bell LLP; Charity Commission; and Law Society.

\(^{709}\) Francesca Quint; University of Plymouth; University of Liverpool CL&PU; Prof Janet Ulph; Charity Growth Trust; Independent Schools’ Council; Baptist Union of Great Britain; Anthony Collins Solicitors LLP; Stone King LLP; ACRE; and Bates Wells Braithwaite.

\(^{710}\) The Colleges of the University of Cambridge.
Record keeping

12.201 The CLA argued that record-keeping would be easier if trust corporation status was conferred automatically as there would be no need to locate a resolution, a Charity Commission scheme or order, or a Ministry of Justice certificate in order to prove the status. Bircham Dyson Bell LLP agreed that there would be an immediate benefit of removing the difficulty of finding evidence of trust corporation status in respect of particular charitable trusts.

Level of oversight

12.202 The CLA argued that in principle, automatic conferral of trust corporation status would not affect the level of oversight given the current availability of trust corporation status through a section 310 vesting declaration, and the proposal that all charitable companies and CIOs should be able to pass a resolution internally.

Against automatic conferral of trust corporation status

12.203 The majority of consultees did not support automatic conferral of trust corporation status. In particular they cautioned against proposals that would have potentially wide-reaching consequences beyond the charity sector.

Unintended consequences

12.204 Lord Hodgson, Bates Wells Braithwaite and the University of Plymouth raised concerns about the unintended consequences of conferring trust corporation status automatically.\(^\text{711}\)

12.205 On the other hand, the CLA and Bircham Dyson Bell LLP could not think of any negative consequence of automatic conferral of trust corporation status.

Beyond the scope of charity legislation

12.206 Francesca Quint was concerned that conferring trust corporation status automatically and without supervision would involve considerations far removed from charity law and outside the scope of the Charities Act 2011.

Trust corporation status should be positively acquired

12.207 The University of Liverpool CL&PU, Stone King LLP, the University of Plymouth and the Charity Growth Trust strongly believed that trust corporation status should be something that is positively acquired, and that a resolution of the trustees is an appropriate mechanism for doing so. Prof Janet Ulph, Anthony Collins Solicitors LLP and the Baptist Union of Great Britain agreed, adding that requiring a deliberate decision encourages careful discussion and consideration of the responsibilities being acquired. Anthony Collins Solicitors LLP added that it would also mean the decision was documented in the charity’s minutes.

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\(^{711}\) See also Supplementary Consultation Paper, para 3.33.
How would automatic conferral work?

**Who should have automatic trust corporation status?**

12.208 The CLA thought that the following bodies corporate (charitable or not) should have trust corporation status conferred automatically.

1. Bodies corporate which are charities with effect from the enactment date of the legislation. This would apply to any existing corporate charities, but any pre-existing trust corporation status would be unaffected.

2. Bodies that are trustees of charities (in respect of such charities) – with effect from the date of appointment as trustee or the date of enactment (whichever is later).

3. Bodies that hold charity land on trust as a custodian trustee with effect from the date of appointment as trustee of such land or the date of enactment.

4. Bodies that act as trustee, administrator or executor in respect of funds which are held for the benefit of one or more charities.

12.209 The Law Society favoured the automatic conferral of trust corporation status for all corporate bodies which are charities and all corporate bodies which are trustees of charities. They presumed that such status would not be conferred retrospectively.

**Transitional provisions**

12.210 The CLA had some concerns regarding the consequences for charities which cannot easily prove their trust corporation prior to the new legislation coming into place. They asked whether the transitional provisions should include a statement of presumption that bodies that have previously acted as trust corporations shall be presumed to have been entitled as against parties without notice of a contrary position. Alternatively the corporation could file the necessary paperwork with the relevant regulator.
Chapter 13: Charitable trusts in insolvency

INTRODUCTION

13.1 In Chapter 13 of the Consultation Paper we discussed what happens to property held on trust for charitable purposes when the trustee becomes insolvent, and in particular the circumstances in which the property is available to creditors of the trustee. We provisionally proposed that the Charity Commission amend its guidance on insolvency to address certain misunderstandings of the law that have arisen. We also asked consultees whether the law in this area is satisfactory and, if not, how it could be improved.

13.2 In this Chapter we begin by analysing consultees’ responses to our provisional proposals and questions before looking at other comments made by consultees on the insolvency treatment of property held on charitable trust.

CONSULTATION RESPONSES

13.3 29 consultees responded to at least one provisional proposal or question in this chapter. 13 consultees responded to all proposals and questions. 6 consultees made additional or separate comments.

13.4 In general, consultees agreed with our analysis of the current law and supported our proposals for the Charity Commission to revise its guidance, Managing a charity’s finances (CC12). Several consultees recognised, however, that insolvencies are often complex and rarely will guidance be a complete substitute for specialist advice.

13.5 Most of the consultees who responded to the final question in Chapter 13 thought that significant reform of the law was unnecessary, but they identified several areas in which the interaction between charity law, trust law and insolvency law is unclear.

RESPONSES TO INDIVIDUAL QUESTIONS

Consultation Question 80.

We provisionally propose that the guidance of the Charity Commission in CC12 should be revised so as to make it clear that the availability of trust property, including trust property that falls within the statutory definition of permanent endowment or a special trust (or both), to meet the liabilities of an insolvent trustee is no different whether the trustee is an individual or a charitable company.

Do consultees agree?

[Consultation Paper, paragraph 13.74]
13.6 28 consultees responded to this question:

(1) 26 consultees agreed with our provisional proposal;

(2) no consultees disagreed; and

(3) 2 expressed other views.

13.7 We explained in the Consultation Paper that the rules of trust law and insolvency law that determine how trust property is to be distributed to the creditors of an insolvent trustee apply in the same way whether (a) the trustee is an individual and the distribution occurs in a bankruptcy, or (b) the trustee is a company and the distribution occurs in a liquidation. We highlighted passages of CC12 that might be interpreted as suggesting that the law treats property held on charitable trust differently depending on whether the trustee is an individual or a company, and we proposed that this guidance be revised to better reflect the underlying law.

13.8 Several of the consultees who agreed with our proposal emphasised the need for guidance that is both legally accurate and intelligible to charity trustees. The CCNI said that “given the complexities of trust law it is important that trustees understand the issues and are able to act appropriately to manage and protect the assets of the charity”. The Institute of Chartered Secretaries and Administrators supported improved guidance that “would enable trustees to better understand their position in what will undoubtedly be a stressful situation”. The CLA expressed the view that:

Currently, the Charity Commission’s guidance is general in nature and in certain parts lack clarity. It should be clear, concise and accurate. There are complex issues for lay trustees and the guidance should clarify and confirm the availability of trust property, specifically that which is permanent endowment, special trust property or both, to meet liabilities of an insolvent trustee, irrespective of whether that trustee is an individual or a charitable company.

13.9 The Charity Commission said that it is happy to change its guidance in CC12 if it is proving confusing. The Commission agreed that the general rule – that the liabilities of the trustee cannot usually be satisfied from the trust property unless they are incurred

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712 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Wales Council for Voluntary Action; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological Protection; Trowers and Hamlins LLP; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

713 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Wales Council for Voluntary Action; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Independent Schools Council; Society for Radiological Protection; Trowers and Hamlins LLP; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Stewardship; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

714 Charity Commission; Veale Wasbrough Vizards LLP (who said “there has never been any distinction based on the status of the trustee”).
in connection with the trust – applies equally to unincorporated and corporate trustees. It added, however, that there was some uncertainty as to whether a trust fund comprising permanent endowment is a distinct charity; that the answer may differ depending on whether the trustee is an individual or a charitable company; and that the answer will determine the availability of the fund to the trustee’s creditors in insolvency. We discuss these comments in paragraph 12.34 of the Report.

Consultation Question 81.

We provisionally propose that the guidance of the Charity Commission in CC12 should be revised to reflect more fully and accurately the law governing the exercise of trustees’ rights of indemnity from trust property for the benefit of the creditors of the trustee, in particular in respect of permanent endowment and special trusts.

Do consultees agree?

[Consultation Paper, paragraph 13.75]

13.10 28 consultees responded to this question:715

(1) 26 consultees agreed with our provisional proposal;716

(2) no consultees disagreed; and

(3) 2 expressed other views.717

13.11 In the Consultation Paper we explained that while property held on trust for charitable purposes does not generally form part of the assets distributable to creditors in the trustee’s insolvency, creditors may be able to benefit from the trustee’s rights (if any) to be indemnified from the trust property against liabilities incurred on behalf of the trust.

715 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Wales Council for Voluntary Action; Charity Commission for Northern Ireland; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological Protection; Trowers and Hamlins LLP; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

716 Institution of Civil Engineers; Francesca Quint; Geldards; Anthony Collins Solicitors; University of Plymouth; University of Liverpool CL&PU; Wales Council for Voluntary Action; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Independent Schools Council; Society for Radiological Protection; Trowers and Hamlins LLP; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; and IoF.

717 Charity Commission for Northern Ireland; Charity Commission.
A trustee is entitled to be indemnified out of trust property for liabilities properly incurred on behalf of the trust. This right comprises:

(a) the right to reimbursement, which arises where the trustee has discharged a trust liability out of his or her own money and entitles the trustee to repayment out of the trust funds; and

(b) the right to exoneration, which permits the trustee to discharge a trust liability directly from the trust funds.

In the event of bankruptcy (for individuals) or liquidation (for companies), the trustee’s rights of indemnity (if any) from the trust property vest in the trustee in bankruptcy or liquidator and are exercisable for the benefit of the trustee’s creditors. The right of reimbursement is available for the benefit of all creditors, but the right of exoneration is available only for the benefit of those creditors whose liabilities were incurred on behalf of the trust.

A trustee may be responsible for administering more than one trust. Typically each trust will carry its own rights of indemnity, and the trustee will not be able to exercise the right to exoneration from one trust fund to discharge liabilities incurred on behalf of another. So in the trustee’s insolvency, the rights to reimbursement from the various trust funds can be exercised for the benefit of all the trustee’s creditors, but the right to exoneration from trust A can only be exercised for the benefit of the trust creditors of trust A, the right to exoneration from trust fund B for the benefit of the trust creditors of trust B, and so on.

Almost all consultees who responded to our proposal agreed with our explanation of the current law, and that the Charity Commission’s guidance in CC12 should be amended to reflect it. For instance, in their joint response NCVO, ACF, CFG and IoF said that “the guidance of the Charity Commission should be revised as outlined by the Law Commission. There is ambiguity in the guidance as it is currently drafted and that this should be clarified.”

Veale Wasbrough Vizards LLP said that:

We agree that the Charity Commission should revise its guidance CC12 in relation to both trust property and the trustees' right of indemnity. There is only currently a short reference under paragraph 2.3 in CC12 to an entitlement to pay expenses under section 31 of the Trustee Act 2000. A reference to an entitlement to an indemnity and an explanation of this might be tied in with paragraph 5.2 of CC12.

The University of Plymouth thought that any revised guidance should emphasise that:

(1) the trustee’s right to reimbursement arises only where the trustee has properly incurred expenses on behalf of the trust and such expenses have been duly authorised. If no such expenses have been incurred or authorised, then the right does not arise at all and so there is no asset for the purposes of insolvency proceedings; and

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718 Trustee Act 2000, s 31(1).

719 A trust liability is a liability that is personal to the trustee since the trust has no legal personality of its own.
the right to exoneration only applies to debts incurred by the trustee on behalf of
the trust and not for the benefit of his or her personal creditors.

13.15 The CLA, while expressing broad agreement with our analysis, acknowledged that
"the availability or otherwise of an indemnity is very much dependent on the particular
circumstances". Similarly, the CCNI said:

While the CCNI agrees that clarification is good, it queries whether it may be
preferable to warn that this is a complex area of law and identify examples of the
issues which may be faced and thereafter signpost to specialist advice. As the
issues will be specific to the facts of the case (as in the Wedgwood case), to give
general guidance on such a complex topic may be problematic.

13.16 Stewardship argued that to either increase the length or the complexity of the
guidance in CC12 could serve against the purpose of providing general guidance for
trustees.

13.17 The University of Liverpool CL&PU expressed some concern about the capacity of the
Charity Commission to make amendments to its guidance in the light of resourcing
issues and the prioritisation of its compliance work.

13.18 Consultees suggested further improvements to the guidance in CC12 that went
beyond what we proposed in the Consultation Paper. Bates Wells Braithwaite said
that there should be greater clarity on the status of “restricted funds” in insolvency and
the extent to which it is lawful for charities to declare trusts over their own property in
order to protect it from creditors. In their joint response NCVO, ACF, CFG and IoF
suggested that the Charity Commission should specifically refer to the issue of
charities facing group pension liabilities under section 75 of the Pensions Act 1995 in
any revised guidance.

Consultation Question 82.

We invite the views of consultees as to whether the law relating to the availability of
permanent endowment and special trusts to the creditors of an insolvent trustee is
satisfactory and, if not, how it could be improved.

[Consultation Paper, paragraph 13.76]

13.19 13 consultees responded to this question.\textsuperscript{720}

13.20 Two consultees recommended specific changes to the law. The Independent Schools
Council and Veale Wasbrough Vizards LLP suggested that the law that determines
when creditors and other third parties can assume that liabilities incurred by an
incorporated trustee of a charitable trust are trust liabilities could be improved by the
introduction of a statutory presumption, though they did not specify in which direction

\textsuperscript{720} Francesca Quint; Geldards LLP; University of Plymouth; Bates Wells Braithwaite; CLA; Bircham Dyson Bell
LLP; Stone King LLP; Charity Commission; Independent Schools Council; Society for Radiological
Protection; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship.
the presumption should operate. We consider this suggestion in paragraph 12.52 to 12.54 of the Report.

13.21 Most consultees expressed the view that there was no need for reform to the law on the insolvency of trustees of charitable trusts, but many thought that there were aspects of the law not covered by our provisional proposals that are not well understood by trustees and ought to be clarified.

Special trusts

13.22 The CLA and Bircham Dyson Bell LLP said that further guidance should be introduced regarding the insolvency treatment of special trusts, especially special trust property acquired by a charitable company.

Restricted funds

13.23 Bates Wells Braithwaite reported that there is uncertainty about the insolvency treatment of “restricted funds”.

The question that arises is how far “restricted funds” should be recognised to be held “on trust” and how far they should be distinctly considered to be held “on conditions”, which may lead to a repayment/clawback claim if those conditions are not fulfilled. The latter may, or may not, be considered technically to constitute “a trust”, but either way there is a question about a difference in treatment from the most formal form of separated trust on insolvency.

Specifically a restricted fund held on conditions may be held as beneficial property of a corporate charity, subject to its proper treatment in accordance with the conditions or restriction. On an insolvency event it may still be held on such conditions and it is only the insolvency which visibly creates the breach of condition that could generate a repayment/clawback claim. As in mainstream corporate insolvency, the practical issue that arises here is how far the funds have been separated from general funds and what is required to establish sufficient separation for funds held on a restricted basis, to be treated as separate trust funds, rather than general funds.

The question for creditors becomes whether the provider of restricted funds has privileged trust-based access to the funds it provided on conditions, or whether that provider is a general creditor and the restricted funds become general funds in the insolvency. For example, a requirement to hold restricted funds in a separate account, as opposed to allowing the intermingling of funds, may or may not apply and may or may not have a material effect on this question. Generally expressly using, or not using, the language and formalities of trust may or may not also be significant.

13.24 We agree with these comments, which demonstrate how the insolvency treatment of a charitable trust is so fact-dependent: see paragraphs 12.50 to 12.54 of the Report. As we explained in the Consultation Paper and in the analysis above, the classification of property as a special trust or as permanent endowment does not tell us about its insolvency treatment, but the circumstances indicating that the use of the property is limited in some way will often point to the existence of a trust, which is important from an insolvency perspective. Similarly, “restricted funds” are not as such accorded any special treatment in insolvency; one has to look at the nature and terms of the
restriction to determine whether a trust has been created. In many cases there will be a trust.

**Declaring trusts over property as a protection mechanism**

13.25 Bates Wells Braithwaite said that, viewed from a creditor perspective, there is concern that trustees will act deliberately to shelter assets by utilising trust concepts and that there may be, in the extreme, some inappropriate artificiality in this. They said that comment from the Law Commission on the boundary between what is legitimate and what is artificial in that sense might be helpful. They referred back to their comments in relation to permanent endowment and to the CLA’s response to the Charity Commission in relation to the creation of permanent endowment which may be used to protect assets from creditors in certain circumstances.

**OTHER COMMENTS BY CONSULTEES**

**Special protection for permanent endowment**

13.26 Prof Duncan Sheehan said:

I agree that if permanent endowment is available to meet the claims of trustees to indemnity that it should not matter whether it is an unincorporated charity or if the trustee is a charitable company. However, I wonder if it is entirely appropriate for permanent endowment to be used in this way at all. Presumably permanent endowment would only be called upon if expendable were insufficient. This is meant highly speculatively, but one suggestion, perhaps, is that if it is a corporate charity the liquidator will only be able to make use of the company’s own money held absolutely and if unincorporated the non-permanent endowment funds. This might imply that the trustees of an unincorporated charity would have to meet the shortfall between liabilities and assets (excluding permanent endowment), which is more onerous than at present. The permanent endowment would then still be available for charitable purposes.

**Awareness of the law**

13.27 Francesca Quint said that “there are common misconceptions, even among lawyers, about what trustees can do with property representing permanent endowment (e.g. ‘it can never be mortgaged’) or subject to restrictions/special trusts (e.g. ‘it is always available to meet the general liabilities of the main charity’)."

13.28 The Institute of Chartered Secretaries and Administrators said: “For trustees of unincorporated charities the associated risks to their personal property can be negligible or misunderstood. Likewise, there may be considerable ignorance as to the use of assets in insolvency situations. Greater clarity and moves to better promote understanding would therefore be desirable for all trustees, but especially those of unincorporated charities.”
Chapter 14: Charity names

INTRODUCTION

14.1 Chapter 14 of the Consultation Paper examined the statutory powers of the Charity Commission to direct a charity to change its name. Section 42 of the Charities Act 2011 provides the Charity Commission with a power to direct a charity to change its name on five grounds. The first ground, section 42(2)(a), applies only to registered charities and covers names which are the same as, or too like, the name of any charity (whether registered or not). We proposed that section 42(2)(a) be extended to unregistered charities. Additionally we asked whether the power under section 42 should be extended to all exempt charities; it presently applies to some, but not all.

14.2 The Charity Commission currently has no power to refuse or delay an institution’s application for registration as a charity when the proposed name infringes section 42.\(^721\) The Commission can ask an institution to change its name voluntarily. If the institution refuses then the Commission can issue a formal direction requiring a change of name, but it cannot refuse or delay an application for registration or the entry of a new name in the register. We proposed that the Charity Commission should be able to refuse an application for registration, and refuse the entry of a new name on the register, if the criteria in section 42(2) apply. We also proposed that the Charity Commission should be able to delay an application for registration, and to delay the entry of a change of name, pending the resolution of a section 42 issue.

14.3 31 consultees commented on the issues discussed in this chapter.\(^722\) Recurring themes that were emphasised by consultees included transparency, public trust and confidence in charities, making the law more logical, resource constraints and improving Charity Commission guidance.

14.4 Lord Hodgson stressed the need to ensure that the interests of the public are protected. He stated that “transparency is a critical part of maintaining public trust and confidence. Permitting charities to act in a way which, inadvertently or otherwise, might confuse the general public needs to be prevented”.

14.5 The resource constraints of the Charity Commission were identified by some consultees,\(^723\) though there were differing views as to how the proposals might affect...
this concern. The Institute of Chartered Secretaries and Administrators were of the opinion that the proposals would benefit the Charity Commission:

At a time when the Commission is required to do more with limited funds, it seems appropriate that new powers to enable them to do their job without undue administrative burdens would be welcome. The situation regarding charity names appears to be particularly unhelpful and measures to remedy the situation are sensible.

However, the Association of Church Accountants and Treasurers preferred to move towards a process of deregulation in order to free up the Charity Commission’s resources.  

14.6 The CLA expressed a desire to receive more guidance relating to the potential practical effects for a charity if it is subject to a section 42 power. They noted that the current guidance did not address the possible financial implications. A charity is unlikely to have budgeted for a change in name and there will be costs involved in “publicising the new name and seeking to establish the new name with supporters and stakeholders”, as well as changing its notepaper, website and emails.

The Commission’s guidance “How to choose a charity name” simply states “Your charity will be responsible for any costs involved”. The operational guidance (OG300) refers to the human rights considerations of the name of a charity being part of its property (for the purpose of the right to protection of property), but does not refer to the potential cost consequences of a name change.

14.7 The CLA working party indicated a need for the Charity Commission to provide “as much notice as possible” to a charity when directing a name change. This would avoid the costs being “compounded” if the charity received notice after spending money on items bearing its name, such as stationery.

RESPONSES TO INDIVIDUAL QUESTIONS

14.8 We now consider consultees’ responses to the individual questions in this chapter of the Consultation Paper.

Consultation Question 83.

We provisionally propose that section 42(2)(a) of the Charities Act 2011 be amended to remove the reference to the charity being registered.

Do consultees agree?

[Consultation Paper, paragraph 14.37]

14.9 28 consultees answered this question.

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724 See para 14.19.
(1) 23 agreed;  
(2) 2 disagreed; and  
(3) 3 expressed other views.

Public trust and confidence in charities

14.10 Six consultees, agreeing with the proposal, emphasised the importance of section 42(2)(a) in maintaining public trust and confidence in charities and that this applies equally to registered and unregistered charities. A charity’s name is a key identifier and it is important that the public is not misled or confused when distinguishing between different charities, whether they are registered or unregistered. This is especially relevant where a charity wishes to adopt a name which is the same as, or similar to, the name of a highly prominent charity. Confusion could lead to undesirable consequences, for example donations being given to one charity when they were intended for another.

14.11 Transparency of the register of charities was seen as key to the rationale of section 42(2)(a). The CLA, with whom Bircham Dyson Bell LLP agreed, identified the role of the Charity Commission in “maintaining the accuracy and integrity of the Register of Charities”. They highlighted the confusion that would be created if different charities could be identified on the register with “identical or close to identical names”. This is not limited to registered charities alone. “If a member of the public searches the register for the name of an unregistered charity, it would be confusing if they were then presented with an entry for another (registered) charity which happened to have the same name.”

14.12 The CCNI indicated that the proposal “promotes equal treatment of all charities and increases public trust and confidence in charity regulation. An infringement of section 42 of the Charities Act 2011 by a non-registered charity could cause public offence.”

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725 Institution of Civil Engineers, Francesca Quint, Geldards LLP; Anthony Collins Solicitors LLP, University of Plymouth, University of Liverpool CL&PU; WCVA; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Services; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; University of Oxford; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities Property Association; NCVO; ACF; CFG; IoF.

726 Institution of Civil Engineers; Francesca Quint, Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; CCNI; Action with Communities in Rural England; Churches Legislation Advisory Services; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Stone King LLP; Society for Radiological Protection; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; NCVO; ACF; CFG; IoF.

727 University of Oxford; Association of Church Accountants and Treasurers.

728 CLA; Bircham Dyson Bell LLP; Charity Commission.

729 CCNI, Stewardship; NCVO; ACF; CFG; IoF.

730 Charity Commission.

731 CLA.
14.13 NCVO, ACF, CFG and IoF emphasised the importance of the power both in ensuring that the public is not misled, but also to prevent disputes between two charities over a particular name. They added that these aims are “not limited to cases where the infringing name is being taken up by a registered charity”.

**Consistency**

14.14 The proposal was described as “eminently sensible” and one which “supports consistency”. The CLA working party noted that they could find no justification for distinguishing between registered and unregistered charities when applying section 42(2)(a). They pointed out how the current power led to different consequences depending on the status of the charity, which was undesirable.

[!] If a registered charity has the same name as an unregistered charity, then the Commission should have the same powers to require a change of either (or both) names to address the issue. Currently, section 42(2)(a) would in this situation only allow the Charity Commission power to amend the name of the registered charity.

14.15 Stewardship similarly noted the adverse consequences in the current limitations of section 42(2)(a) describing the fact that it only applies to registered charities as “an anomaly which results in unwanted and undesired consequences”.

14.16 In the Consultation Paper we noted that removing the requirement that the charity be registered would remove with it the requirement that the direction be issued within 12 months of registration. The CLA working party expressly agreed with removing the 12-month time limit on the power to give directions under section 42(2)(a) in respect of registered charities. They considered that situations could arise 12 months after the charity’s name was registered, for example changes to other charity names or where the issue only becomes apparent to the Commission after the 12-month period has elapsed.

**Use of the power in practice**

14.17 Francesca Quint agreed with the proposal and added that the extended power might only be used in limited circumstances, for example “as a result of a specific complaint or, possibly, when the relevant unregistered charity approached the Charity Commission or came to its attention for some other reason”.

14.18 Anthony Collins Solicitors LLP, agreeing with the proposal, also indicated that the power should be limited in its application. They expressed hope that issues over names would be addressed informally using other methods rather than by virtue of section 42(2)(a). They expected charities to change their name voluntarily in reasonable circumstances without the need to resort to a “heavy-handed approach by the Commission”.

**Disagreement**

14.19 The Association of Church Accountants and Treasurers and the University of Oxford disagreed with the proposal. The Association of Church Accountants and Treasurers

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732 Institute of Chartered Secretaries and Administrators.

733 CCNI.
thought that it was preferable to move towards deregulation rather than enhancing the powers of the Charity Commission.

In our view, the pros and cons set out in Chapter 14 ... do not amount to a convincing case for widening the Charity Commission's powers and duties in face of the risk of detriment to the sector from over-regulation. There is a generally accepted need for deregulation to free up administrative resources from the increasingly onerous consequences of more and more detailed legislation where common sense and goodwill ought to prevail as the guidelines for resolving disputes between charities.

Comparative

14.20 The Charity Commission for Northern Ireland (CCNI) provided a comparison with its position. As Northern Ireland only began registering charities in December 2013 it has only received notifications of a change of name from unregistered charities, and there have been no objections to any of those notifications. Its position is different as all charities must register with CCNI; unlike England and Wales, there are no exempt or excepted charities.

Further considerations

14.21 The Charity Commission did not disagree with the proposal, but identified a requirement for “clear criteria to establish what the legal name of an unregistered charity is”. In response, we do not think that this would be a significant problem. If an unregistered charity applies to register then the Charity Commission already has to identify its name. The Charity Commission also pointed out that there would likely be a “significant evidential burden” in establishing grounds for the section 42 power.734 We do not think that it would be more difficult to show that an unregistered charity is causing negative effects such as loss, detriment, harm or public confusion by having a name which is similar to another charity than it would be for a registered charity.

14.22 The Association of Church Accountants and Treasurers indicated a need to be aware of charities from other EU countries and their “name-protection needs”. We think that section 42(2)(d) could be used to address this issue. A charity may be required to change its name if the name gives the impression that the charity is connected in some way with another EU charity when it is not.

Working names

14.23 A section 42 direction can only be given in respect of a charity’s formal, or main, name. The Charity Commission has no legal power to direct trustees to change working names.735 Additionally section 42(2)(a) can only be used to protect a charity’s formal name, and not its working name.

14.24 By contrast section 42(2)(d) can be used to protect a charity’s working name; when determining whether a charity’s formal name gives the impression of a connection under 42(2)(d), the Charity Commission can consider other charities’ working names.

734 Charity Commission, OG330 Name of Charities (August 2015), para 13.1. We refer to the guidance as “OG330”.

735 We explain the meaning of formal, or main, names and working names in para 13.5 of the Report.
14.25 Stewardship and Anthony Collins Solicitors LLP expressed a desire that working names be treated in the same way as formal names. This is justified by the need to ensure that the public is not misled. They focused on the fact that many charities make regular use of a working name. Therefore to avoid confusion that would result from mistaking working names the same consistent approach should be adopted.

We do have a concern that these powers only cover the legal registered name of the charity and are not extended to cover the working name(s). At the heart of this legislation is the desire that the public is not misled and protected from confusing one charity with another. If the public face of the charity makes prominent use of a working name rather than a registered name this confusion is still likely to exist.  

We query whether the Commission should also have a power to require a charity to change or discontinue use of a working name otherwise a charity could change its registered name but continue to use an objectionable name as an informal working name.

14.26 We address this suggestion in paragraphs 13.30 to 13.34 of the Report.

Other suggestions

14.27 Anthony Collins Solicitors LLP noted a need to define the parameters of a name being the “same as” or “too like” another charity’s name. Their previous experience suggested that the Commission had considered similarity in broad terms. The CLA working party thought that a name will be “too like” if it can be said to mislead the public.

They suggested that section 42(2)(a) could be merged with the power under section 42(2)(b) which covers names likely to mislead the public and is applicable to unregistered charities. This would permit the Charity Commission to use section 42(2)(b) in respect of unregistered charities with similar or identical names to another charity. The CLA added that this would clarify the scope of section 42(2)(a)(ii) as it would confirm that “a name will be “too like” another charity if it is likely to mislead the public”. This would avoid other interpretations such as the test adopted by Companies House which is used to determine whether company names are too similar. Bircham Dyson Bell LLP agreed with this response.

14.29 We have concluded that grounds (a) and (b) should remain separate. They deal with different problems; ground (a) addresses a charity’s identity (where one charity might be confused with another), whereas ground (b) addresses a charity’s actions (where its name may not properly reflect what the charity does). Nor do we think that ground (a) should necessarily be limited to cases where the similar names are likely to mislead the public; it might be appropriate to exercise the power where, for example, there is a dispute between two charities about their names yet the names are unlikely to mislead the public.

14.30 Stone King LLP suggested that unregistered charities should be legally obliged to register their name on a register of charity names. We think that this would be
problematic. Having two registers would be confusing; it would lead to a situation where unregistered charities were not required to be registered, but were required to register their names. We also note that the Charity Commission refers to their records of unregistered charities when registering charities\textsuperscript{738} so some of the benefits from Stone King LLP’s suggestion are already available.

**Consultation Question 84.**

We invite the views of consultees as to whether the Charity Commission’s power under section 42 of the Charities Act 2011 to issue a direction requiring a charity to change its name should be extended to all exempt charities.

[Consultation Paper, paragraph 14.39]

14.31 29 consultees responded:\textsuperscript{739}

- (1) 23 thought that section 42 should be extended;\textsuperscript{740}
- (2) 2 partially agreed with extending section 42;\textsuperscript{741}
- (3) 2 thought that section 42 should not be extended;\textsuperscript{742} and
- (4) 2 expressed other views.\textsuperscript{743}

**Public confidence**

14.32 Some consultees, agreeing with the proposal, justified the extension of section 42 to exempt charities on grounds of promoting public trust and confidence in charities.\textsuperscript{744} Stewardship emphasised that section 42 was necessary to avoid misleading the public into “thinking that a specific charity is either connected to another charity, or is working to achieve purposes that they are not”. They could see no reason why it did

\textsuperscript{738} OG330, para B5.3.

\textsuperscript{739} Institution of Civil Engineers, Francesca Quint, Geldards LLP; Anthony Collins Solicitors LLP, University of Plymouth, University of Liverpool CL&PU; Lord Hodgson; CCNI, Action with Communities in Rural England; Churches’ Legislation Advisory Services; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; University of Oxford; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities Property Association; NCVO; ACF; CFG; IoF.

\textsuperscript{740} Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; CCNI; Churches Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Stone King LLP; Society for Radiological Protection; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities Property Association; Law Society; NCVO; ACF; CFG; IoF.

\textsuperscript{741} CLA; Bircham Dyson Bell LLP.

\textsuperscript{742} University of Oxford; Association of Church Accountants and Treasurers.

\textsuperscript{743} WCVA; Charity Commission.

\textsuperscript{744} University of Liverpool CL&PU; Lord Hodgson; CCNI; Stewardship.
not apply to exempt charities. The University of Liverpool CL&PU agreed, describing the rationale of the power as being “largely to prevent public confusion” and therefore the status of the charity is “irrelevant”.

Consistency

14.33 Anthony Collins Solicitors LLP found the proposal to extend section 42 to all exempt charities “logical” and the Law Society described it as a “sensible suggestion”. The Institute of Chartered Secretaries and Administrators welcomed consistency in the approach towards exempt and registered charities. Other consultees explained that they saw no reason why the current distinction existed with one consultee adding that he thought it preferable to abolish the whole concept of exempt and excepted charities. The CCNI thought that the proposal to extend the section 42 power to exempt charities would promote “equal treatment of all charities”.

Regulatory oversight

14.34 The CLA said they were unsure why the section 42 power only applied to some exempt charities, and thought that it might be because some exempt charities are subject to a similar power exercisable by their principal regulator. They agreed that regulatory oversight was necessary for all exempt charities, but were concerned that any extension might lead to a situation where the powers of the Charity Commission and another regulator crossed over. “We should avoid a situation where a party can seek a change of name by application to multiple regulators, each of which might be required to apply different rules.” The CLA reiterated its support to a commonality of approach towards all charities. They suggested that powers which are exercisable by other regulators either conform to the requirements under section 42 or be removed so that section 42 applies to all.

14.35 The Charity Commission explained that it generally consults the principal regulator if it wishes to exercise its powers in respect of exempt charities. It said that if the section 42 power was extended to exempt charities then this practice of consultation would presumably continue. It suggested that the power be at the invitation of the principal regulator.

14.36 Francesca Quint, agreeing with the proposal, said that if section 42 was not extended to all exempt charities then it might leave some unprotected. “If not, there is every likelihood that the exempt charity's principal register would not do anything to protect the goodwill of charities outside its own jurisdiction, e.g. HEFCE would only take action to protect English universities etc.”

14.37 By contrast, the University of Oxford disagreed with the proposal saying that “the Charity Commission’s regulatory oversight should be restricted to those charities for which it is principal regulator”. This was echoed by the Association of Chartered Accountants and Treasurers who stated that the principal regulator is responsible for protecting the name of the charity.

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745 University of Plymouth; Stewardship.
746 Prof Gareth Morgan.
If the charity is exempt and thus cannot register, its principal regulator surely has an interest in the protection of its name from misuse by a rival charity – if only to mitigate the risk of loss of private funding that might otherwise have alleviated pressure on public funding for the exempt charity. And an excepted charity only needs to make a case for its voluntary registration in order to gain section 42 protection for its name.

Other suggestions

14.38 Stone King LLP agreed that section 42 should be extended to all exempt charities. They also suggested that a register of charity names should be established which legally obliges all exempt charities to register their names. We respond to this suggestion above.747

Consultation Question 85.

We provisionally propose that the Charity Commission be given a power to refuse an application by an institution for registration as a charity, and to refuse the registration of a change of name, if any of the criteria in section 42(2) of the Charities Act 2011 apply in respect of the name of the institution.

Do consultees agree?

[Consultation Paper, paragraph 14.43]

14.39 29 consultees answered this question.748

(1) 20 agreed,749

(2) 4 were broadly supportive;750

(3) 2 supported the proposal to give the Charity Commission a power to refuse the registration of a change of name, but did not support a power to refuse an application for registration as a charity;751 and

747 See para 14.30 above.

748 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; OSCR; University of Liverpool CL&PU; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF.

749 Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Stone King LLP; Society for Radiological Protection; Association of Church Accountants and Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities Property Association; Law Society.

750 NVCO; ACF; CFG; IoF.
(4) 3 expressed other views. 752

Agreement

14.40 Many consultees welcomed the proposal describing the new power as “logical,” 753 “sensible” 754 and “useful.” 755 Anthony Collins Solicitors LLP thought it “illogical” that problems with names could not be resolved before the charity was registered. They stated that in practice the Charity Commission is unlikely to finalise the charity’s application until the issues regarding the name are resolved. The new power would therefore reconcile the law with the Commission’s current practice. Veale Wasbrough Vizards LLP considered this power an “omission from the current regime”. Stewardship described it as “strange” that a charity’s name can be registered before the Charity Commission has determined whether it is appropriate or not. They agreed that the Commission should have a power to prevent a charity from registering until the issue with its name has been “satisfactorily resolved”.

14.41 The Association of Church Accountants & Treasurers, agreeing with the proposal, noted “obvious cost-savings for the Commission’s work”.

14.42 The CCNI agreed with the proposal, believing that it would promote public trust and confidence in charity regulation. NCVO, ACF, CFG and IOF said the current situation means that the public might be misled if they check the register before the charity concerned has changed its name leading to adverse results. They endorsed our statement in paragraph 14.41 of the Consultation Paper that the current situation is “administratively inconvenient” as the Charity Commission might have to knowingly register an objectionable name only to have to remove that name at a later date.

14.43 The Charity Commission believed that a balance has to be struck:

Currently, we register such a charity on the basis that we will require it to change its name. With regard to the registration of a change of name, the issue for us is transparency insofar as that charity has legally changed its name and is using that name to operate. Public trust and confidence to identify charities has to be balanced against any confusion between two charities with similar names.

Consistency with CIOs

14.44 Some consultees welcomed the proposal as it brought the Commission’s powers more in line with the powers of Companies House. 756 Sections 53 and 66 of the Companies Act 2006 prevent a company from being registered if it has a name which is offensive or is the same as another name already registered.

751 CLA; Bircharm Dyson Bell LLP.
752 Francesca Quint; OSCR; Charity Commission.
753 Veale Wasbrough Vizards LLP.
754 CCNI.
755 CCNI; Institute of Chartered Secretaries and Administrators.
756 CCNI; Institute of Chartered Secretaries and Administrators.
14.45 The University of Liverpool CL&PU agreed with the proposal, noting that the new power would create consistency with CIOs; section 208 gives the Charity Commission a power to refuse registration of a CIO if any of the section 42 criteria apply in relation to the proposed name.

14.46 The Charity Commission also identified the unique position of CIOs. It stated that it is more difficult where organisations are created by registration as they already exist and will continue to exist despite a refusal to register them. The Commission questioned whether it was helpful if charities continue to operate unregistered because it refuses to register them. However, the Commission said that in some circumstances registration would be particularly important to the charity and this power might be particularly helpful in the case of a change of name. The Commission concluded that it would not object to the new power.

Entitlement to be registered

14.47 Francesca Quint expressed reservations with the proposal commenting that it would further “breach the principle that all registrable charities should be entitled to be registered (the other existing breach being that the Commission as a matter of policy refuses to register many small charities)”. Additionally she noted that this proposal would further distinguish between registrable and non-registrable charities, denying them “equal treatment”. Preventing charities from being registered because they have not complied with a section 42 direction is “undesirable” and could potentially have adverse consequences.

It would give unconscientious trustees an excuse not to bother to register on the mistaken understanding (not uncommon) that an unregistered charity is not subject to the Commission's jurisdiction. It would also be unjust towards bona fide donors to the charity who could be prevented from getting the benefit of tax relief on their gifts.

14.48 The CLA and Bircham Dyson Bell LLP did however agree with the proposal to allow the refusal of the registration of a change of name as it would be clear that the organisation had already qualified as a charity.

14.49 The CLA and Bircham Dyson Bell LLP disagreed with the proposal to refuse an application by an institution for registration as a charity. The CLA pointed out that an organisation which qualifies as a charity, as defined in the Charities Act 2011, is entitled to be registered by the Charity Commission. The name should not prevent the organisation from being registered as this may suggest to third parties it is not a charity. They noted that “this could have serious repercussions for the charity, its relationship with donors, banks etc”. Bircham Dyson Bell LLP added that “registration as a charity has legal consequences related to the recognition of an entity's status as a charity; the entity's name is distinct from its charitable status”.

14.50 Bircham Dyson Bell LLP pointed out that the fact that a CIO is only created once it has been registered continues to cause difficulties.

Registration as a charity is not the same as registration as a company – a legal test needs to be applied for a charity, and a CIO has to be a charity... Section 208 is anomalous in giving the Commission a power to refuse registration of a CIO due to its name; a power which does not apply in relation to other charities.
14.51 The CLA advocated creating consistency with CIOs by removing the section 208 power instead of providing the Charity Commission with the proposed power. We address this suggestion in paragraph 13.48 of the Report.

Comparative

14.52 The Scottish Charity Regulator (“OSCR”) suggested that the proposals were similar to its own approach. Under section 5(2)(a) of the Charities and Trustee Investment (Scotland) Act 2005, OSCR must refuse to register a charity which has an objectionable name.

Further considerations

14.53 The CCNI expressed caution that the power should only be “used as a last resort where an institution has refused to co-operate with the Commission”.

Other suggestions

14.54 The CLA suggested that section 42 be amended so that it can apply to a charity which has submitted a registration application, but before it has been registered. The Charity Commission would then be able to address “simple” name issues where detailed investigation is not necessary. If the Charity Commission came across a situation where they were not able to use section 42 promptly then they could simply note on the register that there is an unresolved issue with its name. The CLA did consider whether it might be possible to omit the charity name from the register and only list its registered number. This would mean that the charity could confirm its charitable status and provide its number to third parties. However, the CLA thought that there might be risks of abuse if the number was published without another identifier.

14.55 Francesca Quint also suggested that as an alternative it might be possible to annotate the register to show if and why a section 42 direction has been issued. She compared this with the use of a notification of a failure to supply accounts on time. She referred to Bank of Beirut SAL v HRH Prince Adel El-Hashemite757 which addressed the benefits of annotating a register instead of removing the organisation from a register.

Consultation Question 86.

We provisionally propose that the Charity Commission be given a power to stay an application by an institution for registration as a charity, and to stay the registration of a change of name, pending an inquiry into the compliance of the name of the institution with the criteria in section 42(2) of the Charities Act 2011.

Do consultees agree?

[Consultation Paper, paragraph 14.44]

757 [2015] EWHC 1451 (Ch).
14.56 24 consultees answered this question.\(^758\)

1. 20 agreed;\(^759\)

2. 1 was broadly supportive;\(^760\)

3. 2 supported the proposal to give the Charity Commission a power to stay the registration of a change of name, but did not support a power to stay an application for registration as a charity;\(^761\) and

4. 1 expressed other views.\(^762\)

14.57 Many consultees referred to their responses to the previous proposal about the power to refuse an application for registration or to refuse the registration of a change of name.

14.58 The University of Liverpool CL&PU agreed with the proposal as it “speaks directly to the concern over public confidence in the names of organisations”. The CCNI suggested that staying the registration of a name change pending an inquiry into its compliance “promotes public trust and confidence in charity regulations”. The Institute of Chartered Secretaries and Administrators described the new power as “advantageous”.

14.59 Two consultees seemed to prefer a power to stay to a power to refuse.\(^763\) The CCNI, agreeing with the proposal, thought that a power to stay was “less draconian” than a power to refuse registration. It suggested that in most situations charities would work with the Commission to address issues with names. The CCNI suggested that if the charity then continued to refuse to change its name the Charity Commission could consider refusing the application for registration.

**Entitlement to be registered**

14.60 The CLA, Bircham Dyson Bell LLP and Francesca Quint echoed their response to the proposal to refuse an application to register. Once an institution has qualified as a charity then it should be recognised and registered as such, even if there are ongoing

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\(^{758}\) Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Lord Hodgson; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Charities’ Property Association; Law Society; NCVO; ACF; CFG; IoF.

\(^{759}\) Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Lord Hodgson; CCNI; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Stone King LLP; Society for Radiological Protection; Association of Church Accountants & Treasurers; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; Charities’ Property Association; Law Society. Charity Commission and RSPCA (who had no objection to the proposal).

\(^{760}\) NCVO; ACF; CFG; IoF.

\(^{761}\) CLA; Bircham Dyson Bell LLP.

\(^{762}\) Francesca Quint.

\(^{763}\) Francesca Quint; CCNI.
issues regarding the name. They suggested that the charity should have a note attached to its details on the register which indicates the issue with its name. However, the CLA and Bircham Dyson Bell LLP agreed with the proposal to stay the registration of a change of name.

Resources

14.61 The CLA and Bircham Dyson Bell LLP were anxious to avoid further delays within the registration process. The CLA noted that it is “often lengthy already with delays due to workload and backlogs”. They suggested that there was sufficient time at present to consider the name and resolve the issues without staying the application to register. The Association of Church Accountants and Treasurers, however, focused on the “cost saving” benefit that it believed would result from the proposal.
Chapter 15: Determining the identity of a charity’s trustees

INTRODUCTION

15.1 Currently the Charity Commission has a power to determine who the members of a charity are under section 111 of the Charities Act 2011. This power can be exercised either where a charity applies for its membership to be determined, or where the Charity Commission has commenced an inquiry into a charity under section 46 of the Charities Act 2011. Lord Hodgson recommended that this power be extended to allow the Charity Commission to determine the identity of a charity’s trustees as well as its members. We agreed and made a provisional proposal accordingly.

RESPONSES

Consultation Question 87.

We provisionally propose that the Charity Commission be given the power to determine the trustees of a charity, either (1) on the application of the charity or any person claiming to be a trustee of the charity, or (2) following the institution of an inquiry into the charity under section 46 of the Charities Act 2011.

Do consultees agree?

[Consultation Paper, paragraph 15.7]

15.2 35 consultees responded to this question:764

(1) 26 agreed;765

(2) 3 disagreed;766 and

764 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Colleges of the University of Oxford; Anthony Collins Solicitors LLP; University of Plymouth; Colleges of the University of Cambridge; OSCR; University of Liverpool CL&PU; WCVA; Lord Hodgson; CCNI; Action with Communities in Rural England; Churches’ Legislation Advisory Service; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; CLA; Birchin Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; University of Cambridge; Lawyers in Charities; University of Oxford; Association of Church Accountants and Treasurers; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Law Society; NCVO; ACF; CFG; IOF.

765 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; Action with Communities in Rural England; Institute of Chartered Secretaries and Administrators; Bates Wells Braithwaite; Stone King LLP; Charity Commission; Society for Radiological Protection; University of Cambridge; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Law Society; NCVO; ACF; CFG; IOF.
6 expressed other views.  

Agreement  

15.3 Many consultees were persuaded by the proposal as they believed it was a “helpful” addition and would make the administration of charities more efficient. Anthony Collins Solicitors LLP described the proposal as a “logical extension to section 111”. Identification of trustees early on was seen as beneficial in particular where there are disputes between “factions within a charity each of which is claiming to have the validly appointed trustees”.  

15.4 Lord Hodgson emphasised the importance of transparency in maintaining public trust and confidence in charities. He could not justify any circumstances where the identity of trustees could be concealed from the regulator.

The Regulator needs the power both to inhibit malfeasance but, equally important, to be able to blow away cobwebs from dormant or semi dormant charities.  

15.5 The University of Cambridge agreed with the proposal and thought that the power should go further and be available to anyone, not just the charity or a person claiming to be a trustee. It also thought that the power should be subject to a right of appeal.  

15.6 The CCNI thought that the proposal would assist “in ensuring the proper administration of a charity in a more expeditious, economical and efficient way”. It thought that the power would help when it was unclear who was in control of the charity. The benefits would be felt by the public and the charity as both have an interest in knowing that proper administration is carried out by those who are in charge of the charity. The CCNI agreed that the power should be given to the Charity Commission following the application of the charity or following an inquiry into the charity under section 46. However, it did not agree that an individual claiming to be a trustee should be able to ask the Charity Commission to exercise its power as they thought this would be “complex and problematic”.  

15.7 The Institute of Chartered Secretaries and Administrators agreed with the proposal suggesting that a tool to identify members and trustees would help to “speed up” conflict resolution and clarify any uncertainty. They also noted:  

It is likely that if the charity, or the Commission, requires such an exercise of this power there are other administrative matters that require resolving within the charity and a trustee body that has the benefit of section 46 backing is more able to act swiftly in resolving those concerns.

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Colleges of the University of Oxford; University of Oxford; Association of Church Accountants and Treasurers.

Colleges of the University of Cambridge; OSCR; CCNI; Churches’ Legislation Advisory Service; CLA; Bircham Dyson Bell LLP.

WCVA; Institute of Chartered Secretaries and Administrators.

Anthony Collins Solicitors LLP; University of Liverpool CL&PU; CCNI; NCVO; ACF; CFG; IOF.

Anthony Collins Solicitors LLP.
15.8 The Charity Commission expressed concern about the resource implications of the proposal. However, it was persuaded by the potential use of such a discretionary power and agreed with the proposal.

**Power in practice**

15.9 The Churches' Legislation Advisory Service (CLAS) posed a situation where the power might not be appropriate.

For an unincorporated church charity, the trustees may be the entire adult membership of the congregation... Such a power would enable the Commission to decide, in effect, who was a member of the congregation in good standing and who was not; and that goes against the self-understanding of most Churches as Churches.

15.10 The CLAS recognised that the power, although problematic in this context, might be necessary in certain circumstances. They concluded that the power should only be used as a last resort.

15.11 Bates Wells Braithwaite agreed with the proposal “although a preferable formulation would be for the Charity Commission to determine the trustees of a charity, seeking, wherever possible, to implement any prior process appointing any trustees which may have failed only due to a minor irregularity. The reason for this wording is that the Charity Commission’s discretion to determine who the trustees are should not be absolute – it should be limited except in situations of last resort.”

15.12 The CLA thought that although the proposal appeared to be a “welcome additional power”, on closer inspection it gave rise to “strong concerns”. They imagined that the circumstances where the power would be exercised would be when internal processes for appointing trustees have broken down or defects in the process have been identified, leading to confusion about whether some individuals have been properly appointed as trustees. Additionally, there is unlikely to be an appropriate mechanism to correct the position. In these circumstances the CLA could see that a power to identify trustees would help to clarify the situation.

15.13 The CLA made a number of points relating to the practical application of the power.

1. They were concerned that the Charity Commission could, as a result of an inquiry under section 46, make a “determination” which could potentially vest rights and liabilities in an individual. The CLA thought that this should not be the result of a power to “determine”, but instead it should be decided by a legal finding. For this reason they did not think that the power should be exercised in situations other than on the application of the charity or any person claiming to be a trustee of the charity. Other situations should be addressed by the Commission’s other powers with further consideration given to issues of liability.

2. Determining who the charity trustees are would impose liabilities on individuals, for example in insolvency cases or under the Transfer of Undertakings (Protection of Employment) Regulations 2006. It would also impose on individuals the duties of a charity trustee. Additionally if an individual was
determined not to be a charity trustee then they could be relieved of liability which could have implications for other charity trustees.

(3) They questioned whether a deeming provision similar to section 252(4)(b) of the Charities Act 2011 would be required to vest the rights and liabilities of a charity trustee in the determined charity trustee. However, they noted that automatic vesting of rights and liabilities might not always be appropriate so there may need to be a power to make a direction to that effect.

(4) They thought that the determination should not be applied retrospectively, but instead run from the date of the Charity Commission’s order.

If the power to determine charity trustees could apply retrospectively, we think there is a risk of someone who had not in fact been a charity trustee being “fixed” with potentially unknown liabilities. That would open up a question of whether the power would be subject to appeal to the Tribunal (section 111 is not subject to appeal to the Tribunal) and the prospect of someone subsequently wishing to challenge a determination due to finding they were subject to unexpected liabilities.

(5) They thought that the power should only be exercised to determine if an individual is a charity trustee if the individual concerned has agreed to the appointment. Otherwise an individual could be exposed to liabilities without their consent and without clarity on whether they had been validly appointed. The Charity Commission, before issuing an order to appoint or confirm the appointment of trustees, usually asks the individual to sign a declaration of willingness to act.

(6) They suggested that the power should operate similarly to a power to appoint and remove trustees. There should be no other implications.

For example, it should not affect the right of any removed trustee to a lien over the trust fund if permitted under law and it should not result in any transfer of other rights or liabilities to the new trustees which would not otherwise be transferred under a normal deed of appointment and removal (or equivalent document for corporate charities). The question of the rights and liabilities prior to any “determination” would be a matter for decision under normal legal principles.

15.14 The Colleges of the University of Cambridge thought that the power should not be given to the Charity Commission in the absence of a sufficient appeal process. They noted that the power had the potential to provide a useful mechanism to identify the charity trustees. However, they expressed caution at drawing an analogy with the membership of a charity as the consequences were different.

For, whereas membership of a charity will not normally carry with it responsibilities or governance rights other than of a very limited nature, charity trusteeship carries with it both duties and potential liabilities. Moreover a charity has a strong interest in its own governance and a decision relating to charity trusteeship may quite possibly involve issues of the interpretation of the governing instruments of a charity,
whereas a decision relating to membership is more likely only to involve issues of fact and identity.

15.15 They suggested that if the power was introduced then it should be extended so that it is available on the application of a person who is not claiming to be a trustee of the charity. Furthermore, there should be a right of appeal (incorporated into schedule 6 to the Charities Act 2011) against a decision of the Charity Commission under the power.

Disagreement

15.16 The Colleges of the University of Oxford, disagreeing with the proposal, thought that it was inappropriate in the college context as “trusteeship status follows from appointment to an academic or administrative post”. They added that the power was already addressed in College Statutes whilst external control of matters was covered by the powers of Visitors and the Academic Staff statutes.

15.17 The Association of Church Accountants and Treasurers disagreed with the proposal as it saw no real need for the Charity Commission to have such a power. In order to determine the identity of trustees it is enough to simply follow an audit trail from the charity’s governing document and records of proceedings.

Non-membership charities do not suffer from the same problem as charities whose trustees are wholly or partly elected by a membership the extent of which may be in doubt as a result of defective record-keeping and which as a result can be torn apart by disputed claims to membership votes. Where such electoral disputes do not exist, it is simply a matter of following an audit trail from the charity’s governing document and records of proceedings in order to be able to track all changes in the trustee-body – whether arising from that body’s own decisions or an external body’s nomination powers. If for lack of use of those powers the trustee-body has dwindled to the point where the charity can no longer be properly administered, there are remedies enough in the law as it is, without giving a legal power to the Charity Commission to step in and do the existing trustees’ work for them – especially if asked to do so by a claimant to trusteeship who has perhaps bypassed the trustee-body itself in order to lever the Charity Commission into intervening in the charity’s administration without having to show good cause.

15.18 The University of Oxford wanted clarity on this issue, but thought that the Commission should be limited to providing guidance on identifying trustees and not providing a determinative conclusion. They stressed that, as determination of trustees is a matter of law, it is best decided by the courts.

Comparative

15.19 The Scottish Charity Regulator (“OSCR”) provided a comparison with its own position:

OSCR has a general power to obtain any information it requires for the purpose of inquiries. OSCR does not have an express power to obtain trustee details although this information is obtained for initial registration purposes.
Further guidance

15.20 Francesca Quint agreed with the proposal adding that guidance from the Charity Commission on the “legal and good practice obligations of membership charities to maintain an up-to-date list of members” would be useful.

Definition of charity trustees

15.21 The CLA drew attention to the different definitions that are used to define individuals in control of the administration of a charity. Section 177 of the Charities Act defines charity trustees as “the persons having the general control and management of the administration of a charity”. There is little guidance about what this definition means. They had found that it was not always clear whether an individual might be considered a charity trustee under section 177.

For example, this might be the case where a group of persons are provided a supervisory function under the charity’s constitution. In addition, questions can arise as to whether a person with no formal role under a charity’s governing document may be treated as a charity trustee (e.g. a shadow director).

15.22 They found that the Finance Act 2010 added to the confusion for example by referring to managers instead of trustees and defining them as the “the persons having the general control and management of the administration of the body or trust”. They noted that HMRC has suggested that this definition in the Finance Act is broader than the Charities Act 2011.

15.23 The CLA suggested that the definition of a charity trustee should be more workable. They stressed the importance of consistency with other legislation and recommended that the definition of manager in the Finance Act should be updated and that the Charity Commission should issue clear guidance on any new definitions.
Chapter 16: The Charity Tribunal and the courts

INTRODUCTION

16.1 Chapter 16 of the Consultation Paper considered a number of issues that have arisen since the Charity Tribunal was established by the Charities Act 2006. We considered three issues:

1. the ability of trustees to obtain advance assurance that legal costs they propose to incur in litigation can properly be paid from the charity’s funds (known as a “Beddoe order”);

2. the power of the Charity Tribunal to suspend decisions of the Charity Commission, pending a challenge in the Tribunal; and

3. the procedure for making references to the Tribunal on points of law, specifically whether the Charity Commission should be required to obtain the Attorney General’s consent before making a reference, and whether the Tribunal should have a power to award remedies following a reference.

16.2 We also discussed a related issue, namely the requirement that charities seek authorisation from the Charity Commission before commencing “charity proceedings”, which, broadly speaking, are disputes within the charity as opposed to disputes with outsiders. If the Charity Commission refuses permission, then the charity can seek authorisation from the High Court. We proposed that charities should be able to choose to obtain the Court’s authorisation, rather than first having to ask the Charity Commission, if the proceedings are against the Charity Commission.

16.3 33 consultees commented on issues discussed in this chapter.

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771 The Tribunals, Courts and Enforcement Act 2007 (“the TCEA 2007”) created a single structure for most tribunals, divided into the First-tier Tribunal and the Upper Tribunal. The First-tier Tribunal and the Upper Tribunal each have separate chambers covering different subject matters. The Charity Tribunal’s work was transferred to the General Regulatory Chamber of the First-tier Tribunal (“the First-Tier Tribunal (GRC)”) and the Tax and Chancery Chamber of the Upper Tribunal (“the Upper Tribunal (TCC)”). We use the term “Charity Tribunal” to refer to both the First-tier Tribunal (GRC) and the Upper Tribunal (TCC) when they are exercising the jurisdiction originally conferred by the Charities Act 2006, and the term “charity cases” to refer to cases falling within that jurisdiction.

772 Charities Act 2011 s 115(2).

773 Charities Act 2011 s 115(5).

774 Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; Patrick Ryan; OSCR; University of Liverpool CL&PU; Dr Mary Synge; WCVA; Lord Hodgson; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; William Henderson; RSPCA; Law Society; NCVO; ACF; CFG; IoF; Attorney General’s Office.
Charity Tribunal

16.4 The Institute of Chartered Secretaries and Administrators said that “the introduction of the Charity Tribunal in the Charities Act 2006 was generally warmly received, however it has yet to fulfil its stated aims. Measures to improve the work and accessibility of the Tribunal are likely to again be warmly received by the sector.”

Charity proceedings

Uncertainty as to the meaning of “charity proceedings”

16.5 Francesca Quint said there are some areas where it is unclear whether proceedings fall within the definition of “charity proceedings”, for example claims against trustees for breach of trust and claims against a third party seeking an account based on a constructive trust in favour of the charity. The University of Plymouth requested clarification of the meaning of “charity proceedings”.

Do proceedings in the Charity Tribunal amount to “charity proceedings”? 

16.6 In the Consultation Paper, we expressed the view that proceedings in the Charity Tribunal were not “charity proceedings” under section 115. Whilst the CLA agreed with us, Hubert Picarda QC expressed his firm disagreement, and his view on this point shaped his response to the Consultation Paper.

16.7 Section 115(8) defines charity proceedings as:

- Proceedings in any court in England or Wales brought under –
  - the court’s jurisdiction with respect to charities, or
  - the court’s jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

16.8 Section 353 defines “the court” as:

- the High Court; and
- within the limits of its jurisdiction, any other court in England and Wales having a jurisdiction in respect of charities concurrent (within any limit of area or amount) with that of the High Court.

16.9 Hubert Picarda stated that the Upper Tribunal falls within this definition since “it was constituted as a court of record and given a jurisdiction to make administrative schemes echoing the inherent jurisdiction of the court. … The Upper Tribunal is denominated and created a superior court of record. This gives it equivalent status to the High Court and means that it can both set precedents and can enforce its decisions (and those of the First-tier Tribunal) without the need to ask the High Court or the Court of Session to intervene. So ineluctably, as one must deduce, it can itself grant any necessary injunction or suspensory order or extract any undertaking necessary to enforce its decision or a decision of the First-tier Tribunal.” We address this issue in paragraphs 15.21 to 15.24 of the Report.

775 Consultation Paper, para 16.36.
Schedule 6

16.10 Decisions of the Charity Commission that can be appealed to the Charity Tribunal are listed in Schedule 6. Lord Hodgson expressed disappointment that Schedule 6 fell outside our terms of reference: “the legal implications of the operations of the Tribunal … represent something of a minefield to a charity. Clearing away at least some of the brambles of Schedule 6 might have helped”. Patrick Ryan supported Lord Hodgson’s recommendation to remove Schedule 6 of the Charities Act 2011 and so permit a right of appeal to the Charity Tribunal against any Charity Commission decision; he said “Schedule 6 is not only confusing and difficult to understand, but also makes it impossible for beneficiaries to access the Charity Tribunal”. Schedule 6 falls outside our terms of reference but we comment on it in paragraphs 9.35 and 9.40 of the Report.776

Comparative

16.11 OSCR provided a summary of the Scottish position.

In Scotland the Scottish Charity Appeals Panel (SCAP) can only hear appeals against OSCR's decisions. The SCAP Rules 2006 provide for determination of expenses by SCAP itself: there is no provision for OSCR to intervene in respect of expenditure by charities on litigation.

RESPONSES TO INDIVIDUAL QUESTIONS

16.12 We now consider consultees’ responses to the individual questions in this chapter of the Consultation Paper.

Consultation Question 88.

We provisionally propose that, when applications within (or in contemplation of) proceedings against the Charity Commission fall within the definition of “charity proceedings” under section 115 of the Charities Act 2011, the charity should be permitted to obtain authorisation to pursue that application either from the court or the Charity Commission.

Do consultees agree?

[Consultation Paper, paragraph 16.32]

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16.13 27 consultees responded to this question.\textsuperscript{777}

(1) 25 agreed with the proposal;\textsuperscript{778} and

(2) 2 expressed other views.\textsuperscript{779}

Agreement

16.14 Many consultees expressed their agreement with us that it was inappropriate that charities might have to seek permission from the Charity Commission to pursue an application, such as an application for a Beddoe order, when the action was against the Charity Commission.\textsuperscript{780} The new proposal would help to avoid this conflict of interest.

16.15 The Charity Commission welcomed the proposal. The University of Liverpool CL&PU thought that “increasing choice will facilitate more effective access to justice”. Anthony Collins Solicitors LLP thought the proposal was “logical” and would ensure that the Charity Commission could not unreasonably withhold its consent to stop a charity from continuing with its claim.

16.16 The Ministry of Justice Jurisdiction and Procedure Branch said that the proposal was “aligned to MoJ’s policy priorities for delivering/promoting access to administrative justice to the public”. It noted that the proposal would “provide further transparency and make the process easier for appellants to understand…. It saw no disadvantages to the proposal.

16.17 The Institute of Chartered Secretaries and Administrators questioned how many charities would use this authorisation process “given the costs likely to be incurred by approaching the court instead of the Commission”, but recognised the importance of the choice being available.

16.18 Stone King LLP said that “the possibility of seeking consent from the court would need to be made clear in relevant Charity Commission guidance”.

16.19 The CLA and Bircham Dyson Bell LLP expressed their agreement with the discussion in the Consultation Paper leading to our proposal and they agreed in principle with our proposal subject to three points of detail.

\textsuperscript{777} Institution of Civil Engineers; Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG and IoF.

\textsuperscript{778} Institution of Civil Engineers; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; National Trust; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; NCVO; ACF; CFG and IoF.

\textsuperscript{779} Francesca Quint; Prof Gareth Morgan.

\textsuperscript{780} WCVA; Lord Hodgson; Stone King LLP; Veale Wasbrough Vizards LLP; NCVO; ACF; CFG and IoF.
First, they noted that section 115(1) lists the persons permitted to pursue charity proceedings, and this is not limited to the charity. We agree that all those listed in section 115(1) should be permitted to seek authorisation from the court or Charity Commission.

Second, they did not want to limit the choice to cases where the proceedings were “against” the Charity Commission, but wanted to include all proceedings where the Charity Commission is a party. Again, we agree with this suggestion.

Third, they suggested that, where the substantive proceedings are in the Charity Tribunal, authorisation should be available from the Charity Commission or the Tribunal (rather than the court). It is that issue to which we now turn.

Should the Charity Tribunal have the same power?

16.20 Nine consultees thought that authorisation should be available from the Charity Tribunal. Bates Wells Braithwaite and NCVO, ACF, CFG and IoF (in their joint response) said that authorisation from the Charity Tribunal would cost less and be quicker. The Charity Tribunal would “likely become a more appropriate forum than the court, given its familiarity with the charity-specific considerations which drive decision-making in relation to court proceedings”.

16.21 The CLA understood our justification for not giving the power to the Charity Tribunal – that there is little point in adding a third body to the authorisation process. However, they said that where “the requirement for authorisation to take or defend “charity proceedings” arises within substantive proceedings which fall within the Tribunal’s jurisdiction, it would be logical for the Tribunal to provide the appropriate authorisation”. The charity should therefore be able to obtain authorisation either (a) from the Charity Commission, or (b) from the Court or Tribunal depending on which body is hearing the substantive proceedings.

16.22 We address this suggestion in paragraph 15.20 of the Report.

Further considerations

16.23 Francesca Quint thought that, if the charity is not going to seek section 115 consent from the Charity Commission then it is important that the Attorney General is involved. She suggested that the Tribunal could be given the power to make a Beddoe order if the substantive claim was against the Charity Commission, or alternatively that Beddoe proceedings be removed altogether and replaced with a requirement for the charity to obtain written approval from the Attorney General to continue with the substantive claim. We can see no reason why the court should not be able to provide authorisation of its own accord; section 115 already provides that the court can grant authorisation where it has been refused by the Commission.

781 Francesca Quint; Prof Gareth Morgan; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; NCVO; ACF; CFG and IoF.
782 Bates Wells Braithwaite.
783 Consultation Paper, para 16.31, n 47.
Consultation Question 89.

We invite the views of consultees as to the differing costs of seeking authorisation to pursue charity proceedings under section 115 of the Charities Act 2011 from (a) the Charity Commission and (b) the court.

[Consultation Paper, paragraph 16.34]

16.24 11 consultees responded.\textsuperscript{784}

16.25 Nearly all consultees commented that the costs of seeking authorisation from the court would be greater than from the Charity Commission. Francesca Quint said that an application to the court would be “substantially more expensive”. Consultees noted that this may be due to instructing counsel in court applications.\textsuperscript{785} Bates Wells Braithwaite suggested that the costs can be “several thousand pounds huger” due to court fees and other formalities. The National Trust thought that the costs of a court hearing would be “in the region of £5,000 to £10,000”.

16.26 The CLA, with whom Bircham Dyson Bell LLP agreed, said that “the material to be prepared is similar, whether application is made to the Charity Commission or the Court”. The difference in cost would depend on the response of the Commission or court. For example, the Commission might approve the application or it might require further information. Similarly, the court might approve the application without a hearing or it might require a hearing. If a court hearing is necessary then the costs are likely to be “significantly higher”.

[If the matter is high profile, likely to be controversial and/or vigorously contested or is high value, it can be more likely that the application for charity proceedings will require greater consideration by the Commission/Court.]

16.27 The CLA added that even if an application is made to the Charity Commission, the Commission may decide that the Court should make the ultimate decision, so an application to the Charity Commission may not therefore be cheaper.

16.28 Stone King LLP did not think there would be a substantial difference in the costs:

In a case of this sort (we imagine that proceedings against the Charity Commission which are not Tribunal proceedings would be likely to involve judicial review) other, non-section 115 legal costs would be likely to dwarf section 115 costs, making any difference in costs between (a) and (b) insignificant.

16.29 The RSPCA thought that there were too many variables to comment.

\textsuperscript{784} Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Lawyers in Charities; National Trust; RSPCA.

\textsuperscript{785} Anthony Collins Solicitors LLP; Ministry of Justice Jurisdiction and Procedure Branch; Lawyers in Charities; National Trust.
Consultation Question 90.
We invite the views of consultees as to whether charities should be required to obtain authorisation from the Charity Tribunal or the Charity Commission before commencing proceedings in the Tribunal.

[Consultation Paper, paragraph 16.39]

16.30 24 consultees responded.  
(1) 21 thought that charities should not have to obtain authorisation;  
(2) 2 thought that they should have to obtain authorisation;  
(3) 1 expressed other views.

Requirement for authorisation

16.31 The Institute of Chartered Secretaries and Administrators thought that charities would benefit from gaining authorisation before commencing proceedings.

No requirement for authorisation

16.32 Prof Gareth Morgan thought such a requirement would be “absurd”. Francesca Quint said a requirement for authorisation would be a “retrograde step in that it would hinder access to the Tribunal and tend to result in the very circumstance which led to the establishment of the Charity Tribunal”. She said it would be helpful if charities were better alerted to the alternatives to making an application to the Tribunal. She also said that authorisation “would not prevent the Charity Commission from investigating and dealing with unwarranted expenditure by charities on Tribunal applications … and in my view it would be preferable for any such remedy to be applied after the event than to subject all potential applicants to the Tribunal to an additional bureaucratic hurdle”.

16.33 Consultees often expressed agreement with some or all of our reasons for not requiring authorisation in paragraph 16.38 of the Consultation Paper. However, the
University of Liverpool CL&PU and Stewardship were unconvinced by our second reason, namely that “legal representation is less common and there is minimal risk of adverse costs orders” in the Tribunal so there is less pressing need to protect charitable funds. The University of Liverpool CL&PU said “existing tribunal cases demonstrate that costs can escalate, so we think that the costs argument, of itself, is not a compelling reason to support a need to seek authorisation.” Similarly, Stewardship said:

We fully accept that the proceedings are different and whilst recognising that this is likely to result in lower costs, we do not consider that an expectation of lower costs [should be] a reason for not obtaining consent. As has been pointed out in the consultation, charities will at times incur the services of a legal team, which will come at a cost.

16.34 Three consultees said that authorisation would increase costs and cause delay.  

16.35 The Charity Commission added that charity trustees and persons affected by the decisions can bring proceedings under Schedule 6 to the Charities Act 2011 which would create complexities if the proceedings needed prior authorisation.

**Existing safeguards**

16.36 Some consultees thought that authorisation was unnecessary because there are existing powers for the Tribunal to reject claims of little or no merit under rule 8(3)(c) of the Tribunal Procedure Rules.  

16.37 Bates Wells Braithwaite, the Charity Commission and NCVO, ACF, CFG and IoF added that concerns about the misuse of charity funds are adequately addressed through the costs regime.

**Authorisation from the Charity Commission**

16.38 Anthony Collins Solicitors LLP said that as many of the proceedings in the Tribunal would be against the Charity Commission it would be “incongruous for the Commission to have to consent to a tribunal claim against itself”. The Charity Commission also said that it would be inappropriate for it to authorise proceedings for the same reason.

16.39 As noted above, Hubert Picarda QC thought that proceedings before the Charity Tribunal were “charity proceedings” and therefore already required the consent of the Charity Commission. He agreed that the Charity Tribunal should not be given the power to authorise such proceedings and continued: “I would expect the Charity Commission to give consent to proceedings going to the Charity Tribunal rather than court proceedings in the same way judges do when they are asked to give leave to appeal, though with due regard to the need to preventing vexatious appeals and the need to involve the courts in contentious cases of importance . . But it has to consider as well in relation to its own powers whether it is necessary to have a tribunal or any hearing when it has scheme making powers which cover not only cy-pres occasions.

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791 Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP.

792 University of Plymouth; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Charity Commission; NCVO; ACF; CFG and IoF.
but also cases where it can make an administrative scheme on the grounds of expediency.”

**Authorisation from the Charity Tribunal**

16.40 The Ministry of Justice Jurisdiction and Procedure Branch said that a charity should not have to obtain authorisation from the Charity Commission owing to the inevitable conflict of interest. However, it suggested that an application to the Tribunal would be appropriate “as it removes the conflict of interest situation for the Charity Commission and gives the charity access to an independent decision maker” at a low cost.

**Other comments**

16.41 Prof Gareth Morgan suggested that, where section 115 consent is necessary, there should be a *de minimis* level below which Charity Commission consent is unnecessary, and that it should be explicit that taking professional advice on possible proceedings is excluded from the requirement for section 115 authorisation.

16.42 Taking advice does not require authorisation, since it is not taking charity proceedings. We can see the attraction of a *de minimis* threshold below which Charity Commission authorisation is not necessary. The difficulty is that the likely legal costs (both the charity’s own legal costs and any costs order made against the charity) are inherently unpredictable. Moreover, once charity proceedings have begun, they cannot easily be stopped and the *de minimis* threshold might be crossed during the proceedings. It is therefore necessary that all proceedings must be authorised, even if the initial costs are expected to be low.

**Consultation Question 91.**

We invite the views of consultees as to the likely costs of having to obtain authorisation from the Charity Tribunal before pursuing proceedings in the Tribunal.

[Consultation Paper, paragraph 16.41]

16.43 12 consultees responded to this question. 793 6 consultees thought that there would be additional costs. 794

16.44 Lawyers in Charities said that duplication of costs would arise as charities would have to pay for lawyers to prepare an application for authorisation and then to prepare the proceedings. Bates Wells Braithwaite thought that the costs would increase because the charity would have to show “real merit from the outset which is likely to mean a more legalist and, therefore, costly route involving front loading the case to ensure that the challenge does not fall at the first hurdle”. Anthony Collins Solicitors LLP

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793 Francesca Quint; Anthony Collins Solicitors LLP; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP.

794 Anthony Collins Solicitors LLP; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Lawyers in Charities; National Trust.
thought that a charity would seek legal representation which would add unnecessary costs in the range of £1,000 to £5,000 plus VAT. The National Trust said that, if a hearing was required, the costs could be in the region of £5,000 to £10,000.

16.45 Veale Wasbrough Vizards LLP said that Charity Tribunal costs can already be high. A requirement to gain authorisation would “have the effect of extending the time period for cases to be heard and adding to the costs”.

16.46 The CLA, with whom Bircham Dyson Bell LLP agreed, said that it was “difficult to tell in the abstract – it would depend upon the procedure and the tests applied” but “any such requirement would add to the costs of such an application, without any readily identifiable benefit”.

16.47 Stone King LLP thought that costs “would be low but unnecessary and an additional inhibition on bringing proceedings which is not warranted”. Prof Gareth Morgan said that the costs would not be very much, but there might be an extra two hours of work.

16.48 The Ministry of Justice Jurisdiction and Procedure Branch said that the present Tribunal system was low-cost as it was possible to deal with applications without a hearing.

Consultation Question 92.
We provisionally propose that the Charity Tribunal should be given the power to make Beddoe orders in respect of proceedings before it.

Do consultees agree?  
[Consultation Paper, paragraph 16.54]

16.49 27 consultees responded to the question.  

(1) 24 agreed; and  
(2) 3 disagreed.

795 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; William Henderson; RSPCA; Law Society; NCVO ACF; CFG and IoF.

796 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Lord Hodgson; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Society for Radiological Protection; Lawyers in Charities; Prof Gareth Morgan; Stewardship; William Henderson; RSPCA; Law Society; NCVO; ACF; CFG and IoF.

797 Charity Commission; Hubert Picarda QC; William Henderson.
Agreement

16.50 Some consultees thought that the proposal would aid access to justice and encourage trustees to take necessary action. WCVA called the proposal “sensible”; it would prevent unnecessary court proceedings, which “goes against the spirit with which the Charity Tribunal was created” and may discourage charities from pursuing action. Stewardship said that without these powers some charities may be discouraged from raising genuine grievances for fear that trustees may be required to reimburse the trust for expenses incurred. NCVO, ACF, CFG and IoF made similar comments. The University of Liverpool CL&PU said that the current situation may prevent access to justice. They recognised that charity trustees are risk averse and having Beddoe protection may encourage them to take essential legal action.

16.51 The Institute of Chartered Secretaries and Administrators thought that the proposal would “provide additional assurance to trustees without the need for incurring additional costs by approaching the court”. The Law Society said that the proposal would save time and money. Stone King LLP said that the Tribunal was “well-placed to balance the need to provide trustees with security on costs and the need to safeguard the charity’s funds for its charitable purposes”.

16.52 The CLA, with whom Bircham Dyson Bell LLP agreed, said that the Tribunal should have the power to award Beddoe relief “both in respect of the costs that the charity trustees properly incur (or propose to incur) in the proceedings and in respect of costs for which they may become liable under a costs order made against them if they have been unsuccessful in litigation”. They noted that the possibility of obtaining authority from the Charity Commission under section 105 or section 110 is not available for all applications:

For example, if the appeal relates to a decision of the Charity Commission under section 30 not to enter an institution in the register of charities, or under section 34 to remove an institution from the register, the Commission would not then regard the institution as a charity for the purpose [of] section 105, or those running the institution as charity trustees for the purpose of section 110.

16.53 Francesca Quint agreed “in substance” but thought that the power should be given a new concept and name rather than be known as a Beddoe order. She agreed with our statement that different Tribunal judges should hear the costs application and the substantive proceedings. The CLA agreed with us that the Tribunal should use the same criteria as the Court when considering an application for a Bedore order798 and that the power should be conferred by way of primary legislation799.

Disagreement

16.54 The Charity Commission said that Tribunal proceedings are meant to be quick and efficient, and conferring a power to make Beddoe orders would add cost and delay. The Commission thought that there is already adequate protection in the Tribunal through its case management powers and because costs orders are not normally made. The Charity Commission said that it was able to use section 110 of the

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798 Consultation Paper, para 16.52.
Charities Act 2011 to give the equivalent of *Beddoe* protection, and if the appeal was against the Commission then a “Chinese wall” could be established to avoid the conflict of interests.

16.55 William Henderson also identified the alternative ways in which trustees could seek *Beddoe* protection. He said that Tribunal proceedings to give *Beddoe* relief would likely be expensive; the Tribunal is meant to be a cheap and quick alternative and “weighing it down with *Beddoe* applications would be likely to detract from the fulfilment of that intention”. Additionally he doubted whether there were enough Tribunal judges to be able to ensure that the *Beddoe* application and the substantive claim were heard by different judges and members.

**Consultation Question 93.**

We invite the views of consultees as to whether the Attorney General should always be a party to applications for a *Beddoe* order.

[Consultation Paper, paragraph 16.55]

16.56 21 consultees responded.800

(1) 19 thought that the Attorney General should not always be a party;801

(2) 1 thought that the Attorney General should always be a party;802 and

(3) 1 expressed other views.803

**Attorney General should not automatically be a party**

16.57 Prof Gareth Morgan said such a requirement would be a “major complication”.

16.58 Consultees tended to agree with our argument in the Consultation Paper804 that it is not necessary for the Attorney General to be party to all applications, and that the

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800 Francesco Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; Prof Gareth Morgan; Stewardship; RSPCA; Law Society; Attorney General’s Office.

801 Francesco Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; Lawyers in Charities; Prof Gareth Morgan; Stewardship; RSPCA; Law Society; Attorney General’s Office.

802 Institute of Chartered Secretaries and Administrators.

803 Hubert Picarda QC.

804 Consultation Paper, para 16.53.
Tribunal can invite the Attorney General to participate in appropriate cases.\textsuperscript{805} The Ministry of Justice Jurisdiction and Procedure Branch said that this would allow for “maximum flexibility”.

16.59 Geldards LLP said that \textit{Beddoe} applications and proceedings should be ex parte.

16.60 The Attorney General said that the requirement may lead to duplication of effort between the Attorney General and Charity Tribunal.

[T]he Tribunal will be competent to assess whether litigation is an appropriate use of charity funds and the situations in which the Attorney General would take a different view should be limited. The Tribunal also already has the power to invite the Attorney General to be joined to any proceedings and so, if joining the Attorney General would be of assistance to the Tribunal, it can refer the matter on.

\textbf{Attorney General should automatically be a party}

16.61 The Institute of Chartered Secretaries and Administrators thought that there was some advantage in the Attorney General being a party to an application for a \textit{Beddoe} order, “if only for a comprehensive index for such applications”.

\textbf{Other views}

16.62 Hubert Picarda QC was cautious about limiting the role of the Attorney General:

Any further marginalisation of the role duties powers and functions of the Attorney General are to be discouraged and the strengthening of the role and perhaps most important of the resources at the disposal of the independent Attorney General’s Office are to be encouraged and promoted so as to redress the drawbacks identified by the criticisms and assessment of the performance of the Commission in relation to its statutory objectives functions duties and powers.

\begin{center}
\textbf{Consultation Question 94.}
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\begin{quote}
We invite the views of consultees as to the differing costs of seeking \textit{Beddoe} protection from (a) the Charity Commission, (b) the court, and (c) the Charity Tribunal.
\end{quote}

[Consultation Paper, paragraph 16.64]

16.63 12 consultees responded to this question.\textsuperscript{806}

\textsuperscript{805} Anthony Collins Solicitors LLP; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Stewardship; Law Society.

\textsuperscript{806} Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Lawyers in Charities; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Law Society.
16.64 Most consultees said that the court would be most expensive.\textsuperscript{807} There was some disagreement about whether the Charity Commission or the Charity Tribunal would be the cheapest option.

16.65 The court was thought to be the most expensive owing to court fees and the increased likelihood of charities seeking legal advice.\textsuperscript{808} It was suggested that counsel’s fees would be over £10,000.\textsuperscript{809}

16.66 Francesca Quint, Veale Wasbrough Vizards LLP, the University of Plymouth and Lawyers in Charities said that the Charity Commission procedure would be the least expensive. Lawyers in Charities said that charities could prepare an application to the Commission themselves.\textsuperscript{810}

16.67 By contrast, Prof Gareth Morgan however thought that an application to the Tribunal would be the cheapest option. Anthony Collins Solicitors LLP agreed and said that the cost of seeking Beddoe protection from the Tribunal should be “negligible”, and the costs of approaching the Commission would be higher because legal advice would likely be taken.

16.68 Bates Wells Braithwaite said that the cost of applying to the Tribunal and the Commission should be “broadly comparable, provided the Charity Tribunal procedure is relatively informal”. Stone King LLP agreed, adding:

\begin{quote}
unless the proceedings require the court’s involvement … the Beddoe application should not be made in court, for public policy reasons (cost and the desirability of keeping proceedings out of court and in a more appropriate forum generally).
\end{quote}

16.69 The CLA, with whom Bircham Dyson Bell LLP agreed, said that it was difficult to ascertain the differing costs without knowing the Tribunal procedure. The cost would likely depend on the response taken by the each of the bodies. However, dealing only with the Tribunal and not having to apply to the court would be more efficient and therefore less expensive.

\textsuperscript{807} Francesca Quint; Anthony Collins Solicitors LLP; University of Plymouth; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP.

\textsuperscript{808} Bates Wells Braithwaite; Anthony Collins Solicitors LLP; Ministry of Justice Jurisdiction and Procedure Branch.

\textsuperscript{809} Law Society.

\textsuperscript{810} Lawyers in Charities.
Consultation Question 95.

We invite the views of consultees as to whether, in light of the associated difficulties:

(1) the Charity Tribunal should have the power to suspend the effect of a Charity Commission decision pending challenge (or to award an interim injunction to prevent named persons from taking action in reliance on it); and

(2) all decisions of the Charity Commission should take effect only after a certain period of time.

[Consultation Paper, paragraph 16.86]

16.70 25 consultees responded to this question.\[^{811}\]

1. 1 thought that (1) and (2) should be available;\[^{812}\]

2. 12 thought that all or part of (1) should be available;\[^{813}\]

3. 1 thought that (2) should be available;\[^{814}\]

4. 7 thought that neither (1) nor (2) should be available;\[^{815}\] and

5. 4 consultees expressed other views.\[^{816}\]

(1) Suspending the effect of a Charity Commission decision pending challenge or awarding an interim injunction to prevent action in reliance on it

Support for a power to suspend decisions/award interim injunctions

16.71 Many consultees commented on the desirability of being able to suspend Charity Commission decisions to allow time for a challenge, but few addressed the difficulties that we had identified or proposed workable solutions to them.

16.72 WCVA said that it is necessary that decisions can be challenged by third parties effectively and as such were in favour of permitting the Tribunal to suspend the effect of Charity Commission decisions or to award interim injunctions. The Institute of Chartered Secretaries and Administrators, the Ministry of Justice Jurisdiction and Procedure Branch and the Society for Radiological Protection, however, were not convinced that this was necessary.

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\[^{811}\] Francesca Quint; Geldards LLP; University of Plymouth; University of Liverpool CL&PU; WCVA; Institute of Chartered Secretaries and Administrators; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Charity Commission; Stone King LLP; Society for Radiological Protection; Hubert Picarda QC; Lawyers in Charities; National Trust; Prof Gareth Morgan; Veale Wasbrough Vizards LLP; Stewardship; RSPCA; Law Society; NCVO; ACF; CFG and IoF.

\[^{812}\] Institute of Chartered Secretaries and Administrators.

\[^{813}\] Geldards LLP; University of Plymouth; WCVA; Bates Wells Braithwaite; Lawyers in Charities; National Trust; Prof Gareth Morgan; Stewardship; NCVO; ACF; CFG and IoF.

\[^{814}\] Society for Radiological Protection.

\[^{815}\] University of Liverpool CL&PU; Ministry of Justice Jurisdiction and Procedure Branch; CLA; Bircham Dyson Bell LLP; Charity Commission; Veale Wasbrough Vizards LLP; RSPCA.

\[^{816}\] Francesca Quint; Stone King LLP; Hubert Picarda QC; Law Society.
Chartered Secretaries and Administrators said that it would be logical and that it would “hopefully save a charity resource and time in not having to implement a decision which is later overturned by the Tribunal.”

16.73 The National Trust said that suspension should be available “unless the matter is so serious that it could not be rectified unless immediate action was taken”.

16.74 Stewardship saw merit in the power to suspend decisions. It appreciated that “to provide certainty and protection to third parties, actions undertaken by charities in good faith would be required to stand and would therefore not be void”. It did not think that a register of decisions should be maintained, which third parties were required to consult, as this would create undue burdens for third parties.

Concerns about a power to suspend decisions/award interim injunctions

16.75 The Ministry of Justice Procedure and Jurisdiction Branch was not persuaded that there would be significant benefits. If such powers were to be conferred, there will need to be an extensive examination of the “implications of a change in relation to tribunals performing this role”. It identified the courts as the most appropriate body to award injunctions.

16.76 The Charity Commission said that the power of suspension would adversely affect the Commission’s ability to perform its functions effectively:

  in particular, in relation to [our] compliance work, the power to open an inquiry and the exercise of [our] temporary and protective powers. Our decisions in this regard are subject to the scrutiny of the Charity Tribunal and recent decisions have supported our ability to “look and see” in relation to inquiry cases and the importance for the protection of charities and their assets in the exercise of these powers (for instance “freezing” bank accounts and appointing Interim Managers). The impact of any such suspension or power to issue interim injunctions pending the outcome of an application to the Tribunal would seriously impede the investigation of potential misconduct and/or mismanagement in charities and put at risk charitable assets and damage public trust and confidence.

16.77 Veale Wasbrough Vizards LLP said that “it would be inappropriate for there to be an automatic delay or a power for the Tribunal to order a delay” and added:

  In our experience it can be vitally important that action be taken immediately following a Commission decision, particularly in the context of an inquiries and where interim managers have been appointed and orders made to “freeze” bank accounts.

16.78 The CLA identified precedent for a power to suspend decisions in section 327 of the Charities Act 2011 (when the decision is being considered in a reference to the Tribunal). However, they agreed with our view that the disadvantages of any new power to suspend decisions or award injunctions outweighed any benefits. They said that, in practice, any such power might not work in the circumstances it was meant to:

  namely where a charity proposes to do something once it has obtained the necessary authority of the Commission, but the charity knows its action will be controversial and opposed by a third party (who has standing to appeal) and for
which the charity can make all the necessary preparations behind closed doors. In
theory, in such circumstances, the charity could simply act before the third party was
aware of the charity’s proposals or that the order or decision giving the charity
authority to carry out its proposals had been made.

16.79 In most controversial cases the charity will have publicised its proposals to give notice
of their intentions. Third parties would usually have been given the opportunity to
present their views. The CLA suggested that a more pressing issue might be the
implementation of the publicity requirements under section 88.

For example, if charity A is a regular grant recipient of charity B, and charity B
applies for a scheme to change its objects in a way which would mean it would no
longer be able to make grants to charity A, should it be a requirement for notice of
the proposed scheme to be given to charity A? Or is this a matter of guidance as to
sensible communication with stakeholders and interested parties?

16.80 The CLA said that it should not be easier for third parties to delay or disrupt proposals
which have been agreed to by the Commission and are in the interests of the charity.

16.81 The University of Liverpool CL&PU agreed with our reasoning in the Consultation
Paper817 and said “the suggested solutions to the problems identified are
disproportionate to the risk posed by such problems”.

Suspending controversial decisions

16.82 Stone King LLP noted the injustice that could arise if the Charity Commission, the
trustees or a third party acts on the decision “in such a way as to prejudice an
appeellant’s position (before he or she is able to appeal) to the extent that a successful
appeal would provide little or no remedy”. But “nor should any solution prevent the
majority of uncontroversial, uncontested decisions from taking effect quickly and
effectively”. A balance has to be struck between individuals who wish to appeal the
decision and individuals who need to be able to rely on the decisions and act
promptly.

16.83 Stone King LLP said that some decisions which have a “significant potentially
irreversible impact” should either be suspended to allow time for an appeal or be
capable of suspension on appeal. Decisions in this category would be those which are
likely to have a harmful effect on individuals for example “removing a person from
employment by order under section 79(2) of the 2011 Act, or decisions authorising
disposal of (public) property.” The risk of harm to the charity should be considered and
minimised “but this could occur by other means than the order taking effect
immediately (for example by suspending the person from employment or using
another regulatory power)”.

16.84 Similarly, Francesca Quint suggested specific provision for cases of particular
controversy. She identified a “halfway-house” where the Charity Commission or
Tribunal could suspend particularly controversial decisions until the period for bringing
an appeal had expired. Prof Gareth Morgan did not think the Charity Commission
decisions should be delayed, but said that the Commission should try to make

817 Paras 16.78 to 16.84.
decisions which “as far as possible only take place after (say) 14 days except in cases where there is a real likelihood of abuse in the meantime”.

(2) Delaying the date on which Charity Commission decisions take effect

16.85 The Institute of Chartered Secretaries and Administrators said that it would be favourable if there was a “set period of time in which the trustees can register a challenge with the Tribunal but does not have to implement the decision”.

16.86 Most consultees did not think the effect of decisions should be delayed for the following reasons:

1. it would “hamper good administration and give far too much power to objectors”,\textsuperscript{818}

2. it “would produce an inevitable delay for very little or no benefit”,\textsuperscript{819}

3. it would be “wholly impractical and would put myriad transactions of charities at risk”,\textsuperscript{820}

4. it would “impede case[s] where swift action is needed”,\textsuperscript{821} and

5. charities might require immediate rulings for example to protect charity assets.\textsuperscript{822}

16.87 The Charity Commission said that many of its powers have notice periods for example making schemes and the removal of trustees. However, in relation to temporary and protective powers a requirement to give notice would undermine their effectiveness and render them useless.

The notice period would allow those involved in the misconduct and mismanagement to have the time and opportunity to continue to abuse the charity and its assets with the knowledge that we are planning to stop/curtail their activities.

Other views

16.88 Francesca Quint identified a problem with the appeal process in that “an appeal may be brought by any person ‘affected by the decisions’, who need not be a person ‘interested in the charity’ and this could mean that appeals are brought to further an individual’s self-interest.

16.89 Hubert Picarda QC said that the Upper Tribunal has equivalent status to the High Court and is therefore already able to grant injunctions or suspend decisions. See paragraph 16.9 above.

\textsuperscript{818} Francesca Quint.
\textsuperscript{819} Stewardship.
\textsuperscript{820} CLA; Bircham Dyson Bell LLP.
\textsuperscript{821} Prof Gareth Morgan.
\textsuperscript{822} Lawyers in Charities.
Consultation Question 96.

We invite the views of consultees as to whether the Attorney General’s consent should continue to be required before the Charity Commission can make a reference to the Charity Tribunal.

[Consultation Paper, paragraph 16.93]

16.90 23 consultees responded.

(1) 17 consultees thought that the Attorney General’s consent should not continue to be required.

(2) 6 consultees thought that the Attorney General’s consent should continue to be required.

No requirement for consent

16.91 Francesca Quint thought it preferable that the requirement for the Attorney General’s consent be removed in this and other provisions. She noted that the Charity Commission has “nearly all the ‘hands-on’ experience of charities” whilst the involvement of the Attorney General has “decreased compared with the situation in the 1970s and 1980s”. The University of Plymouth also said that “it is difficult to see what his involvement contributes”.

16.92 Stone King LLP said that there is no reason why the Charity Commission’s ability to make a reference should depend upon the consent of the Attorney General. The priorities and drivers of the Charity Commission and the Attorney General do not necessarily align. They concluded:

if the Government has confidence in the Charity Commission, it ought to be allowed to bring references to assist it achieve its purposes without consent of the Attorney General.

16.93 The Attorney General acknowledged that the rationale for consent was to ensure that work is not duplicated, but said that this can be achieved using other methods. It is

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823 Francesca Quint; Geldards LLP; Anthony Collins Solicitors LLP; University of Plymouth; University of Liverpool CL&PU; Dr Mary Synge; WCVA; Lord Hodgson; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; National Trust; Prof Gareth Morgan; Stewardship; NCVO; ACF; CFG and IoF; Attorney General’s Office.

824 Francesca Quint; Geldards LLP; University of Plymouth; Dr Mary Synge; WCVA; Lord Hodgson; Bates Wells Braithwaite; Stone King LLP; Charity Commission; National Trust; Prof Gareth Morgan; Stewardship; NCVO; ACF; CFG and IoF; Attorney General’s Office.

825 Anthony Collins Solicitors LLP; University of Liverpool CL&PU; Ministry of Justice Jurisdiction and Procedure Branch; CLA; Bircham Dyson Bell LLP; Society for Radiological Protection.

826 Dr Mary Synge also said that the Charity Commission and Attorney General do not have a common approach.
likely that the Attorney General’s Office and the Charity Commission would work closely together and “discuss any matter in advance of a reference being made”. The Charity Commission is “well placed to identify areas of the law which required clarification and to construct appropriate questions”. The Attorney General concluded that removing the consent requirement “would enable the Charity Commission to contribute constructively towards the development of charity law… without the need for the duplication of functions in requesting the consent of the Attorney General”.

Notification

16.94 Ten consultees said that it would be sufficient for the Charity Commission to notify the Attorney General before making a reference to the Charity Tribunal.\(^\text{827}\) The Charity Commission said that it would be happy to provide notice so that the Attorney General can decide whether to become involved.\(^\text{828}\)

16.95 Dr Mary Synge provided a detailed response. She said that it is sufficient if the Attorney General is notified and entitled to be joined as a party. The Charity Commission’s power to make a reference should not be constrained.

Whilst it might notify the Attorney General of its intention to make a Reference, and might usefully take account of his views or even agree a joint form of questions, the rationale for the Reference process, and the efficacy and efficiency of its implementation, would seem to be best served by relieving the Commission of the need to seek consent. This would avoid additional cost and delay and lessen or remove the potential or perceived risk of interference or influence based on considerations which are essentially political. It is, after all, the Commission which is more directly involved with charity law on a daily basis and it should be encouraged, or at least confident, to seek the legal clarification that it needs.

16.96 NCVO, ACF, CFG and IoF said that the requirement for consent prevents the Charity Commission from contributing to the development of charity law. Their review in 2011 identified that “the Attorney General’s role caused some weakness in the system, because of the uncertainty surrounding when, why and how the Attorney General decided to act, particularly with regard to references”.

Requirement for consent

16.97 Consultees described the requirement for consent as “an effective mechanism”\(^\text{829}\), and one that provides “useful checks and balances”\(^\text{830}\) and “an important safeguard in deciding whether a Reference should be made”\(^\text{831}\)

16.98 The CLA did not identify the issue of consent as a problem and saw nothing to be gained from removing the requirement. They added that the Attorney General should arguably use his consent power more frequently.

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\(^{827}\) Geldards LLP; WCVA; Lord Hodgson; Bates Wells Braithwaite; Charity Commission; Stewardship; NCVO; ACF; CFG, and IoF.

\(^{828}\) He would be entitled to do so under Charities Act 2011, s 325(4)(a).

\(^{829}\) University of Liverpool CL&PU.

\(^{830}\) Anthony Collins Solicitors LLP.

\(^{831}\) Ministry of Justice Jurisdiction and Procedure Branch.
16.99 The University of Liverpool CL&PU also thought that there was no need to change the existing position; a requirement to notify the Attorney General “does not add any effective oversight in situations where the questions to be determined are at issue between the Charity Commission and the Attorney General; and may, in fact be a more wasteful process”.

Consultation Question 97.
We invite the views of consultees as to whether the Charity Tribunal should have the power to award remedies in reference proceedings and, if so, which.

[Consultation Paper, paragraph 16.102]

16.100 14 consultees responded.  
(1) 2 consultees thought the Charity Tribunal should have the power to award remedies;  
(2) 8 consultees thought it should not; and  
(3) 4 expressed other views. 

16.101 Those consultees who thought the Tribunal should have the power to award remedies did not explain why they disagreed with our view that the Tribunal had adequate powers or set out what remedies they thought should be available.

16.102 Consultees who did not think that the Tribunal should have the power to award remedies noted that the purpose of the reference procedure is to clarify the law and not to provide remedies for individual disputes. Bates Wells Braithwaite added that “subsequent failures to act upon the findings could give rise to a claim and remedies sought”. The Charity Commission thought that the Charity Tribunal “has adequate powers to deal with references”.

16.103 Two consultees suggested that the Tribunal should have some additional powers. The University of Plymouth could see no need for the Tribunal to award damages or pecuniary remedies but said “the Tribunal should retain the power to refer back to the Commission and to suspend those decisions… . Ultimately, it should be able to quash Commission decisions although this is unlikely to be necessary on the basis that the Commission is required to comply with the Tribunal’s decisions.” The Ministry of

832 Francesca Quint; University of Plymouth; University of Liverpool CL&PU; Dr Mary Synge; Ministry of Justice Jurisdiction and Procedure Branch; Bates Wells Braithwaite; CLA; Bircham Dyson Bell LLP; Stone King LLP; Charity Commission; Society for Radiological Protection; National Trust; Stewardship; RSPCA.

833 Stone King LLP; National Trust.

834 Francesca Quint; University of Liverpool CL&PU; Dr Mary Synge; Bates Wells Braithwaite; Charity Commission; Society for Radiological Protection; Stewardship; RSPCA.

835 University of Plymouth; Ministry of Justice Jurisdiction and Procedure Branch; CLA; Bircham Dyson Bell LLP.
Justice Jurisdiction and Procedure Branch said that the Tribunal should have a “power to make consequential directions” in situations “where there was not also a Judicial Review being heard. Otherwise there is a risk of confusion as to the outcome of the Reference.”

The status of Tribunal decisions following a reference

16.104 Francesca Quint said that there was uncertainty regarding “the status of the decision which follows a reference”:

Does it bind (i) the parties, (ii) the Government or (iii) non-parties including other charities? If it does, what is the mechanism for a charity to distinguish itself from the facts assumed in the decision on the reference? In other words, who can then authoritatively apply the law as clarified by the decision? It would be helpful for this to be set out formally, or at least for some recognised convention to be adopted. Possibly it could be provided for by guidance agreed between the Tribunal, the Attorney General and the Charity Commission.

16.105 The CLA, with whom Bircham Dyson Bell LLP agreed, said that the reference procedure may require further consideration. They said that there “is a lacuna in the drafting of section 327”. They disagreed with our statement in the Consultation Paper that the Charity Commission is “required to act in accordance with the Tribunal’s decision on the reference in respect of the particular state of affairs to which it relates.” They said that this only applies where the reference involves the “application of charity law to a particular state of affairs”. References are more likely to be broader and involve “the operation of charity law in any respect”. They added that the independent schools reference was brought under the equivalent of section 326(1)(a). In respect of such references, there is no similar requirement that the Charity Commission acts in accordance with the decision of the Tribunal.

References in practice

16.106 The CLA expressed concern that the reference procedure and the Charity Tribunal were under-used, and suggested an investigation into the reasons for this. They said that there is a perception that the Charity Commission avoids taking issues to the Tribunal and suggested that this was due to resource issues or “concern that a decision of the Tribunal “against” a Charity Commission decision may be seen as the Commission “losing” the case and/or may lead to criticism of the Commission.” The CLA said that such a concern is misplaced as the Charity Commission cannot be expected to get all of its decisions right. They noted that it is important that a forum exists for addressing Commission decisions and where the Charity Commission can also raise difficult questions of charity law.

16.107 The Hodgson review included a broad assessment of the success of the Charity Tribunal, which falls outside our terms of reference.

836 Consultation Paper, para 16.98.
837 Under Charities Act 2011, s 3235(1)(b) (second limb) or s 326(1)(b).
838 Under Charities Act 2011, s 3235(1)(b) (first limb) or s 326(1)(a).
839 Hodgson Report, ch 7, and para (e) of the terms of reference at p 149.
Appendix 1: List of consultees

Action with Communities in Rural England (ACRE)
Anthony Collins Solicitors LLP
Association of Charitable Foundations (ACF)
Association of Church Accountants & Treasurers (ACAT)
Association of Corporate Trustees (TACT)
Association of the Heads of University Administration (AHUA)
Attorney General’s Office
Baptist Union of Great Britain
Bates Wells Braithwaite
Bircham Dyson Bell LLP
Canal & River Trust
Cancer Research UK
Central Association of Agricultural Valuers (CAAV)
Chancery Bar Association
Charities’ Property Association
Charity Commission for England and Wales
Charity Commission for Northern Ireland
Charity Finance Group (CFG)
Charity Investors’ Group
Charity Law and Policy Unit (University of Liverpool)

Charity Law Association (CLA) working parties:
  Nicola Evans, Bircham Dyson Bell LLP (Chair)
  Tracey Chippendale-Holmes (Chair)
  Sylvie Nunn, Wrigleys Solicitors LLP (Chair)
  Eva Abeles, IBB Law
  Catherine Beringer, Auxilium Advisers
Rebecca Fry was a member of the CLA working party that responded to the main consultation in 2015, before she joined the Charity Commission.
Alexandra Whittaker, Stone King LLP
Hannah Whyatt, Farrer & Co

Church Growth Trust
Churches’ Legislation Advisory Service (CLAS)
City of London Corporation as trustee of Bridge House Estates
Cluttons LLP
Colleges of the University of Cambridge
Colleges of the University of Oxford
Department for Business, Innovation and Skills (as it then was)
Durham University
Crispin Ellison (adviser), Legacy Link
Gerald Eve LLP
Fellowship of Independent Evangelical Churches (FIEC)
Geldards LLP
General Medical Council
Guy’s and St Thomas’ Charity
William Henderson (barrister)
Higher Education Funding Council for England (HEFCE)
Lord Hodgson of Astley Abbotts CBE
Imperial College London
Incorporated Church Building Society
Independent Schools Council
Institute of Chartered Secretaries and Administrators
Institute of Directors
Institute of Fundraising (IoF)
Institute of Legacy Management
Institution of Civil Engineers
Val James (solicitor)
Jurisdiction and Procedure Branch, Justice Policy Group (Ministry of Justice)
HM Land Registry
Landmark Trust
Law Society
Keith Lawrey (adviser)
Lawyers in Charities (LinC)
Methodist Church
Joel Moreland (adviser)
Professor Gareth Morgan (Sheffield Hallam University)
Dr John Picton
National Council for Voluntary Organisations (NCVO)
National Trust
Office of the Scottish Charity Regulator (OSCR)
Open University
Overseas Development Institute
Robert Pearce QC (barrister)
Hubert Picarda QC (barrister)
Pinsent Masons LLP
Plymouth University
Privy Council Office
Francesca Quint (barrister)
Monsignor Nicholas Rothon
Royal Archaeological Institute
Royal Institution of Chartered Surveyors (RICS)
Royal Photographic Society
Royal Statistical Society
RSPCA
Patrick Ryan
Professor Duncan Sheehan
Social Finance
Society for Radiological Protection
Stewardship
Stone King LLP
Sustrans and Railway Paths
Dr Mary Synge (Cardiff University)
Trowers and Hamlins LLP
Professor Janet Ulph (University of Leicester)
United Reformed Church, Yorkshire Synod
University College London
University of Birmingham
University of Cambridge
University of Oxford
University of Warwick
UnLtd
Veale Wasbrough Vizards LLP
Wales Council for Voluntary Action (WCVA)
Wellcome Trust
Welsh Government
Withers LLP